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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-
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AND INCLUDING VOLUME 25 OF THE
SOUTH CAROLINA REPORTS

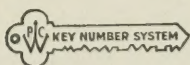
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REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME X

FROM JAN. TERM, 1858, TO JAN. TERM, 1859
BOTH INCLUSIVE

BY J. S. G. RICHARDSON
STATE REPORTER

CHARLESTON, S. C.
McCARTER & CO.
1859

ANNOTATED EDITION

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LAW

CHANCELLORS AND JUDGES

DURING THE PERIOD COMPRISED IN
THIS VOLUME.

CHANCELLORS.

HON. JOB JOHNSTON.

“ BENJ. F. DUNKIN.

“ GEORGE W. DARGAN.

“ F. H. WARDLAW.

JUDGES.

HON. JOHN B. O'NEALL.

“ DAVID L. WARDLAW.

“ THOMAS J. WITHERS.

“ JOSEPH N. WHITNER.

“ THOMAS W. GLOVER.

“ ROBERT MUNRO.

PREFACE

All the cases contained in this volume were prepared for publication by the reporter himself, but owing to his indisposition and absence in a distant State during the period that the first part of the volume was passing through the press, he was unable to attend in person to the proof reading of the first four hundred pages. From the four hundredth page to the end he attended to it himself. Under the circumstances he has deemed it best to reserve from publication a list of errata he had in part prepared, apprehending that it might not be perfect. After he has had an opportunity to consult the Chancellors, such list will be prepared and published in the next volume of Equity Reports.^(a) Indeed the Reporter has concluded that such is the best course to pursue in all cases. It is impossible for any one, but the author himself, especially when copies (often very inaccurate) and not the original manuscript are used, to correct, so as to have entirely accurate, proof sheets for the press; and where such corrections are not made by the author, a list of errata might be very incomplete unless prepared by him.

(a) No errors seem to have been discovered; at least, no list was published, so far as can be discovered.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—JANUARY

TERM, 1858

CHANCELLORS PRESENT. (a)

HON. BENJ. F. DUNKIN,
HON. FRANCIS H. WARDLAW,
HON. GEORGE W. DARGAN.

10 Rich. Eq. *1

*MARIA DUPONT v. E. L. HUTCHINSON
and Others.

(Charleston, Jan. Term, 1858.)

[Wills 533.]

Testator made separate devises of real estate to his two daughters for life, with remainder to their children, and "should either of my daughters die leaving neither child nor children, then the estate bequeathed to her for life shall descend to the child or children of my other daughter, and my son H., their heirs and assigns forever." M., one of the daughters, died leaving no child, but leaving H. and two sons of her sister surviving her: *Held*, that the two sons were entitled to divide the estate with H. equally and per capita.

[Ed. Note.—Cited in *Rogers v. Morrell*, 82 S. C. 404, 64 S. E. 143, 129 Am. St. Rep. 899.

For other cases, see Wills, Cent. Dig. § 1147; Dec. Dig. 533.]

Before Wardlaw, J., at Charleston, January, 1857.

Wardlaw, Ch. Mathias Hutchinson, by his Will, devised certain real estate to his daughter Maria, "for life, and after her decease, to the child or children of her, the said Maria Dupont, which may be born and alive at the time of her decease; but for want of such child or children, the said property to return and be considered as a part of my estate, and be disposed of as I shall hereinafter mention and direct;" and devised certain other real estate to his daughter Mary, "subject to all the limitations and provisions" of the estate, the use of which had been given to Maria; and further provided, "that should either of

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my daughters die leaving neither child nor children, then the estate bequeathed to her for life shall descend to the child or children

of my other daughter, and my son Edward Louis Hutchinson, their heirs and assigns forever." Maria died without ever having had a child, and Mary died in 1848, leaving, by two husbands, two sons, namely, Hutchinson D. Firth and Edward L. Whitaker. The question submitted to me, is, whether the estate given to Maria for life is to be divided equally among E. L. Hutchinson, H. D. Firth, and E. L. Whitaker, or to be divided in such manner that E. L. Hutchinson shall receive one half, and the two sons of Mary the other half between them. The Master, in his report, adopts the former view, and E. L. Hutchinson brings the matter under the review of the Court by way of exception.

The exceptant must prevail, if the limitation over be void for remoteness, and the estate be left to descend under the Statute of distributions, or if the context of the will demonstrates the intention of the testator, that on the happening of the contingency the estate should be divided per stirpes.

My opinion, however, is against the exceptant on both points. As to the validity of the limitation over, it is sufficient to refer to the case of *Matthis v. Hammond*, 6 Rich. Eq. 399. And as to the mode of division, the case seems to fall within the principle declared by Chancellor Harper in *Conner v. Johnson*, 2 Hill's Eq. 43: "if there be a devise to an individual designated by name, and to other individuals designated as a class, as to A and the children of B, all the individuals take equally, and per capita." See also *Butler v. Stratton*, 2 Bro. C. R., 367; *Perdriau v. Wells*, 5 Rich. Eq. 20. An exception to this general rule is established in *Cole v. Creyon*, 1 Hill Eq. 319 [26 Am. Dec. 208], to the effect, that in a bequest to an ascertained individual and to a class of unascertained

(a) Hon. Job Johnston absent by leave of the Legislature.

tained individuals, (to be ascertained at some future time after the death of the testator,) one-half shall go to the ascertained individual, and the other half to the class when they shall be individually ascertained. This ex-

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ception seems to proceed on the principle that the titles of the devisees accrue at different times. But in this case all the devisees are contingent upon the death of Maria Dupont without leaving children, and upon the happening of that contingency all the devisees were fixed and ascertained, the children of testator's other daughter as much as E. L. Hutchinson. See the cases cited, and the reasoning in *Cole v. Creyon*, also *Barksdale v. Macbeth*, 7 Rich. Eq. 125.

It is adjudged and decreed that the exception be overruled, and the report be confirmed.

E. L. Hutchinson appealed upon the ground:

That the intention of the testator, as evidenced by the word "descend," in reference to the interest which his grand children were to take in a certain event, as well as by the context, clearly contemplates a division between the son, and those grand children in moieties.

Petigru, for appellant.

Porter, Macbeth, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This Court approves the decree, and it is not necessary to expatiate on the grounds of appeal.

The testator provided for the children of either of his daughters on equal terms contingently, and evinced no expectation of the previous death of one rather than the other. If in event Maria had died childless, before Mary, having children, the children of Mary would have taken portions of the estate primarily given to Maria, although their mother was living and distributee of testator and of her sister by descent. It is manifest, then, that the testator could not have intended the equivocal word "descend," to have the technical meaning of proceed to the heir.

It is ordered and decreed that the decree be affirmed and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.
Decree affirmed.

10 Rich. Eq. *4

*COMMISSIONERS OF PUBLIC BUILDINGS FOR CHARLESTON DISTRICT v.
JOHN W. ANDREWS and Others.
(Charleston. Jan. Term, 1858.)

[*Equity* ⇨117.]

An irregularity in suing in the names of the members composing the Board of Commissioners of Public Buildings, when the suit

should have been in the name of the Attorney-General on the relation of the Plaintiffs, can only be taken advantage of by the Defendant himself and by plea in abatement. After pleading to the merits it is too late to make the objection.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 289; Dec. Dig. ⇨117.]

[*Limitation of Actions* ⇨35.]

A bill to make certain estate liable for the satisfaction of fines imposed by the Court of Sessions on the Defendant is not barred by the Act of 1748, because not filed within the time limited by the Act. That Act applies only to the prosecution which is barred if not commenced within six months.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 158; Dec. Dig. ⇨35.]

Before Wardlaw, Ch., at Charleston.

This case will be sufficiently understood from the Circuit decree and the decree of the Court of Appeals. The Circuit decree is as follows:

Wardlaw, Ch. The plaintiffs, as Commissioners of Public Buildings for Charleston District, filed this Bill September 12, 1854, to make certain estate of the defendant, John W. Andrews, liable for the satisfaction of certain fines imposed by the Court of General Sessions on this defendant. These fines were imposed in 1847 and 1848; and in 1848 and 1850 the defendant regularly obtained the benefit of the Prison Bounds Act. In his schedule and assignment he included nothing but "wearing apparel," whereas it is alleged that he owned lands, merchandize and choses, fraudulently omitted from his schedule. The Bill professes to be filed with the leave of the Attorney General, but it is not filed in his name on the relation of the plaintiffs. This of itself is a great—I think, a fatal irregularity. Besides, it is a Bill for discovery

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and relief. If *it were a bill for discovery merely as ancillary to some remedy sought at law, no proof outside of the answers would be admissible, and the answers explicitly deny all the fraud which is charged. And as a bill for relief, the objection seems to me irresistible; that the Court of Law is as competent as this Court to investigate frauds of this description. Why was not the objection made at the repeated discharges of defendant that his schedule was defective and fraudulent? But the plea of the statute of limitation of 1748, that a penalty cannot be recovered after six months, and of 1712 that account cannot be required after four years, is interposed, and in my judgment protects the defendants.

If I considered myself bound to decide whether the defendant, Andrews, was, or was not guilty of fraud concerning the purchase of the twenty-three mile tract, and of the proceeds of his store, I should have had difficulty; but I do not feel required to decide these questions.

It is adjudged and decreed that the Bill be dismissed.

The plaintiffs appealed on the grounds:

1. It is respectfully submitted, that the Chancellor is mistaken in supposing that the complainants alleged that defendant "owned lands, merchandise and choses, fraudulently omitted from his schedule." The complainants seek to make liable to their demands certain property of the said Andrews, acquired subsequently to the period of his discharge under the Prison Bounds Acts. He was discharged 22d November, 1848, in one case; again 11th November, 1850, under two others; and the property sought to be made liable was acquired in 1852, as alleged in the Bill, and fraudulently put out of the reach of the plaintiffs, judgments and *fi. fas.*

2. It is respectfully submitted, that the suit was properly brought by the plaintiffs, and not by the Attorney General. That by the A. A. 1827, recited in the bill of complaint, the forfeitures and fines were vested in the complainants for the uses provided by law; and that they were a quasi corpora-

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tion, *and entitled to maintain the suit, and that the consent of the Attorney General was only procured *pro forma*.

3. That the defendant has not made any objection to the character in which the complainants have sued, nor to their right to sue in their own names; that he has answered to the whole bill; has pleaded a special plea, and demurred specially; and in none of these forms of defence has he set up the objection raised in the decree.

4. That it is respectfully submitted, that the answer to the enquiry in the decree, "why was not the objection made at the repeated discharges of the defendant, that his schedule was defective and fraudulent?" is simply that the property which the complainants seek to make liable to their claim, was acquired by defendant long after the times respectively of his discharges, under the Prison Bounds Act, as heretofore stated.

5. It is respectfully submitted, that the plea of the statute of limitations does not apply here, because this is not an action or suit for a penalty, in any sense, but an application for the aid of this Court, to a creditor who has subsisting judgments and executions at law, which he cannot enforce without the assistance of this Court.

6. That the Chancellor is mistaken in supposing that the plea of the statute of limitations of 1712, was pleaded at all; only the statute of 1748 was pleaded.

7. That the answer of the defendant overrules his plea of the statute of limitations.

Simons, Dunkin, for appellants.

Yeadon, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The plaintiffs are the Commissioners of Public Buildings for

Charleston District, declaring in their own names, and suing in their official capacity. The defendant, in the year 1848, had been indicted in the Court of Sessions for Charleston District for various misdemeanors; had been convicted, and was sentenced and fined

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by the Court. There *were six several indictments, and the offences were for illicit traffic with slaves and for retailing spirits without a license. In each case he was sentenced to a term of imprisonment, in the aggregate amounting to 26 months, and his fines in the aggregate amounted to \$600. He suffered the full measure of his punishment by imprisonment. For the fines, writs of *fi. facias* have been issued, but they have all been returned *nulla bona* by the Sheriff. The said defendant was afterwards discharged in these cases under the provisions of the Act of Assembly of 1788, commonly called the Prison Bounds Act.

The act of 1827, among other things, provided that all fines and forfeitures incurred and imposed in any Court of Sessions for any Circuit District in the State, shall be paid to the Commissioners of Public Buildings for such district, to be applied in aid of their assessment for the purposes of the said Act.

By virtue of the provisions of this Act the plaintiffs, as the Commissioners of Public Buildings of Charleston District, were entitled to receive the fines imposed on the defendant, John W. Andrews. Those fines were properly payable to them. They had sought to enforce the collection of the fines by writs of *fi. facias*. To these the Sheriff has made a return of *nulla bona*. They have filed this bill, in which they charge, that the defendant, "by concealing his property, and fraudulently and surreptitiously covering and removing it from your orators, (the plaintiffs,) has escaped the exigency of the executions of *fi. facias* heretofore issued, and has further fraudulently endeavored to evade and escape the payment of the said fines. That the said John W. Andrews, by traffic, carries on a considerable business; that he has in his possession a stock of goods in a store or shop, also wagons and horses which your orators (the plaintiffs,) are informed and believe, and so charge are his own property, and purchased with his own means, if he would admit it. That the said John W. Andrews carries on a large trade on credit with the inhabitants of the neighborhood, and that at this time he has choses in action, debts, and other demands

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due and owing to *him; that sometime between the months of February, and August, 1852, the said John W. Andrews, having accumulated considerable means, agreed with one Samuel Lynes, Sen., who was then the owner of a tract of land in the Parish aforesaid, known as the twenty-two mile house

tract, to purchase the said tract and the tavern and buildings thereon for the sum of \$1,500, and at the same time, the said John W. Andrews took possession of the same; that is to say, one George Hough, who was up to, and at the time of the said agreement, the tenant of the said Samuel Lynes, Sen., attorned to the said John W. Andrews, and was accepted by him as tenant as aforesaid; that said John W. Andrews, by the fraudulent and corrupt connivance of the said Samuel Lynes, Sen., took no title or conveyance of the said premises, but kept the agreement secret at the time, and suffered the title to remain unchanged; that after the said agreement between the said Samuel Lynes, Sen., and the said John W. Andrews was made, the said John W. Andrews made an agreement with one John Donnelly, Jr., for the sale to him of one hundred and six acres of the said tract of land at and for the price and sum of two hundred dollars; that the said John W. Andrews, with the consent of John Donnelly, Jr., invoked the further connivance of the said Samuel Lynes, Sen., to make a title directly to the said John Donnelly for the said parcel of land, and to receive the said \$200 on account of the purchase of the tract, which was agreed to by the said Samuel Lynes, and he accordingly executed a title to the said John Donnelly of the said one hundred and six acres with a warranty, and accepted the price from Donnelly and credited the said John W. Andrews therewith. The plaintiffs further charge, that at another time, the said John W. Andrews paid another sum to the said Samuel Lynes of seven hundred dollars, part cash, and part by a credit on the store account, which the said Samuel Lynes owed the said John W. Andrews; and that afterwards, the said Samuel Lynes came to a settlement of the whole matter, and the balance adjusted between them was settled

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by the said John *W. Andrews giving to the said Samuel Lynes either his own note, or bond with John McCullers as surety, or the note or bond of John McCullers, with said Andrews as surety;"—other fraudulent contrivances are charged, not necessary to be particularly noticed.

The plaintiffs pray for process against John W. Andrews, Sen., Samuel Lynes, Sen., John Donnelly, Jr., John McCullers, and John W. Andrews, Jr., for discovery from them all; that the covenant agreement may be set aside, that a trust may be declared of the said lands, and that the same may be decreed to be the property of the said John W. Andrews, and that the said stock of goods, horses, wagons and tract of land may be sold for the purpose of paying their claim. They also pray for general relief.

The defendant, John W. Andrews, to the bill of the plaintiffs pleaded the statute of 1748, which provides a bar against the re-

covery of all fines, penalties and forfeitures, unless the action, suit or prosecution for the same shall be brought within six months from the commission of the offence.

The defendant also filed an answer, in which he denied all the allegations of fraud in the plaintiffs' bill. He admits, that he owns a small stock of goods. He also admits, that he bought the tract of land mentioned in the bill, from Samuel Lynes, but says, that he has a legal title for the same; explains why the title was not sooner executed, and denies all fraudulent concealment about the same.

The other defendants have also answered, but as their answers have not been presented in the brief, I will not attempt to state what these answers contained.

When the case came to be tried, the Chancellor decided it upon a preliminary objection. He says in his decree: "The bill professes to be filed with leave of the Attorney General, but it is not filed in his name on the relation of the plaintiffs. This of itself is a great,—I think, a fatal irregularity." The bill is filed, as I have before stated, in the names individually of the plaintiffs, styling

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themselves Commissioners of Public *Buildings of Charleston District. The formal consent of the Attorney General is indorsed upon the bill under his own signature. This I think is sufficient. The consent of the Attorney General is a matter of course, and is a mere form. The act prescribes that the fines shall be paid directly to the Commissioners. Their receipt would be a legal discharge. And where a person is entitled to receive, he has, or ought to have the right to sue for money, or anything else, unless the law which gives him the right to receive, clearly designates some other to bring suit, where it becomes necessary. But the Court does not now decide that question; as for the purposes of this case, it is unnecessary now to be decided. The Court is unanimously of opinion that the irregularity, (if it be one,) should be objected to by the defendant himself, and not by the Court on its own motion. The Court is also unanimously of opinion, that the defendant should take advantage of the irregularity by plea in abatement, and that it would be too late to take advantage of it in that form, after pleading to the merits.

We also think the Circuit decree erroneous, in applying the bar of the act of 1748 to the claim of the plaintiffs. That act obviously refers to the original prosecution, where the defendant is indicted for the offence, to which this act may be pleaded in bar, if the prosecution has not been commenced within six months after the commission of the offence charged in the indictment. But it has no application to any proceedings which may be instituted for the enforcement of the sentence.

It remains for me to consider what dis-

position is now to be made of the case. The case on the Circuit was only tried upon the preliminary questions, which arose upon the pleadings. The Chancellor did not consider the evidence offered to support the allegations of fraud charged in the bill. It was much discussed here, whether the plaintiffs had exhausted their legal remedy, which would be indispensable to their having a status in this Court. There were strong grounds for concluding that they had not.

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But as these reasons did *not appear upon the plaintiffs' bill, and as the case was not considered by the Circuit Court on the evidence, nor that evidence set forth in our briefs, this Court decides nothing on that question now. If it should appear that the defendant, at the time of filing the bill, was possessed of property—real or personal—sufficient to satisfy the plaintiffs' claim, which could be levied upon and sold by the sheriff, under a writ of fieri facias; or, not possessing that much property subject to levy and sale, did not possess other property, which required the intervention of this Court to subject it to his debts, then the bill must be dismissed for the want of equity.

Under these views of the case, it is the judgment of this Court, that the Circuit decree be set aside, and the case remanded to the Circuit Court for a new trial.

It is further ordered, that, at such trial, the evidence already taken be read, and that any party to the bill be permitted to introduce any additional evidence.

DUNKIN and WARDLAW, CC., concurred.
Decree reversed.

10 Rich. Eq. *12

*JOSEPH R. TUCKER and Wife, et al. v. T. D. CONDY, Ex'or, et al.

W. D. DeSAUSSURE, Adm'r. v. T. D. CONDY, Ex'or, et al.

(Charleston, Jan. Term, 1858.)

[*Executors and Administrators* ⌘518.]

Where one dies owning property, as well in the country of his domicile as in a foreign State, Administration taken out, in the foreign State, is ancillary to that of the domicile.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2299-2309; Dec. Dig. ⌘518.]

[*Executors and Administrators* ⌘2.]

In such case, if the laws of two countries differ as to the order in which debts are to be paid, it is the duty of the foreign Administrator to pay the debts presented to him there according to the laws of that country, and then, if there be any net balance, to transfer it to the domiciliary Executor or Administrator.

[Ed. Note.—Cited in *Hamilton v. Levy*, 41 S. C. 383, 19 S. E. 610.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2, 652; Dec. Dig. ⌘2.]

[*Executors and Administrators* ⌘2.]

And the domiciliary Executor or Administrator must apply the assets which come to his hands, as well those of the country of the domicile, as those received from the administrator, to the debts presented to him, according to the laws of the country of the domicile.

[Ed. Note.—Cited in *Cureton v. Mills*, 13 S. C. 430, 36 Am. Rep. 700; *Jones v. Jones*, 39 S. C. 256, 17 S. E. 287, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2; Dec. Dig. ⌘2.]

Before Wardlaw, Ch., at Charleston, January, 1857.

This case will be sufficiently understood from the decree delivered in the Court of Appeals.

McCrady, for appellant, cited 35 Eng. L. & Eq. Rep. 68; 1 Mill. 292; 5 Cran. 299; Story Conf. L. § 521, 534; 5 Peters, 518.

Lesesne, contra, cited Story, Conf. L. § 451, 518; Dawes v. Head, 3 Pick. 128; Harvey v. Richards, 1 Mason, 381; 3 Rich. Eq. 339.

The opinion of the Court was delivered by

DARGAN, Ch. Robert M. Allan departed this life, in the year 1839, having duly executed his last Will and Testament, leaving

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a considerable estate in the State of *Mississippi, also, leaving a considerable, though less estate in South Carolina, which was his domicile. Thomas D. Condry and Richard Allan, (since dead,) two of the Executors named in the Will, proved the same; it was admitted to probate in the Court of Ordinary for Charleston District, in the State of South Carolina. Letters testamentary were granted to Thomas D. Condry and Richard Allan, on the 17th June, 1839, the latter of whom, soon afterwards having departed this life, the said Thomas D. Condry became the sole acting Executor.

In the year 1839, or 1840, Thomas D. Condry obtained letters of Administration of the assets of Robert M. Allan, in the State of Mississippi, and possessed himself of both the real and personal property in that State. The Will of Robert M. Allan gave no power to the Executors to sell the real estate; yet, the said Thomas D. Condry, sold the plantation of the testator in South Carolina. This sale, was subsequently confirmed by this Court. He also sold, all the real and personal estate in the State of Mississippi. It does not appear, that he sold the real estate in that jurisdiction, by any legal authority. He appears to have sold it without authority, but with the consent, and at the request of Andrew C. Turnbull, who held a mortgage of the whole of that property for a large amount. The regularity and validity of the sales made by Condry, are not in question here. The only question as to such sales, now before the Court, is, as to the distribution of the proceeds.

Robert M. Allan was largely indebted, at the time of his death. At first, it was with reason supposed, that his estate would be amply sufficient to pay all his debts. But from subsequent and untoward circumstances, for which Condry does not appear to have been in default, nor in any way responsible, this proved to be a mistake; the estate is largely insolvent.

One of the cases stated in the caption of this opinion is a creditors' bill, against Condry, executor of Allan in South Carolina, and administrator in Mississippi, for an account,

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*and to marshal the assets. it is charged against Condry, among other things, that he has committed devastavits, in paying the debts of the insolvent estate out of the order prescribed by law. And this is true, to a large extent, if the South Carolina mode of paying the debts of an insolvent estate, is to be observed in a case like this. The foregoing statement, from a somewhat complicated state of facts, (many of which, are irrelevant to the issue now before the Court,) will be sufficient to a proper apprehension of the question of law raised on this appeal, and now to be decided by the Court.

The laws of South Carolina and Mississippi are different, as to the mode of applying the assets of an insolvent debtor after his death. In the State first named, by the Act of 1789, called the Executors Act, the debts are to be paid in a certain prescribed order, and according to a certain rank and classification therein declared; while in the State of Mississippi under like circumstances, the assets are applied towards the satisfaction of all the debts pro rata, except as to creditors having liens. The question here made is whether the Mississippi assets are to be administered according to the South Carolina or Mississippi mode. The question has never before, (so far as I am informed,) been decided or made in the Courts of this State.

The administration in Mississippi has been completed. The accounts there have been closed. There is no creditor claiming in that jurisdiction. There is a net balance on the administrator's accounts against him in the Orphans' or Probate Courts of that State. And all the creditors now claiming, are of this State.

The administration of the foreign estate is ancillary to that of the domicile. In the foreign administration, the law of that jurisdiction is to prevail in the payment of debts due to the citizens of the country, and all others, (I apprehend,) who make their application for payment there. When this is done, and all claims against the foreign administration are

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satisfied, what *remains to be done with the residue? inasmuch as succession and distribution are governed by the law of the testator's and intestate's domicile, what can be done with the balance, but to remit it to the domi-

iliary and primary administrator, to be dealt with, and disposed of as the law of the domicile directs. When the fund reaches the hands of the primary administrator, it is first subject to the claims of creditors whose claims have not been satisfied in the course of the ancillary administration, and then to the claims of legatees or distributees, as the case may be.

The Court is now acting as well upon the assets that were found at the testator's death in South Carolina, as upon the balance of assets in Mississippi, on the administration in that State. It is contended that, as the law of the latter State applies the assets of a deceased insolvent to the payment of his debts pro rata, the same rule should prevail here, as to so much of the fund as has been derived thence. But surely, this is a misconception. One of the characteristics of personal estate, (and hence the name,) is, that in legal contemplation, it is supposed to be ever attendant upon the person. In its disposition, whether inter vivos, or by succession, or distribution, the forms required by the law of the proprietor's domicile are sufficient to pass and transfer it. This rule obtains from the comity of nations and may be said to be almost universal law.

The law of Mississippi, which I have noticed, by which the assets of a deceased insolvent within that State are applied pro rata among his creditors, without reference to the rules of law on that subject of the testator's or intestate's domicile, (or that of other States, or countries, having similar provisions,) are exceptional to the general principles, which apply in the disposition of personal estate. The exception is based upon a good and sufficient reason. It is the right, and duty of every Government, to protect and aid its own citizens in the recovery and enjoyment of their just claims. When an ancillary administration is granted in a foreign State, (in Mississippi, for example,) no comi-

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ty requires that she should send *her citizens into another State to recover payment and satisfaction of their claims out of assets which are now under the jurisdiction of her own Courts; where their remedy would be simple, easy, and comparatively inexpensive. Though her own laws might dispense the assets to the creditors, upon the principles of equality, her citizens after much expense, trouble, and delay, when sent for the recovery of their debts into a foreign jurisdiction, might fail of obtaining satisfaction from inequalities and exclusions in the application of the assets, based upon fanciful and arbitrary distinctions that prevail in the laws of the foreign country. It is a better, wiser, and safer rule to require, that all the claims presented against the ancillary administration should be first satisfied, before the fund is sent abroad to the primary administrator. When this is done, and every claim upon the

ancillary administration is satisfied, comity steps in, and permits the general principle of international law to prevail, that in the disposition of personal property, the law of the proprietor's domicile shall govern. Such is the judgment of the Court, upon this ground of appeal. And it is so ordered and decreed.

As to Miss Bowman's Appeal, there is some irregularity in the manner in which it has been presented to the Court, and it arises on a point that was not presented to or considered by the Circuit Court. As the adverse counsel interposes no objection, and it manifestly appears that injustice has been done her, the Court will consider her appeal.

Miss Bowman was a creditor of Robert M. Allan, to a large amount, by two several bonds; on one of which bonds is now due (the date of the report,) the sum of \$1127.19, and on the other, the sum of \$1174.24, both of which were secured by a mortgage of the plantation or tract of land, in Saint Andrew's Parish, in the State of South Carolina, on which the said Allan lived at the time of his death. This land was sold by the executor, Thomas D. Condy, at public sale. Mrs. Allan became the purchaser, at the bid of \$6,050.00.

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She *had a bond debt against the estate of Robert M. Allen for \$17,000, unsecured by liens. This sale was confirmed, and as the estate, at that time, was supposed to be perfectly solvent, it was ordered that her bid of \$6,050.00 be paid by entering it as a credit, or payment on her bond debt against the estate; and the Commissioner was ordered to execute a title for the plantation to Dr. George Haig, to whom Mrs. Allan had transferred her bid. At the same time, it was ordered, that the Executor should pay Miss Bowman's claim out of the general assets of the estate in his hands. The estate was then supposed to be solvent. And if this had been the fact, it would all have been well; for it would have been immaterial out of what portion of the estate, Miss Bowman, Mrs. Allan, or any other creditor, would have been paid. But, in consequence of the insolvency, some difficulty has occurred.

It is to be remarked, that by the decree confirming the sale of the plantation on which Miss Bowman held a mortgage, and ordering titles to be made to Dr. George Haig, she was not bound. She was not a party to the cause. Creditors had not then been called in. She was in no wise affected or compromised by the decree. She might have gone on and foreclosed her mortgage, notwithstanding the decree. But to this creditors bill, she is a party. The creditors have all been called; among them, she has appeared, and has proved her debt and mortgage. But the land upon which she had a lien, and priority of claim, by virtue of her mortgage, has been sold under the sanction of the Court, and the proceeds thereof disposed of. And

in the distribution which has been reported and recommended to the Court, her claim has been entirely pretermitted, and no provision made for her. That, now, is the ground of her complaint, and her present appeal. It would not rest with her hereafter, to say she was not a party to these proceedings. She is a party, and if some remedy is not now provided for her, she will be concluded hereafter.

The claim of Miss Bowman is obviously

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meritorious. The *Court recognizes the necessity of making some provision for the satisfaction of her claim. The difficulty is, making a provision which will not come in conflict with some other decretal disposition of the assets heretofore made, and which was intended to be final. Deciding that Miss Bowman's claim must be paid, the Court, in its own embarrassment on this point, has concluded to refer it to the Master to devise and report the mode. It is accordingly referred to the Master to report a scheme for the payment of Miss Bowman's debt out of the funds under the control of the Court, and in the event of a deficiency from such funds, that he have leave to report any special matter.

The Circuit decree is affirmed, except as modified by this decree.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

10 Rich. Eq. *19

*N. B. YOUNG v. CALVIN GREEN.

(Charleston. Jan. Term, 1858.)

[Judgment \hookrightarrow 17.]

It is no ground for the Courts refusing to entertain jurisdiction of a bill to account by an agent residing in this State, and having possession of his principal's property here, against his principal residing in Virginia, that the agent was under contract to take the property to Virginia—the filing of such bill being no breach of trust or fraud.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 33; Dec. Dig. \hookrightarrow 17.]

This was a bill of account, filed 16th February, 1856, by the complainant, a citizen and resident of South Carolina. Complainant, inter alia, alleged that "your orator entered into a contract and agreement with Calvin Green, a resident of the State of Virginia, then the owner of race horses, and engaged in the business of training horses for races and matches, and for sale, by which it was agreed that your orator should give his time and services to the said Calvin, in training his horses and taking care of and superintending them while being prepared for and engaged in races and otherwise, taking them from place and having the general charge, custody and control of them for that pur-

pose." After stating the claim at length and with particularity, the bill proceeds, "and your orator further sheweth unto your Honors, that the said Calvin Green, is a resident of the State of Virginia, and is now without the limits of the State of South Carolina, but that he has certain property within the said State, that is, two negro slaves, named Henry and Dick, and three horses, one called Frankfort, and two others, which are young and have not yet received

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*any appellation; all which property has been and still is in the possession and under the control of your orator, as superintending and interested in the business as aforesaid." The bill further continues: "In tender consideration whereof," &c. &c. &c., "and that in default thereof, the said property above specified, to which the said Calvin in entitled, now within the limits of this State and in the possession and under the control of your orator may be sold," &c. &c.; and in the meantime that Green be restrained from removing the property. Bill prays an injunction to prevent defendant from transferring the property to any other person, or from removing the same beyond the limits of the State; also for a supœna. The injunction was granted by the Master.

Green having subsequently come within the jurisdiction, complainant on the 20th March, 1856, filed his supplemental bill, praying a writ of Ne Exeat and a Subpœna to answer both bills. The writ of Ne Exeat was granted by the Master.

Defendant filed his answer on the 21st March, 1856, which, after admitting that complainant continued in defendant's employment up to the filing of the bill, says *inter alia*, "this defendant attended the Charleston Races in February, and left complainant here with his horses and two negroes of defendant, Henry and Dick, and gave him money to maintain them here and bring them to Virginia, and directed him to remain in Charleston, and exercise the colts in his keeping, till about the first day of March, and then to come on to Broad Rock, and this the complainant faithfully promised to do; but in violation of his agreement and of all duty as an agent, he has filed his bill, and converted his possession of this defendant's property into an adverse possession, against the plainest principles of justice; which require an agent to give up his trust before he assumes the ground of an adversary; and this defendant, though willing at all times to settle fairly with complainant, yet in consideration of his treachery in endeavoring to withhold from him what he had

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received *as his agent, and suing him in a foreign jurisdiction, instead of taking his property home as he was employed to do, submits to your Honors whether horse racing is a business which furnishes ground for

the jurisdiction of Chancery; and whether the complainant, according to the principle of Chancery, can maintain a suit for performance of an agreement which he violates in the very act of suing, and whether he can found any title to relief, or to the process of this court on his own wrong."

The two following letters were introduced in evidence at the hearing:

Charleston, February 16th, 1856.

Mr. Calvin Green:

Dear Sir: My circumstances have compelled me to take legal steps against you for money advanced: my own wages, William's wages, and Thomas' wages, (which I have done in as secret a manner as possible,) which amounts to something like two thousand dollars due me. I acknowledge my sincere thanks for your kindness towards me since I have been in your employment, and would take pleasure in training for you again this spring if you can so arrange as to pay me. The colts I have at the track, and have commenced to gallop them as you directed me. The filly I am galloping 3-4 of a mile in company with the colt, and they both seem to be doing well.

Frankfort I am walking once a day. He is looking well, and I am preparing to give him medicine sometime the first of next week. I shall leave here for Macon, as I promised you, on Sunday, the 24th, and I should like to see or hear from you before I leave. I shall return to Charleston from Macon about the 3d of March, and then, if you wish, I will go on to Virginia and train for you. Yours, respectfully,

N. B. Young.

P. S.—I have not heard from Mr. Shaw yet in regard to Ellen Bateman.

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*Charleston, March 1st, 1856.

Mr. Calvin Green:

Dear Sir: "I received yours of the 22d, day before yesterday, and have seen Mr. Mitchell, and he will write to Mr. Johnson in regard to our business. Frankfort is looking quite well and is doing well. I have him turned out in the race track every day, when the weather is good, in a place I have fixed for him. The bay colt I am galloping regularly, and so far I like him very much.

The filly I have taken on the track with him for company, but do not work her regularly. She is not well yet, but is looking full as well as she did when you left, and I like her action very well. I have not left here since you left, but hear that Linda won mile heats at Macon, and was to run again yesterday. She beat Adelgiza. Your letter in regard to sending Henry and Dick home, I did not receive, or I should have done as you requested. Yours, respectfully,

N. B. Young.

Calvin Green, Esq.:

P. S.—I have written to Mr. Shaw in regard to Ellen Bateman, but have not heard

from him yet. The Goodwin colt I sold for \$250. N. B. Y.

The defendant moved to dismiss the bill for want of jurisdiction, and to discharge the defendant.

His Honor overruled the motion and ordered an account, from which the defendant appealed.

Reasons for Granting the Rule to Dismiss the Bill for Want of Jurisdiction.

The defendant is a resident of Virginia, and as such not amenable to this Court. The only claim of jurisdiction against him rests upon the allegation that he has property in this State. The property consists of

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two negroes and three *horses. It is admitted that he is the owner of them, and at the time of suing out of process against him they were in the State. But they were in the possession of complainant himself as his agent, with orders to return to Virginia, and complainant, instead of obeying his instructions, staid here, and got out process against his principal.

Appellant submitted these points:

1. That the case discloses a breach of trust on the part of complainant.

2. That for complainant to transfer this cause from the jurisdiction of Virginia to South Carolina, is to take advantage of his own wrong.

3. That the Court owes it to its own dignity as well as to the comity of States, to refuse jurisdiction, when the claim of jurisdiction is founded on the fraud of him that claims it.

Petigru, for appellant.

If a man is wrongfully brought into a jurisdiction and there arrested, he ought to be discharged, for no lawful thing founded in an unlawful act can be supported. Per Holt, Ch. J. 11 Mod. 51.

If the defendant be deprived of his liberty by any illegal contrivance on the part of the plaintiff, or of the Sheriff, or officer, the arrest will be void, and in the latter case all subsequent detainers will be void also. Lush's Pr. 600. Therewith agrees Loveridge v. Plaistow, 2 H. Bl. 29; Birch v. Prodger, 1 N. R. 135; Barratt v. Price, E. C. L. R. vol. 23; Holiday v. Pitt, 2 Str. 985.

A disposition has been shown to make a distinction between the arrest and the detainer. But equity has always rejected the distinction. Ex parte Hawkins, 4 Ves. 691; Ex parte King, 7 Ves. 312; Ex parte Donlevy, 7 Ves. 317; Ex parte Ross, 1 Rose. 260. If the first arrest is bad all the detainers are inoperative.

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"Complainants had a right to the law of their own State. If the defendant's intention to remove the slaves had been known, he might have been restrained by the process

of this Court. It was in violation of law that they were removed, and can he retain an advantage gained by the violation of law?" Per Harp. Ch. Dudley's Eq. Rep. 52.

Mitchell, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. It is not disputed by the defendant that this case is within the jurisdiction of the Court, if the special objections made in the grounds of appeal do not prevail; and we confine our consideration to these objections.

It is said, in the first place, that the case discloses a breach of trust on the part of plaintiff. The appeal is from the refusal of the Chancellor to dismiss the bill for want of jurisdiction in the Court, and upon such motion, perhaps in strict procedure, the statements of the bill must be taken as admitted, but it is unnecessary to discuss this point, as the only evidence before us, two letters of plaintiff to defendant, does not vary the contract between the parties as stated in the bill. That contract was, that plaintiff, for some compensation, should have the custody and management of certain horses belonging to defendant, for the purpose of fitting them for racing, and perhaps for sale. This constituted the relation of principal and agent, and not strictly that of trustee and beneficiary. In a loose sense, and for some purposes, every bailment is a trust, but an ordinary bailment creates no such fiduciary relation between the parties as to fix the bailee in possession with the responsibilities of a trustee. If every agent in possession of his principal's property were treated as a trustee, then trusts which were the source of Equity jurisdiction would swell into a boundless sea. 1 Sto. Eq. 464. Then what is the breach of this supposed trust?

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Simply that the agent has *sued his principal. I suppose that a technical trustee entitled to call his beneficiaries to account, might avail himself of their estate in his possession, where they were beyond the jurisdiction, to found an application to the tribunals of his domicile.

It is said, secondly, that to allow the plaintiff to proceed in this jurisdiction, instead of Virginia, enables him to take advantage of his own wrong. We are not informed where the contract between the parties was made, and we know nothing on the point except that the plaintiff resides in South Carolina, and the defendant in Virginia. The wrong imputed to the plaintiff is that he has selected a tribunal of his own State, instead of indulging the defendant with the more acceptable and less expensive course of a suit at home. Surely a plaintiff has the option on this point, and is not required at his own expense and inconvenience to pursue a defendant in a foreign court. It is urged, how-

ever, that plaintiff had the custody of defendant's property here under an engagement to take it to Virginia, and for proof, his letter of March 1, 1856, is relief upon, in which he says: "your letter in regard to sending Dick and Henry home, I did not receive, or I should have done as you requested." This is no proof of any previous promise of plaintiff to carry any of the property to Virginia, and if it were so construed, does not apply to all the property in plaintiff's possession; but, suppose the plaintiff had agreed to take all the property to Virginia, it by no means follows that he could not resort to this property for satisfaction of a debt due to him. A creditor in possession, by universal law, has some precedence over other creditors, and it is no fraud in him to avail himself of this advantage. In criminal cases, it is indifferent by what means an offender who has violated our law be brought within the jurisdiction, even if it be by lawless violence in the territory of another State, and he is responsible for his crime, and not entitled to discharge or exemption from punishment. *State v. Smith*, 1 Bail. 283 [19 Am. Dec. 679]. The rule is different in civil cases, and

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if one should be *brought within our territory by force or fraud, for the purpose of arresting him, jurisdiction would not be acquired by this unlawful act; and perhaps the result would be the same if his property should be brought within our territory by force or fraud for the purpose of grounding suits here against him. But there is no reason for extending the doctrine further. In the present case, so far from the property of defendant having been introduced by any force or fraud of the plaintiff, it appears that the defendant himself brought the property hither, and left it in plaintiff's possession after the February races. If plaintiff has committed any wrong, or done any thing which may be denominated fraud, it consists in not taking back to Virginia property brought into South Carolina with consent of the owner. But, at the utmost, that is a simple breach of contract, and not fraud in any legal sense, and not within any rule or doctrine which would oust the Court of jurisdiction.

Thirdly, it is said that the Court owes it to its own dignity, as well as to the comity of States, to refuse jurisdiction when the claim of jurisdiction is founded on the fraud of the claimant. The doctrine of this ground may be sound, but it has no application to the case. So far as we perceive, the whole fraud of the plaintiff is in preferring the judicial remedies of the State of his residence. Doubtless, it would have been more convenient to defendant to have this litigation at home, but the convenience of the plaintiff is to be preferably consulted. In hard times it may be inconvenient to debtors to pay their

creditors any where; but we cannot acknowledge, with proper self-respect, that the rights of litigants can be more safely determined elsewhere than in South Carolina.

It is ordered and decreed that the appeal be dismissed.

DUNKIN and DARGAN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *27

*MAGDALEN GREEN and Others v. THE BANK OF GEORGETOWN and Others.

(Charleston. Jan. Term, 1858.)

[Execution \hookrightarrow 171.]

Under a dormant execution against G., his creditors having levied on certain negroes in his possession, the wife and children of G. filed their bill against the creditors, and G., alleging that the negroes were held under a parol trust for their separate use, and praying that the sale be restrained; that the trusts be decreed and established, as against G., and that a trustee be appointed. G. admitted all the allegations of the bill. The bill having failed, as against the creditors, for want of proof as to the trusts, held that the Court would not interfere, at the instance of the plaintiffs, to restrain the sale, although the levy was as against G., a technical trespass. The Court also refused to declare the trusts or appoint a trustee.

[Ed. Note.—Cited in *Wheeler v. Alderman*, 34 S. C. 537, 13 S. E. 673, 27 Am. St. Rep. 842.

For other cases, see *Execution*, Cent. Dig. § 511; Dec. Dig. \hookrightarrow 171.]

Before Dargan, Ch., at Georgetown, February, 1857.

This was a bill filed on behalf of Magdalen Green, wife of Richard G. Green, and their children, Richard B. Green, John W. Green, Hugh S. T. Green, and Sarah Green, and James W. Skinner and Mary A. his wife, also a child of the said Magdalen and Richard G., complainants against the said Richard G. Green, Samuel Kirton, and Bank of Georgetown and Alexander Robertson, executor of Benjamin Allston.

The bill alleged that some time in the year 1845, certain negroes, to-wit: Betty, Phillis, Benn and Bess, the property of the said Richard G. Green (one of the defendants), were levied on and sold by the Sheriff of Georgetown District, under an execution against him, in favor of John W. Coachman, deceased, entered in the Sheriff's office, July 29, 1844.

That these negroes when sold, were purchased by the late Mr. Benjamin Allston, at

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a full price, and the money applied *towards satisfaction of the said execution. That after his purchase he gave them to the wife and children of the said Richard G. Green, to their separate use, free from the control, liabilities, &c., of the said Richard G. Green.

That this gift was made verbally, and in pursuance thereof the negroes were deliver-

ed, and went into the possession of Richard G., who received them upon such terms, and who assumed the character of trustee for his wife and children, who composed his family, and resided under the same roof with him.

That frequently afterwards, Mr. Allston expressed his purpose to have an instrument of writing, in which the said trust should be expressed and declared; that this he stated distinctly and particularly in the spring of the year 1847, when about to leave the district for the summer, declaring that as soon as he returned he would have such an instrument drawn up, but before he returned he sickened and died, so that the terms and trusts of the said gift were never reduced to writing.

That the said Benjamin Allston departed this life, leaving duly executed his last will and testament, whereby he appointed Alexander Robertson, Esq., his executor, who has qualified as such on his will.

That ever since the gift of Mr. Allston, when the negroes passed under the control of the said Richard G. Green, for the use of his wife and children, they have so remained, and have been used and appropriated to their benefit and support; that the said Richard has never set up or pretended any claim to such negroes in his own right, but has always admitted that he held them for the exclusive benefit of his wife and children under the said gift of Mr. Allston.

That all the facts and circumstances attending the possession of the negroes, have been well known since the said gift to the Bank of Georgetown and to Samuel Kirton.

That some time about the middle of April last, Thomas R. Sessions, Sheriff of Georgetown, under the direction, and as the agent of the said Samuel Kirton and Bank of

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Georgetown, *claiming to be entitled to the said execution against Richard G. Green, levied upon and took out of the possession of himself and family, the negro slaves, the said Betty, one of those previously purchased by Mr. Allston as above, and her child Anthony, born since such purchase and gift, and Maxian, the child of the said Phillis, so purchased and given by Mr. Allston as aforesaid, also born since the said purchase and gift in the family of the said Richard G. Green.

That the execution under which the said Thomas R. Sessions acted, in seizing the said negroes, is that lodged in the office 29th of July, 1844, above specified, and towards the satisfaction of which the money received on the former sale was applied.

That the said Thomas R. Sessions, having received a bond of indemnity from the said Bank of Georgetown and Samuel Kirton, after having levied on the said negroes, at their instance as aforesaid, now holds them in the common jail, and purposes, under their

instructions, to sell the negroes and apply the proceeds to the payment of the said execution claimed by the said Kirton and Bank.

That complainant, Magdalen Green, is the wife, and the complainants, Richard B. Green, John W. Green, Hugh S. T. Green, (the two latter infants,) Sarah J. Green and Mary A. S., wife of James W. Skinner, are the only children of the said Richard G. Green.

The bill prayed that defendant, Kirton and the Bank, be restrained from selling and disposing of the said negroes; that the interests of the complainants in the said negroes, and the trusts of the gift made by Mr. Allston, for the benefit of the complainants, may be decreed against the said Richard G. Green, and established, and a proper person appointed trustee, to hold the same for their use.

That Richard G. Green, Samuel Kirton, the Bank of Georgetown and Alexander Robertson, executor of Benjamin Allston, may answer the allegations of the bill, and that subpoena issue against them.

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*Upon motion before the Commissioner, an injunction was granted, restraining the defendants, Kirton and the Bank of Georgetown, and the Sheriff, as their agent, from proceeding under the execution and selling the negroes.

The bill was taken, pro confesso, against all the defendants, but, subsequently, answers were filed in behalf of Samuel Kirton, the Bank of Georgetown and Mr. Robertson, as the executor of Mr. Allston. Richard G. Green also answered, admitting all the allegations of the bill.

The answer of Kirton admits, that "Thomas R. Sessions, in obedience to instructions from him and his co-defendants, the Bank of Georgetown, did levy upon the slaves mentioned in the said bill, under the execution therein described, and that the execution and judgment upon which it was issued had been, before that time, duly assigned by the said John W. Coachman to the Bank, and by the said Bank, in fact, assigned to this defendant. But whether or not these slaves are the same as those sold under the previous levy, mentioned in the same bill, or are the descendants of them, this defendant cannot by any means admit, and prays proof thereof;" denies that the slaves mentioned in the bill are the property of Mr. Benjamin Allston, or of his estate, either in his own right, or as a trustee for complainants, and that the said trust therein, pretended to be set up, ever was created."

"Believes that it never was the intention, either of Mr. Allston or of Richard G. Green, that the trusts so set up ever should exist; and he positively denies that if such intention existed it ever was consummated."

"Admits that the said slaves have been, and are, in the possession of Richard G.

Green, for a long period of time, but positively alleges that the said Green neither set up nor pretended to set up any other claim to the possession of them, than devolved upon him as the natural protector and guardian of his wife and children, or in any other way, as pretended in said bill, than as their actual owner."

But, on the contrary thereof, defendant

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says that he has had *very many dealings with the said Richard G. Green, for a course of years; that in these dealings Green frequently spoke of the said slaves purchased by Mr. Allston, at the previous levy, and also the slaves mentioned in the bill as his own property, liable for and applicable to his debts.

That upon one occasion Green offered said slaves to him for sale, and in order to assure him of a good title in them, informed him that Mr. Allston had purchased, at the said sale, for him, the said Green, and on his behalf; that further, to sanction his assertion, Green showed to him a letter from Mr. Allston, in the handwriting of Eleazer Waterman, Esq., which letter clearly recognized the slaves as the property of Green, and appointed an early day for the re-payment of the money advanced for them. That this letter was but a short time since in the possession of Green, and must now be within his control. And defendant craves that it may be ordered to be produced by said Green, and exhibited to this Honorable Court.

Insists "that the slaves seized by the Sheriff are the property of Green, and liable for his debts." That the judgment under which the Sheriff proceeded, constituted a valid claim against Green, and craves against him a decree for the application of the said property to the said debt, as well as all others, that may be brought to the attention of the Honorable Court.

The answer of the Bank of Georgetown admits the levy by Sheriff Sessions, of the negroes named in the bill as the property of Richard G. Green, under the execution against him in favor of John W. Coachman, subsequently assigned to the Bank, and by it assigned to Kirton.

Insists that the said slaves are the property of said Green, and liable to his debts. That the allegations in the bill, as to the purchase of Mr. Allston, and the supposed trust, are improbable, "and in fact untrue."

That the facts, as previously stated by Green, and which defendant believes to be

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true, are that Mr. Benjamin Allston *was the ostensible purchaser of said slaves at the previous levy. That he either became the purchaser of the said slaves, as the agent of Richard G. Green, or after the said purchase, induced by his own representations, and also, as must be concluded from his well known character, led thereto by his kind na-

ture, he returned the slaves into the possession of the said Richard G. Green, with the understanding that the said Richard G. Green should keep them and repay to him, the said Benjamin Allston, the amount of his bid, whenever he was able to do so. That thus the slaves were but for a very short time, if ever, out of Green's possession; but, at any rate, he took them into his possession; used them as his own property; proped his falling credit time and again, by their ostensible ownership; made promises for the payment of debts out of the proceeds of the anticipated sale of them. That Mr. Allston, himself, always acted upon this construction, and has so expressed himself in writing, as may be seen by the production of a letter in the possession of R. G. Green, which should be produced before this Honorable Court; or, by proof of its contents, that the pretended trust, so uncertain in its character and terms, never had any foundation in fact, and would never have been set up, had not the fraudulent aim of Richard G. Green been prevented, and his possession, in the face of his creditors, been interrupted. That thus the said slaves are the property in law, and in fact, of the said Richard G. Green, the said defendant in execution, and the amount of money paid by the said Benjamin Allston, constitutes a debt against the said Richard G. Green. That at all events, and apart from the action of the Sheriff, under the said execution, the said slaves are liable for the debts of the said Richard G. Green, and that this defendant prays that, as against its said co-defendant, it may be ordered and decreed that the said property be so applied.

Alexander Robertson, Esq., says he knows nothing of the alleged sale of the slaves mentioned in the bill, or the purchase by Mr. Allston, except that being then one of the

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firm *of Robertson & Blacklock, the factors of Mr. Allston, he paid out of the funds of Mr. Allston in their hands, the sum of nine hundred and two dollars (\$902,) on an order drawn in favor of Geo. Durant, the Sheriff, as follows:

Georgetown, March 3d, 1845.

Messrs. Robertson & Blacklock:

Gentlemen:—Please pay to the order of George Durant, Sheriff, nine hundred and two dollars, being the purchase money, at Sheriff's sale, of four negroes, named Betty, Phillis, Ben and Bess, purchased by me at the Sheriff's sale to-day, under the case, Executors of Lathrop against R. G. Green, and charge,

Yours, respectfully,

Benjamin Allston.

That Mr. Allston died about the Fall of 1847, and left his will appointing defendant executor, and he has qualified as such. That the negroes in question, never came into his possession, as a part of Mr. Allston's estate; that he never claimed them as such, nor does

he now desire to interpose any such claim.

That he knows nothing of his own knowledge of the gift and trust set forth in the bill, but has heard from some of the family of his testator, that they believed that these negroes were intended, in some way, for the benefit of Mr. Green's family, and "he is willing that such order and decree in the premises, with regard to the said negroes, should be made, as may seem right to the Court. And prays," &c.

Upon these pleadings the cause came to be heard before his Honor, Chancellor Dargan, at Georgetown Sittings, 1857.

At the hearing, it was proved by the Sheriff, Sessions, that he had levied on three negroes, Betty, Anthony and Maxian, as the property of Richard G. Green, under an execution in the case of Coachman v. Green, and it was admitted that this was the same lodged in 1844, under which the negroes

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bought *by Mr. Allston, 3d March, 1845, that is Betty, Phillis, Ben and Bess, had been sold; and it was also admitted that the negroes are the same, that is, Betty and her child and grandchild, born since the previous sale.

Mr. Richard G. Green was offered as a witness on behalf of the complainant, but objected to as interested, and the husband of the complainant in the cause, and the objection was sustained.

It was proved by the Tax Collector that the negroes had been returned by Mr. Richard G. Green, as the property of Mr. Allston, until his death, when it was changed and returned as the trust estate of Benj. Allston, was again changed the last year, and then returned by R. G. Green, for family.

Admitted that the money bid for the negroes was paid by Mr. Allston, that is, that the draft, copied in the executor's answer, was thus paid.

After hearing the argument of Counsel, his Honor made the following order:

"The bill and answer being read, and testimony adduced, and Counsel heard, it is ordered, adjudged and decreed, that the bill be dismissed for want of proof of the allegations thereof, and that the injunction heretofore granted in this case be dissolved."

The complainants appealed on the grounds:

1. For that it appearing that the defendants, Samuel Kirton and the Bank of Georgetown had, through the Sheriff, levied upon and seized the negroes mentioned in the bill and were about to sell the same wrongfully, and without legal authority, inasmuch as the execution under which they assumed to act, had long since ceased to possess such authority, it is submitted that they should be restrained by injunction from carrying out their illegal purpose.

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*2. For that it appearing that the defendant, Richard G. Green, admitted the trust

set up by the complainants, and acquiesced in the appointment of a new trustee, such trusts should have been decreed against him, and provision made for a new trustee, with a proper declaration of trust.

Mitchell & Dozier, for Appellant.

Munro & Simonton, for Bank.

Shaw, for Kirton.

The opinion of the Court was delivered by

WARDLAW, Ch. The wife and children of Richard G. Green, plaintiffs, proceed against him and the executor of Benjamin Allston, the Bank of Georgetown and Samuel Kirton, defendants, for the purposes of having a parol trust as to certain slaves in behalf of the plaintiffs, declared and established, and of enjoining the Bank and Kirton from selling and disposing of said slaves. The complaint is, that Benjamin Allston purchased these slaves March 3, 1845, at Sheriff's sale, under a fi. fa. issued in 1841, in the case of Coachman, executor of Lathrop, against R. G. Green, for a full price appropriated towards satisfaction of the execution, and delivered them to plaintiffs for their separate use, free from the control and liabilities of R. G. Green; and that plaintiffs, remaining in the enjoyment of this property, were unlawfully dispossessed in April, 1856, by the Sheriff of Georgetown, acting under the direction of the Bank and Kirton, and without other authority than the execution mentioned, which had lost its activity by lack of renewal. Richard G. Green, husband and father of plaintiffs, admitted on the bill all its allegations; the executor of B. Allston, in his answer, ignored the whole matter, except the payment for his purchase by B. Allston; and the Bank and Kirton, who were the assignees of the said execution, denied all notice or belief that these slaves, which were in the possession of Richard G. Green, were held on any trust

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*whatsoever. No material evidence was offered at the hearing. The Chancellor adjudged and ordered that the bill be dismissed for want of proof of its allegations, and that an injunction which had been granted by the Commissioner be dissolved. From this decree the plaintiffs appeal.

Their first ground of appeal asserts that as Kirton and the Bank had seized the slaves without legal authority, they should be restrained by injunction from consummating their illegal purpose. It is not disputed that the seizure of the slaves by these defendants was not authorized by a dormant execution, and that they were in fact naked trespassers. It is likely that in the proper tribunal, where trespasses are considered and damages awarded, R. G. Green might recover for the unlawful injury to his possession; but he makes no complaint as plaintiff or appellant. The plaintiffs insist that through him, who acknowledges their beneficial in-

terests, they may demand the restoration of the slaves to that legal possession in which they were before this possession was invaded by the unlawful act of some of the defendants. Frequently in this Court, where all the parties in interest are before the tribunal, it is regarded as indifferent on which side of the controversy they may be arrayed; but it is very unusual to allow to any party to complain of the invasion of the merely legal rights of another where the latter is silent and acquiescent. The jurisdiction of the Court for the specific delivery of such personal property as is now in controversy, is firmly established, where the right of the plaintiff is clear; but it never has been, and it ought not to be exercised where the right of the plaintiff is liable to be soon defeated and the possession of the defendant may become lawful by easy resort to legal procedure. Here the wrong of the Bank and Kirton consists in levying under a dormant execution, which may be soon revived. A technical trespass has been committed, but the Court of Law is the proper tribunal for the redress of this injury. If there had been allegation and proof that defendants were insolvent, this Court might

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properly have interfered, *possibly for restoration, certainly for preservation of the property pending litigation; but the solvency of the offending defendants is conceded.

The second ground of appeal affirms that as defendant, R. G. Green, admitted the trust set up by plaintiffs, such trust should have been declared by decree against him, and a new trustee appointed. The brief does not exhibit that there was any prayer for the substitution of trustees; and if it had, such substitution is necessarily subsequent in its nature to the ascertainment and declaration of the trusts. But how is it practicable for the Court, on the information afforded, to ascertain what the trusts were? Was the wife to have a separate estate for life to her separate use with remainder to her husband, if survivor, or to her children, in any event, at her death? Or were the wife and children to enjoy the estate jointly, in exclusion of the husband? Were further limitations intended? We cannot tell. The plaintiffs, however, do not need our aid. The defendant, R. G. Green, against whom alone they ask the interposition of the Court in this respect, has already admitted all their allegations, and undoubtedly will give them any declaration of trust they may desire. They do not complain that he is contumacious. It is manifest that the purpose of the bill was to restrain the creditors of R. G. Green, and all beyond is a fetch.

It is ordered and decreed that the decree be affirmed and the appeal dismissed.

DUNKIN and DARGAN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *38

*AUGUSTUS SASPORTAS et al. v. J. DE LA MOTTA, et al.

ABRAM CANTER v. AUGUSTUS SASPORTAS, et al.

ABRAM CANTER, et al., v. AUGUSTUS SASPORTAS, et al.

(Charleston. Jan. Term, 1858.)

[Citizens ⇐9.]

Under the Acts of Congress, children born abroad, not only of citizens by birth, but also naturalized citizens, are citizens of the United States.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. § 9; Dec. Dig. ⇐9.]

[Aliens ⇐69.]

Proof that a foreigner resided in this State at least as early as 1778, and that he exercised the privileges and was reputed to be a citizen until his death in 1823, held sufficient to raise the presumption that he had complied with the law in relation to naturalization which existed prior to 1790, and had become a citizen.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 153; Dec. Dig. ⇐69.]

[Aliens ⇐69.]

The existence of a record may, it seems, be presumed, from lapse of time and other circumstances.

[Ed. Note.—Cited in Smith v. Tanner, 32 S. C. 264, 10 S. E. 1008.

For other cases, see Aliens, Cent. Dig. §§ 147-153; Dec. Dig. ⇐69.]

Before Wardlaw, Ch., at Charleston, January, 1857.

Wardlaw, Ch. These cases were heard as one cause. Joshua Canter made his will October 12, 1826, and devised certain lots on Broad, Logan and New streets, in Charleston, to his two sisters, Rachel Canter and Charlotte Sasportas, widow of Abram Sasportas, in the proportion of three-fourths to Rachel and one-fourth to Charlotte, the whole to remain undivided in the possession of Rachel Canter, who was appointed executrix, for the support of his mother Rebecca Canter, during her life; and the testator soon afterwards died. The mother, Rebecca, died in 1835. Rachel Canter, formerly of Charleston, and afterwards domiciled in New York, died during a visit to Bordeaux, in France, in April, 1852. Charlotte Sasportas died at the same place the year before, leaving two children, Augustus Sasportas and Zelmire Peraire,

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wife of *Edward Peraire. Rachel Canter left a will, executed in the city of New York, Oct. 14, 1833, and a codicil, executed at the same place, Oct. 14, 1836, whereby she appointed Jacob De la Motta her executor, and devised to him her share of the lots aforesaid, in Charleston, in trust, to pay one-half of the rents or income to her brother, Abram Canter, during his life, and the other half to De la Motta Canter, Joshua Canter, and Judith Canter, children of her deceased brother Emanuel Canter and to deliver the whole of her share of the lots to these children of

Emanuel, on the death of Abram, to be held by said De la Motta in trust for them, with some limitations over; and the will and codicil have been admitted to probate by the Ordinary of Charleston District, and Jacob De la Motta, Jr., has qualified and acted as executor. To this extent all parties are agreed as to the facts.

The first of the bills in the caption, is by Augustus Sasportas, and Edward Peraire and wife, Zelmire Peraire, plaintiffs, against J. De la Motta, executor and trustee, De la Motta Canter, Joshua Canter, and Judith Canter, devisees of Rachel, for partition of the lots in Charleston, and alleges the intestacy of Charlotte Sasportas. The executor takes part with the plaintiffs, but the other defendants resist partition, suggesting that Charlotte Sasportas left a will devising her portion of the estate to her brother, Abram Canter, in fee, and that if she died intestate, the plaintiffs are aliens, and not entitled to hold real estate.

The second of the bills in the caption is by Abram Canter, against the plaintiffs and defendants in the first suit, (styled, irregularly, a cross bill, for he was no party to the first suit,) and it alleges a will of Charlotte Sasportas in his favor, and imputes suppression of this document, and calls for discovery, and alleges the alienage of the plaintiffs in the first suit. The children of Emanuel take part with him, but the answer of the other defendants deny the will of Charlotte Sasportas, and the alienage of Augustus Sasportas and Zelmire Peraire, children of said Charlotte.

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*The third bill in the caption is by Abram Canter and the children of Emanuel Canter, against the plaintiffs in the first suit, and J. De la Motta, executor and trustee, repeating the allegations of the second suit, and also charging misconduct on the part of J. De la Motta, as executor, and prays for an account of his transactions, as executor and trustee and for his removal from office. No adequate proof whatever of misconduct on the part of J. De la Motta was offered, and at the hearing, an account of his receipts and disbursements was reported by the Master, to which certain exceptions were taken. This bill was dismissed, so far as it sought the removal of the trustee from office; and the exceptions to the Master's report not seriously pressed, were overruled and the report confirmed.

The questions argued before me were, whether or not Charlotte Sasportas made a will, and whether or not her children were aliens.

No will of Charlotte Sasportas has ever been admitted to probate in South Carolina, or in France, and the Court of Equity is not a Court of Probate, although it may be that a will devising lands and formally executed and proved, should receive effect in this court

without probate. It seems by Consular certificates, and it was apparently conceded, that on April 21, 1840, she signed an unattested paper, purporting to give her Charleston estate to her children, and that afterwards she attempted to sign, but did not sign an unattested paper, purporting to be a will, whereby she voluntarily remitted her claims against her sister Rachel. It is not pretended that either of these papers is valid to pass real estate, but it is faintly argued that the last is valid to extinguish her claims upon her sister Rachel's estate. Where satisfaction of a debt is actually made, this may be acknowledged by parol, but without satisfaction, a release must be under seal. *Darlington v. Pulteny*, 1 Cow. 260. The whole doctrine is well expressed in *Peace v. Holmes*, 23 E. C. and C. L. R. 34. "The authorities appear to amount to this, you

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must claim a discharge *from debt, either by gift in the will of testator, or by some means which would amount to a discharge at law. There is no equity to have a valid debt undischarged at law discharged in equity. It is said to be inequitable that a party should take property of testator under his will and refuse to carry out other parts of his intention. But a person is not bound to carry out such intentions as a trust, unless he has been instrumental in causing testator to omit more formal directions concerning the subject matter." Where there is no release at law there must be in equity such evidence as would satisfy a jury of some equivalent to a release.

Next as to the alienage of the children of Charlotte Sasportas. She was a native citizen of this State, but they were born in France, and their father, Abram Sasportas, was born without the region of allegiance to South Carolina, as province or State. It does not distinctly appear that he was a resident here before July 4, 1776, when the separation of the State from Great Britain was declared; but the evidence is satisfactory that he fought as a whig officer in some of the battles of the Revolution, and was a resident of the State before 1778: that he acquired and conveyed real estate in Charleston, as early as Oct. 1, 1785, and frequently afterwards, and was always received and reputed as a citizen, and was extensively engaged in commerce, particularly with France. He went to France in prosecution of his commercial enterprises, about 1804, and remained there until the close of the war with Great Britain, when he returned to Charleston, and remained there until the fall of 1819, and then went again to France for some surgical operations on his eyes, taking with him one of his children, and leaving his wife and other child in America, who, however, joined him not long afterwards. He died in France in 1823. His children were born in France during his first visit there, but always claimed to be citizens

of South Carolina. I forbear to state much other evidence which was offered concerning his citizenship, for the question seems to me

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to be settled by the legislation of *this State and the United States. By our act of 1704, (2 St. 251,) aliens and their wives and children, afterwards coming into the province, were declared to be entitled to all the privileges of persons born here of English parents, on taking certain oaths. This Act was obligatory on the State when she ceased to be a province of Great Britain. It was repealed by the Act of 1784, (4 St. 600,) which provided as a substitute that all free white persons may become citizens on taking the oath of allegiance, prescribed by the Act of 1778, (1 St. 147). Children of a citizen born abroad, during his temporary visit, are citizens by the Act of Congress of 1802. (Ingersoll's Ab. 437). By the Act of Congress of February 10, 1855, "persons heretofore born, or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be, at the time of their birth, citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." I am of opinion that from the residence of Abram Sasportas in this State before 1784, from his reputation as a citizen, and his exercise of the privileges of a citizen, it must be presumed after such lapse of time, that he took the necessary oaths and became a citizen of this State, and that under our Acts and the Acts of Congress, his children are entitled to claim, as they seem always to have claimed to be citizens of the United States.

I suppose the third bill in the caption to be determined by the decretal orders heretofore made, but the parties have leave to apply at the foot of this decree for further orders.

It is ordered and decreed, that in the first bill in the caption, a writ of partition be issued, directed to five Commissioners, to be appointed by the Master, to divide the premises described in the pleadings, so as to allot one-fourth part thereof to the plaintiffs, and the other three-fourths to the devisees of Rachel Canter, subject, in the first place, to the payment of the legacy given by her will

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to Jacob De la Motta, and the *debt to Charlotte Sasportas, mentioned in the Master's report, and after payment thereof, to the uses and limitations of her will.

It is further ordered and decreed, that the second bill in the caption be dismissed.

Abram Canter appealed on the grounds:

1. That His Honor erred in dismissing the second bill.

2. That His Honor erred in decreeing that

Augustus Sasportas and Zelmire Peraire were not aliens.

3. That the decree is not consistent with the facts and equity of the case.

Hayne, Yeadon, for appellant, cited 2 Story L. U. S. 852; Peck v. Young, 26 Wend. 613, 636; Peake N. P. C. 132; 1 Bl. Com. 372; 2 Vent. 1; Vat. 161 B. 1, C. 19, § 215; Dunl. 303; Campbell v. Gordon, 6 Cra. 176; West v. West, 8 Paige, 433; Lowder v. Moses, 3 McC. 93; Davis v. Hall, 1 N. & McC. 292; Constitutions of 1776 and 1778; Darore v. Jones, 4 T. R. 300; 2 Stat. 549; 21 Wend. 390; Cro. Car. 602; 2 Kent, 33, 44, 52; Charles v. Munson, 17 Pick. 70; Manchester v. Boston, 16 Mass. 230, 235; Clifton v. Haig, 4 Des. 336; Vaux v. Nesbitt, 1 McC. 352; 2 Kent, 14; 5 Bin. 371; 4 Stat. 746.

Lesesne, Memminger, contra, cited Dupont v. Pepper, Harp. Eq. 15; Act 1696, 2 Stat. 131; App. P. L. 5; 2 Story L. U. S. 76; 2 Kent, 51; 1 Stat. 152.

The opinion of the Court was delivered by

WARDLAW, Ch. The first and third of the appellant's propositions, denominated grounds of appeal, are not entitled to the name as they do not serve the office of grounds of appeal. They are vague imputations on the decree, and do not point the attention of the Court to any specific error therein. It seems, however, they were not intended to embrace any matter additional to that in the second ground, except to dispute

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*the Chancellor's conclusion, that words of release of a debt in a will not sealed, attested, admitted to probate, nor fully signed, do not constitute a release. This point is quite clear, and we are content to leave it on the Chancellor's reasoning.

The second ground of appeal affirms that Augustus Sasportas and Zelmire Peraire are aliens. They were born without the limits of the United States, and of course aliens by the common law, 1 Bl. 372, 2 Kent 4, but they claim to be citizens, because, at the time of their birth, their parents were citizens, and they found their claim on the fourth section of the Act of Congress, concerning naturalization. 2 Sto. Laws U. S. 852, Dunlop 303. That section provides that "the children of persons duly naturalized under any laws of the United States, or who, previous to the passage of any law on that subject by the government of the United States, may have become citizens of any one of the States under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered citizens of the United States, and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United

States, be considered as citizens of the United States; provided, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." Various questions, involving the construction of the second clause of this section and its application under the circumstances of the case have been discussed by the counsel of the parties.

The mother of Augustus Sasportas and his sister, acquired the real estate in controversy after the death of her husband, and claiming through her they insist that as she was a native citizen and was resident here at the date of the passage of the Act of 1802, their citizenship is adequately saved through her alone, notwithstanding their foreign birth. My own impression is against this view, from the maxim of the common law on this subject *proles sequitur sententiam patrum*, from the

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*inference from the terms of the proviso to the section concerning the residence of the father, and from the course of litigation hitherto under our Acts of naturalization and the Statute, 25 Edward III, raising the question whether or not the citizenship of the father, never of the mother, was sufficient; but there is no authoritative decision upon the point, and the Court reserves it from judgment. I may say, in passing, that, notwithstanding the doubt expressed in *Dupont v. Pepper*, Harp. Eq. 15, as to this Statute of Edward the Third being of force in this State, I agree with Judges Grimke and Cooper that it was adopted by our Act of 1712. Grimke's D. and App. 5, 2 Sta. 549. In the case just cited, the Court arguendo expressed the opinion that the citizenship of the mother was sufficient, but the decision of the case was overruled in the Supreme Court of U. S., 3 Pet. 252 [7 L. Ed. 666], there reported as *Shanks v. Dupont*; not, however, for the error of this opinion, but on the ground that the mother was a British subject and entitled to the protection of her title to land here by virtue of the 9th Section of the treaty of 1794; and in *Davis v. Hall*, 1 N. and McC. 292, the opinion was expressed that the citizenship of the mother, where the father was an alien, would not save the citizenship of children born abroad. Nothing is concluded by us on this point.

It is urged in behalf of appellant that the saving of citizenship, in the clause in question, to children of foreign birth, does not apply to children of persons made citizens by naturalization, and is confined to children of native citizens. This argument has some support from a suggestion of Chancellor Kent in his 35th lecture, 2 Kent 53, from the opinion of C. J. Nelson in the Supreme Court of New York in *Peck v. Young* 21 Wendell 390, and from the opinion of Senator Scott in the same case before the Court of Errors of N. Y., 26 Wend. 613, 626, but is greatly discredited by the reasoning of Chancellor Wal-

worth, who delivered the leading opinion in the same case before the Court of Errors, 26 Wend. 622. I borrow from him much of my

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subsequent argument. The first clause *of the section under consideration, applicable to children under age and resident in the United States at the time of the naturalization of their parents, has been treated as prospective and as including the cases of children of parents naturalized after the passage of the Act, and of children who became residents here after the naturalization of their parents, and who were infants at the time of such naturalization. *Campbell v. Gordon*, 6 Cranch 177 [3 L. Ed. 190]; 8 Paige 433. The second clause of the section is clearly confined to children of parents who before the passage of the Act had been citizens, or at the date of the Act were citizens, and it has been held to include retroactively the case of children whose parents were dead at the time the Act was passed. 16 Mass. R. 235. According to our construction, the two clauses of the section were intended to provide for two classes of children, the first of infant and resident children at the time of the naturalization of the parents, where the parents were aliens at the birth of the children; and the second of children born out of the United States, when at the time of their birth their parents were citizens, whether before or at the time of the passage of the Act. To interpret this second clause as including all children of citizens, without discrimination as to the age of the children when the parties became citizens, and as to the allegiance of the parents when the children were born, would hardly be consistent with the careful provisions of the first clause of the section concerning the infancy and residence here of the children acquiring citizenship through the naturalization of their parents, and might confer citizenship upon adults who fought against our independence throughout the revolutionary war and left the country when our independence had been acknowledged by the treaty of peace in 1783; if their parents abided here and became citizens before 1802, this could not have been the purpose of Congress. But if we limit the remedial provision for children of foreign birth to the case of children born abroad while their parents were citizens, no inconsistency between the first and second clause and no impolitic con-

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sequence as to refugees can follow. The Act of March, 1790, 1 Story Laws U. S. 76, which was the first law passed by the government of the United States concerning naturalization, provided that "the children of citizens of the United States that may be born beyond sea or out of the limits of the United States, shall be considered as natural born citizens;" and the Act of January, 1795, which superseded the former Act, provided that "the children of citizens of the United States born out of the limits and jurisdiction

of the United States shall be considered as citizens of the United States;" and then the Act of 1802, which has been quoted, provided for children of foreign birth, but restricted relief to the children of parents who were citizens at the date of the Act, or had been citizens previously. All of these three Acts contain the proviso that the right of citizenship shall not descend to children whose fathers have never resided in the United States. Thus a child of a citizen might derive citizenship from his father; yet, if he never resided here, he could not transmit the right to his children. The supposed defect of the Act of 1802, was in the omission to provide for children of foreign birth of parents who became citizens by birth or naturalization after April, 1802, and this defect was supplied by the Act of February 10, 1855, which enacted in the first section that "persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be, at the time of their birth, citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States; provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States; and in the second section enacted, that "any woman, who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen." All of these Acts being in *pari materia* should be construed together, so as to form a symmetrical and rational system, wherever their provisions are con-

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sistent. *Richards v. McDaniel*, 2 Mill C. R. 18; *Darour v. Jones*, 4 Term R. 309; *Burnett v. Bull*, 10 Rich. L. The Act of 1855 is to a great extent merely declaratory, dispelling doubts as to the intention of the legislature in previous enactments, and in no proper sense ousting vested rights. Waiving this principle of construing the Acts on this subject as a system, and looking to the meaning of the clause in question of the Act of 1802, segregated from precedent and subsequent enactments, there is no sound principle which would justify us to interpret the phrase "citizens of the United States" as confined to citizens by birth within the United States, in exclusion of naturalized citizens. Statutes conferring rights and privileges are to be construed liberally in behalf of the recipients, in *favorem libertatis*. We must consider, too, that the words are employed in an Act intended to prescribe a uniform mode of transforming aliens to citizens, and where the terms of enactment should be naturally and primarily referred to naturalized citizens, unless the intent to exclude them be expressed or easily implied from the context or be palpably manifested by the policy of the government as declared in its legislative Acts. The exclusion of naturaliz-

ed citizens is not express, nor arising from strong implication, nor against any declared policy by Congress, unless we pervert the phrase children of citizens, naturally meaning children born while their parents were citizens, into all children of aliens who may become citizens. We are of opinion that if Abram Sasportas were a citizen at the time of the birth of his children, the accident of the children being born in France does not make the children aliens, or in other words obstruct their citizenship here.

The appellant contests the citizenship of Abram Sasportas. The facts are, that Abram Sasportas was of foreign birth; that he was married in Charleston, on or before September 16th, 1778; for, on that day, he executed a release and conveyance of his wife's portion; that he fought in some of the battles of the Revolution as a Whig officer; that on October 1, 1785, he received conveyance of

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real estate, and frequently afterwards acquired and conveyed real estate; that he was reputed by some who knew him as early as 1778, to be then a citizen, and was always reputed to be a citizen by the oldest persons who could be brought to testify on the point, that he was domiciled here, and exercised the privileges of a citizen from the earliest date to which his history could be traced; that he went to France about 1804, in prosecution of the commerce in which he was engaged, and while there, in 1812, executed a power of attorney to Rene Godard, of this city, in which he styled himself a citizen of the State; that at the close of our last war with Great Britain, he resumed his residence in Charleston, and abided here for about four years with his wife and children—Augustus and Zelmire, as members of his household; that he returned to France in 1819, with the purpose of having some surgical operation performed on his eyes, and died there in 1823; that his children, although born in France, during his residence, beginning in 1804, always claimed to be citizens of the United States; and that his son, Augustus, had obtained a passport in the character of citizen.

In this state of facts we might presume, without much straining, that Abram Sasportas was resident here on July 4, 1776; and, presuming that fact, he would clearly be an original citizen, on the same standing with natives of the territory. *Chanet v. Villepontaux*, 3 McC. 29; 1 St. 152. But we are disinclined to doubtful presumptions, and prefer to treat the case as if he had become resident here in 1778, from which time his biography is narrated by the evidence.

It is not supposed that he was ever naturalized under any Act of the United States, and if he were a citizen in 1802, he must have attained this character under the laws of South Carolina, before Congress, in 1790, exercised its constitutional power of prescribing a uniform procedure concerning the

subject of naturalization. We must then review the legislation of South Carolina in relation to the admission of aliens to citizenship.

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*The Act of 1696, 2 St. 131, provided that all aliens, male and female, who were inhabitants of the province at the date of the Act, with their wives and children, should enjoy all the rights and privileges of persons born of English parents; adult persons being required to take an oath of allegiance to King William. The Act of 1704, 2 St. 251, provided that aliens then in the province, who had not put themselves within the proviso of the Act of 1696, and all aliens who should thereafter come into the province, should be entitled to all the rights and privileges of persons born here of English parents; exacting, however, oaths of allegiance, and abjuration from persons of the age of sixteen, at the passage of the Act. No oath is expressly required from aliens, not of the age of sixteen, in 1704, who should thereafter come into the province. This was the Act on the subject of force, when the residence of Abram Sasportas in September, 1778, was certainly established to be within the limits of the State. In March, 1778, 1st St. 147, however, the State prescribed an oath of allegiance to be taken by all adults from whom it might be required. In 1784, 4 St. 600, the Legislature enacted that all free white persons then resident in the State, and all such as should thereafter reside therein for one year, should become citizens on taking the oath prescribed by the Act of 1778, before one of the judges of the Common Pleas, who was required to give a certificate thereof. On March 22, 1786, 4 St. 746, the Legislature formally repealed the Acts of 1704 and 1784, but re-enacted, almost in terms, the provisions of the latter Act, yet disabled aliens from voting for members of the Legislature, serving on ordinary juries, and filling certain offices, with an express proviso, that the enactment should not deprive resident persons of rights already acquired under the Acts of 1704 and 1784, or susceptible of acquisition, if the Acts had remained of force. On February 27, 1788, 5 St. 66, an Act was passed requiring the Secretary of State to keep a book in his office for registration of the certificates granted by the judges of the Common Pleas, and himself

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to give a certificate of the registry; and further providing that all persons intending to avail themselves of the rights granted by the previous Acts, and who had taken the oath of allegiance, should be obliged, when required, to produce certificates from the Secretary; and in case of their refusal or neg-

lect, for a prescribed time, that the privilege demanded by them should not be admitted. I suppose this provision for production of a certificate from the Secretary, to be strictly personal to one of foreign birth, offering to exercise a particular privilege, such as voting, and not intended to affect his citizenship, or the claims of his children. However this may be, the citizenship of Abram Sasportas depends on the construction of the Act of 1704, interpreted in the light of other enactments, in *pari materia*. That Act, in itself, required no oath from him, and consequently no record of such oath; but, granting that from the general course of legislation on this subject an oath of allegiance was exacted from him, and required to be recorded, we must consider whether or not his compliance with the law may be presumed, from the great lapse of time, after his exercise of the privileges of a citizen, and his reputation to be a citizen. The efficacy of this presumption, that the exercise of a right for a long term is rightful, and that exact evidence of it is lost, is not disputed, but it is said, that proof of a matter required to be in record cannot be made by parol. In *Rex v. Hube*, Peake's A. P. C. 132, on an indictment for disturbing the public worship of Protestant Dissenters, authorized by the Toleration Act, Lord Kenyon held, that it was incompetent for the minister to prove orally that he had taken prescribed oaths, as the oaths might be proved by record, but he further held, that it was unnecessary to prove the taking of the oaths; so that, at most, his opinion was a mere dictum. Granting that his opinion is sound doctrine, it has no application to presumption from lapse of time. The interests of mankind require us to presume, that the long enjoyment of a claim is rightful, and in protection of such claim, that a grant of land from the State, or of administration from the

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*Ordinary, or of any muniment of title, once existed, and if not produced, that it has been lost by devouring time. In *Smith v. Smith*, Rice, 232, and *McQueen v. Fletcher*, 4 Rich. Eq. 152, records were presumed on evidence not stronger than exists in this case. We conclude that Abram Sasportas had complied with all the pre-requisites to citizenship by the law of this State before 1790, when the Congress of United States began to exercise its power on this subject, and of course, that he was a citizen in 1802, within the proviso of the Act then passed.

It is ordered that the appeal be dismissed, and the decree affirmed.

DUNKIN and DARGAN, CC., concurred.
Appeal Dismissed.

10 Rich. Eq. *53

*JAMES BARR, Executor of James S. Skeen,
and Others, v. FRANCIS G. HASELDON.

(Charleston. Jan. Term, 1858.)

[Equity ⚡427.]

Where the bill of an executor, or other representative, who has no means of knowing the facts, states a case within the jurisdiction, and prays discovery, specific and general relief, and the answer, denying the facts as stated, discloses a case in which the remedy is properly at law, the Court may nevertheless sustain the bill and decree for plaintiff, under the prayer for general relief.

[Ed. Note.—Cited in *Wilson v. Hyatt*, McBurney & Co., 4 S. C. 375.

For other cases, see *Equity*, Cent. Dig. § 1011; Dec. Dig. ⚡427.]

[Interest ⚡12.]

Interest is recoverable upon money laid out for the use of another.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 23; Dec. Dig. ⚡12.]

[Equity ⚡340.]

Matter of avoidance, stated in the answer must be proved by the defendant.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 699; Dec. Dig. ⚡340.]

[Interest ⚡10.]

The borrower must pay interest, although he maintains the lender without charge.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 21; Dec. Dig. ⚡10.]

Before Dunkin, Ch., at Charleston.

The complainants were the executor, widow and infant child of James S. Skeen, who died about the first of January, 1857. The bill alleged that in 1852 the defendant purchased, in his own name, a plantation and some negroes from R. I. Middleton, for \$27,250. That the purchase was, in fact, on the joint account of complainants' testator, and the defendant, who were to share in proportion to the sums respectively contributed by them. That the defendant paid a considerable part of the purchase money and the complainants' testator contributed \$2,140. There were other allegations which were denied in the answer. The bill prayed a discovery; that an account might be taken of the share of complainants' testator in the plantation and negroes, and of the rents and profits—a writ of partition and for general relief.

The defendant in his answer denied that the purchase was on the joint account of defendant and complainants' testator. He alleged that complainants' testator was a step-

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son of de*endant—that he resided with defendant until a short time before the bill was filed, and was maintained, clothed and educated by him. The defendant denied "ever having received one cent or any amount of money whatever from the said James S. Skeen, except two thousand one hundred and forty dollars, which was the legacy paid him by Mr. Gray, the Master in Equity, on the seventh day of March, 1853;

some days after this defendant had purchased the said plantation, Rock Spring and negroes. That at the time the said James S. Skeen received the money he was living as a member of this defendant's family, and regarded and treated by him as his son; that he, of his own accord, offered and himself called and paid that amount, two thousand one hundred and forty dollars, for this defendant to the said R. I. Middleton's agent, on account of the credit portion of the said purchase; that nothing was said as to the time of its repayment, but it was always understood he was to be paid whenever the money was required; that not a word was uttered, nor was there any understanding as regards interest, for this defendant was then supporting and maintaining the said James S. Skeen, and continued to supply him with clothing, groceries and pocket money even when employed, as stated by complainants' bill of complaint, in overseeing, and until he moved from this defendant's plantation, some short time previous to his death." And defendant submitted that as he was and always had been ready to pay the said debt of \$2,140, there was no equity in complainants' bill which entitled them to be heard.

Upon the coming in of the answer, his Honor made the following interlocutory decree:

Dunkin, C. This bill is instituted by the representatives of James S. Skeen, who died in January last. It is not necessary to recapitulate the allegations and charges of the bill, as it is rather in the nature of a bill of discovery, and, for the purposes of this motion, the Court must rely upon the facts stated in the answer. It appears that in

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1842, when the tes*tator was about eleven years of age, the defendant intermarried with his mother, and thenceforth assumed the character of a parent to the testator. On 5th March, 1853, the defendant purchased the plantation and slaves adverted to in the pleadings, for about twenty-seven thousand dollars. Two days after the purchase, to wit: on 7th March, 1853, the testator, who had not long previously attained his majority, and was then living with the defendant, procured from the Master in Equity, the amount of a legacy to which he was entitled, to wit: the sum of two thousand one hundred and forty dollars, and paid the same to the agent of R. I. Middleton, Esq., from whom the defendant had purchased the plantation and negroes, and the money was applied towards the amount due by the defendant. According to the answer of the defendant this amount constituted all that the testator was then worth in the world. It is not suggested that the payment was made without the knowledge of the defendant; and, as he gave no acknowledgment or obligation to the testator, his representatives might very well infer that the payment was made

by the testator on account of his interest in the purchase. But the answer denies this in positive and unqualified terms; and it may be, from the confidential and fiduciary relations so long subsisting between the testator and the defendant, the latter was regarded as holding the amount in trust for the testator whenever he should be called on to account. The answer admits the defendant's readiness to pay the amount, but does not admit his liability for interest, or the plaintiffs' equity.

Assuming the answer of the defendant to be strictly accurate, it would be difficult for the plaintiff to recover at law what the defendant admits his readiness to pay. According to his statement, the payment of two thousand one hundred and forty dollars made by the testator was not, in any sense, at the instance and request of the defendant, but was purely voluntary on the part of the testator and of his own proper motion. It is by no means clear that this would maintain an action of assumpsit at the instance of the

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executor. But, *without the discovery from the defendant, it would be presumed that the payment was made with the defendants own money. This would seem sufficient to prevent the Court from turning the party round to pursue a new litigation.

Upon the coming in of the answer, the defendant, in the judgment of the Court, is entitled to a dissolution of the injunction restraining his disposal of the plantation or the removal of the negroes, and it is so ordered. The Court is further of opinion that, upon the admissions in the answer, the plaintiff is entitled to have the sum of two thousand one hundred and forty dollars paid into Court, and it is so ordered.

From this decree the defendant gave notice of appeal on the grounds:

1. That all the equity of the bill having been denied by the answer, the Court had no jurisdiction over the money, and the order to pay it into Court was erroneous.

2. That if the bill was for discovery, the answer having furnished proof of the indebtedness, the complainants should have been remitted to their remedy at the common law.

3. That the injunction having been dismissed, all that the complainants could claim, or to which they were entitled, was to have their bill retained for further proof.

His Honor afterwards again heard the cause and pronounced a final decree, as follows:

Dunkin, C. The plaintiffs waive their claim to proceed for a specific performance, and the defendant agrees to pay the sum of two thousand one hundred and forty dollars. The only matter submitted to the Court is the question as to interest, and also as to costs.

According to the statement of the defendant, he, in the latter part of February, 1853,

made a purchase of R. I. Middleton to the extent of twenty-seven thousand two hundred and fifty dollars—the titles were executed on 4th March. At that time the plaintiffs' testator, J. S. Skeen, who had recently attained his majority, was living in the house

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of the defendant as one of his family, and by whom, as averred, he had been, for many years, treated with paternal kindness. The testator was entitled to a legacy in the hands of the Master in Equity amounting to two thousand one hundred and forty dollars. On 7th March, 1853, the testator received the amount of his legacy from the Master in Equity, and "called himself" (says the answer) "and paid that amount, two thousand one hundred and forty dollars, for this defendant to the agent of the said R. I. Middleton, on account of the said purchase." The defendant denies, however, in explicit terms, that the testator was concerned in the purchase, and the claim to that construction of this act on the part of the testator is given up. The defendant is willing to repay the amount thus applied to the exoneration of his debt to R. I. Middleton, but objects to the payment of interest. Since the decision of *Bulow v. Goddard*, 1 N. & McC. 45 [9 Am. Dec. 663], the Court is not aware that any doubt has been cast upon the principle there adjudicated, to wit: that "interest is recoverable where there is proof, or where, from the circumstances, it can be inferred that the money has been employed." Judge Nott, delivering the judgment of the Court, says, "interest is recoverable where it can be proved that the money has been used, and that the interest has actually been made." And in the same case Judge Cheves says, "it has been repeatedly determined, and appeared to be the settled law of England, to allow interest on money lent, or laid out for another's use." And he cites, as his authority, Lord Thurlow's opinion in *Craven v. Trehill*, 1 Ves. jr. 63, where he says, "money paid to the workmen, who were to be paid by the defendant, is money advanced for him," and allowed interest as in accordance with the constant practice at Guildhall. *Thompson v. Stevens*, 2 N. & McC. 493, is, perhaps, still stronger upon the general right to recover interest in such case. It is suggested that, as the testator lived in the house of the defendant as one of his family, this should prevent the allowance of interest. But it would be great injustice to the spirit which manifestly actuated the whole conduct of the defendant to his deceased step-

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son, to suppose *that he ever intended to make a charge of board, or any other charge of that character; nor is it now set up as a substantive charge, but it is urged, that it should neutralize the claim for interest. It amounts to the same. The sum paid by the testator for the use of the defendant entitled

him to repayment, with interest as a legal incident. The Court cannot presume any waiver of the right. No agreement to that effect is proved, or suggested. The legal representative of the testator is entitled to interest from the date of the payment made by him.

Then as to the costs. The plaintiffs' bill is for the specific performance of a contract, and this is the burthen of their allegations, and in this they have miscarried. But they sue in their representative capacity—charge the payment of the particular sum on account of the purchase made in the defendant's name—pray a discovery, &c., and conclude with a prayer for general relief. In 2 Hill, Eq. 254 [erroneously cited], Chancellor Harper states the rule of the Court thus: "where a proper case is made, though the specific relief prayed for cannot be granted, yet, if there be a prayer for general relief, the proper relief will be afforded." It was upon this principle, and from the consideration that the plaintiffs sued in their representative capacity and sought also a discovery, that the Court deemed them entitled to the relief which was granted. But whenever relief is afforded in this way it is always done subject to inquiry as to the costs. Certainly the matters in issue were in reference mainly to the question of specific performance in which the plaintiffs have been wholly unsuccessful. The Court is by no means satisfied that, if the demand of the plaintiffs had been originally limited to the relief now afforded, any resort to this, or any other judicial tribunal would have been necessary. The Court is of opinion that the costs should be borne by the estate of the testator.

It is ordered and decreed that the defendant pay to the plaintiff, James Barr, executor of James S. Skeen, deceased, the sum of two thousand one hundred and forty dollars, with interest from 7th March, 1853, less the amount of the defendant's costs to be taxed by the Master.

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*The defendant appealed, and now moved this Court to reverse the decree on the grounds:

1. That there was no equity in the case, and the bill should have been dismissed.

2. That, admitting the jurisdiction, the decree is erroneous in allowing interest from the 7th March, 1853. The only evidence before the Court was the answer, which proved that the money was to be paid when required, and until a demand was made for the money no interest could accrue either at law or in equity.

Phillips, for appellant.

Dunkin, Simons, contra.

The opinion of the Court was delivered by

WARDLAW, C. According to the proof, which consists of the admissions of the an-

swer, the demand of the plaintiff is nakedly for money laid out for the use of the defendant, which might have been recovered at law by action of assumpsit, and if the case made had been stated in the bill it would not have been within the jurisdiction of this Court. If the suit related to matters which had been personally transacted by the plaintiff, or which ought to have been within his personal cognizance, the Court would not have entertained his suit, however plausibly he might have mis-stated the facts to make a case *prima facie* within the jurisdiction of the Court. But here the plaintiff is the representative of one deceased, sues concerning matters not within his full knowledge, transacted by his testator and apparently justifying the misapprehension of plaintiff. He states a case clearly within the sphere of Equity of the joint purchase of land by his testator and defendant—requires from the defendant discovery of the facts, and prays for partition, account for the rents and profits, and for general relief. We have no reason to suspect that his plaint was merely pre-

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tensive. The answer denied partnership in the purchase of the land, yet confessed that testator of plaintiffs had advanced the sum of \$2,140, which was appropriated towards its purchase. In *Nix v. Harley*, 3 Rich. Eq. 383, I had occasion to express opinions which I still entertain. "The remedy to be afforded in a cause in Equity depends upon the whole pleadings of the cause. The case stated by a plaintiff may be so varied by the answer of defendant or the proofs, that a plaintiff may be barred from the special remedy he seeks, yet under the prayer for general relief the Court will afford such remedy as is proper under all the circumstances of the case. The plaintiffs present a case in which *prima facie* the peculiar remedy prayed for, specific delivery of a slave, was just and equitable; and they may not have had the means of knowing and were not bound to anticipate the defences of defendant. The whole case is before us, and in avoidance of further litigation we will decide upon the rights of plaintiffs and the defences of defendants." In that case the Statute of Limitations was held to bar some of the plaintiffs and vest their shares in defendant, and partition, not specially prayed for, was decreed. It is said in *Story's Eq. 64, 71*, that where the jurisdiction of Equity once attaches for discovery, and discovery is obtained, the Court will further entertain the bill for relief, if the plaintiff prays relief, to avoid multiplicity of suits. In *Sims v. Aughtery*, 4 Strob. Eq. 121, it is said, "plaintiffs had a right to come into this Court to seek discovery, and the Court, having entertained the bill for this purpose, had a right to retain it for judgment. In *Backler v. Farrow*, 2 Hill Eq. 111, it was held that "having proper jurisdiction of the case, there is hardly any question in relation

to property which this Court may not determine incidentally, for the purpose of doing complete justice and preventing multiplicity of litigation. A bill will not lie for waste merely, but if the party be properly in Court for another purpose, as to obtain an injunction, an account of past waste will be granted." See *Reese v. Holmes*, 5 Rich. Eq. 532. We approve the doctrine of Chancellor Har-

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per, *adopted by the Circuit Chancellor in this case, that "where a proper case is made, though the specific relief prayed for cannot be granted, yet, if there be a prayer for general relief, the proper relief will be afforded."

The defendant in his answer avowed his readiness to pay the \$2,140 advanced by the testator of plaintiff, and it is stated by the Counsel of defendant that the principal sum has been actually paid. The other question in the cause, indeed the only practical question, for the defendant was exempted from the costs accrued at the hearing, is whether defendant should pay interest on the sum advanced to him by testator before demand of payment was made by the bill, there being no evidence of any previous demand of payment. It is admitted by the answer that the money advanced by plaintiff's testator was used by defendant in extinguishment of interest on his bonds, which would otherwise have fallen upon him. Before the argument of this case I thought it indisputable that in the absence of contrary stipulation, money lent or laid out for the use of another, bore interest from the date of the loan or advance, and created a debt then demandable. Story on Con. 1156, n. Undoubtedly one may lend money to another and stipulate that no interest shall accrue until a future day, when the principal shall be repaid or demand of payment be made, and such stipulation is justly inferred from a note for money borrowed, payable on demand. The case of *Schmidt v. Limehouse*, 2 Bail. 276, quoted to us in proof that a note payable on demand bears no interest before demand, explicitly asserts that "for money had and received, money lent or paid, interest is generally recoverable from the day on which it is received, lent or paid, for it is at that moment the law imposes the duty to pay it, and it is then due and payable." Clearly the parties may postpone by contract the day of payment, and consequently postpone the interest which would otherwise accrue; but in the absence of contract to the contrary, interest accrues from the

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date the principal is *due. In this Court where ever money has been received by a party which ex equo et bono he ought to refund, interest follows as a matter of course. *Smith v. Godbold*, 4 Strob. Eq. 188. *Harrison v. Long*, 4 Des. 113.

It is supposed by us that this point as to interest would not have been mooted, if the

efficacy of the answer had not been misapprehended. The answer admits the borrowing and use of the money, but affirms that defendant understood it was not to be repaid until demanded. The answer does not affirm any agreement of the parties to this effect, and if it had, the plaintiff might use the answer as proof by admission that the money had been borrowed and used, without conceding the avoiding statement of defendant that the money was not due and payable until demanded. This matter of avoidance is an independent defence of defendant, and needs, like other pleas, proof from the affirmant. Without affecting much research on the subject, I find in a single volume of our reports, 5 Rich. Eq., several cases on this point. In *Duncan v. Dent*, p. 12, it was held that the answer of defendant, an administrator to a bill against him for account, alleging that he had kept the funds in his hands without making interest, required proof of the allegation on his part. In *Ison v. Ison* p. 18, the defendant in his answer admitted the gift of a stallion to him by his intestate father, but alleged that he had paid for him; and it was held that this payment, as a matter of avoidance, must be proved by defendant. In *Reeves v. Tucker*, p. 150, the defendant, executor and legatee in a bill for account, alleged that certain negroes belonged to him and not to his testator, and it was held that he must prove his title.

If we had concurred in defendant's view as to the force of the answer, we should have been saved from the necessity of averring the jurisdiction of the Court in this case; for taking the whole answer to be true, it exhibits a case of voluntary payment by plaintiffs' testator of defendant's debt, as to

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which *there was no plain and adequate remedy at law, and probably none in this Court. No person can be rendered a debtor without his contract.

The disallowance of interest is further urged for the reason that defendant maintained plaintiffs' testator. This fact of maintenance is not proved; and if it had been, would not, of itself, have arrested the interest. In *Lloyd v. Carter*, 2 Atk. 84, a party was exempted from interest, he had agreed to pay for maintenance, where he had furnished the maintenance specifically; but here there is no necessary connection between maintenance and interest, and no pretence that one should be set off against the other by any agreement of the parties.

The Chancellor in his decree made the plaintiff from the assets of his testator, pay the costs accrued at the hearing, but manifestly did not contemplate that defendant should pursue the litigation at plaintiffs' expense.

It is ordered and decreed that the appeal

be dismissed, and that defendant pay the costs of the appeal.

DUNKIN and DARGAN, C.C., concurred.
Appeal dismissed.

10 Rich. Eq. *64

*G. S. CAMERON v. STEPHEN WATSON.
(Charleston. Jan. Term, 1858.)

[Partnership \hookrightarrow 87.]

A partnership had funds in Macon, Georgia, and one of the partners sent drafts for the amount to his agent in Georgia, with directions to invest them in cotton and send the cotton to him, and the agent, having received the amount, failed, whereby the funds were lost, *Held*, upon the evidence, that the loss should fall upon the partnership, and not upon the individual partner who remitted the drafts.

[Ed. Note.—For other cases see Partnership, Cent. Dig. § 135; Dec. Dig. \hookrightarrow 87.]

[Partnership \hookrightarrow 87.]

Where, by the terms of co-partnership between A and B, A contributes money, and B his personal services in consideration of the use of the money on which interest is not to be charged, and they are to divide the profits; if no profits are made, and the money contributed by A is sunk, A cannot claim from B a portion of the capital thus sunk, but must bear the whole loss himself.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 135; Dec. Dig. \hookrightarrow 87.]

[Partnership \hookrightarrow 308.]

The partners, however, may make different stipulations, and where, after the dissolution, B allowed A to withdraw the capital contributed by him, *held*, that he was bound, and that he could not charge B with interest from the time of the withdrawal until the partnership was finally settled.

[Ed. Note.—Cited in Stokes v. Hodges, 11 Rich. Eq. 154.]

For other cases, see Partnership, Cent. Dig. § 714; Dec. Dig. \hookrightarrow 308.]

[Evidence \hookrightarrow 354.]

Books kept by the partner who winds up the business of the partnership, are not as a general rule, evidence against the other partner; but such other partner, after every opportunity to inspect the books, having agreed to refer them to an accountant, to make up an account therefrom, to be made the basis of the Master's report, *Held*, that he could not afterwards object to them as evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1437; Dec. Dig. \hookrightarrow 354.]

[Partnership \hookrightarrow 347.]

Held, also, that he was bound by the mode of stating the accounts, as made up by the accountant from the books.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 821; Dec. Dig. \hookrightarrow 347.]

Before Dargan, Ch., at Charleston, February, 1856.

This case came before the Court on exceptions to the Master's report, which is as follows:

The decree of Chancellor Johnston filed on the 26th October, 1852, and affirmed by the Court of Appeals at its January sitting, 1853,

decided "that there was no settlement between the" (plaintiff and defendant as) "partners," and directed the account of the partnership taken by one of the Masters.

At a reference held under this Order, on the 13th April, 1853, the books of the con-

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cern of G. S. Cameron were, by *agreement of the Solicitors of the plaintiff and defendant, placed in the hands of Mr. W. B. Heriot, a skilful accountant, for the purpose of stating the partnership account from the said books.

On the 16th May, 1854, at a reference then held, Messrs. Heriot & Petit (who are associated in their profession) submitted the accounts prepared by them, which accounts are herewith filed, and marked from A. to J. inclusive.

The following abstract of these accounts will show the result to which those gentlemen arrived, and the process by which that result was attained.

The books are balanced at two periods, on the 1st July, 1842, when the partnership of Cameron & Watson was dissolved, and in April, 1852, up to which time the books have been written. These trial balances, so far as they may be relied upon as a test of correctness, prove the books to have been accurately kept. They are exhibited in statement A.

The liabilities of the concern on the first July, 1842, are set down in statement B. as follows:

To Watson, Crews & Co.....	\$15,140 51
Bills payable	32,168 21
S. & J. Watson.....	10,685 79
Cash (overpaid more than received).....	1,715 04
Sundry open accounts.....	3,274 13

Total liabilities at time of dissolution.. \$62,984 68

The assets of the concern at this period were as follows:

Bills Receivable	\$27,814 15
Sundry open accounts.....	10,846 80
W. & J. E. Fort & Co.....	1,250 00
Bank Stock	673 59
Property Account	800 00
G. S. Cameron for stock purchased	19,903 92
Making	\$61,288 46

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*To this sum, however, is added the private account of the partners, to wit:

Geo. S. Cameron, his individual indebtedness	\$ 5,709 48
Adam Johnson, (alleged to have been assumed by G. S. Cameron)	8,822 36
And Stephen Watson.....	2,836 66

Making the total of Assets.. \$78,656 96
And showing an excess of Assets over Liabilities or "apparent gain" to the credit of Profit and Loss, at the date of dissolution

\$15,672 28

An abstract of the Profit and Loss Account showing the above Credit Balance on 1st July, 1842, of \$15,672.28, is appended to statement B.

The books in April, 1852, when they are again balanced, show the following state of the partnership affairs at that time:

Liabilities—Sundry open Accounts.....	\$ 46 55
G. & H. Cameron.....	31,695 47
S. Watson, Capital Account....	1,114 61
	<hr/>
	\$32,856 63
Assets—Bills Receivable	\$ 6,868 24
Sundry open accounts...	5,559 26
W. & J. E. Fort & Co....	518 72
Bank Stock	4 59
	<hr/>
	\$12,950 81

To which is added as before:

Private Acc't of G. S. Cameron	\$ 5,901 96
And Debt of Adam Johnson.....	8,822 36
Private Acc't of Stephen Watson	4,548 79
And account of S. & J. Watson	758 33
	<hr/>
Total Assets	\$32,982 25

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*Showing balance of "apparent gain" to credit of Profit and Loss in April, 1852..	\$ 125 62
	<hr/>
	\$32,982 25

The difference, \$15,546.66, in the Profit and Loss Account at the two periods at which the above statements are made up, is accounted for in the books, by the accumulations of interest against the concern within the said two periods.

The condition of the partnership affairs in April, 1852, having been ascertained from the books as above, Mr. Heriot in exhibit C. states, by several accounts, the manner in which the books should be closed, and a settlement had between the partners. With no expectation of being able to present these accounts more clearly than has been done by Mr. Heriot, an abstract of them here may enable me with more brevity to submit what I have to say in regard to them hereafter.

The debt due to G. & H. Cameron, constituted in April, 1852, the only liability of the concern (excepting three small items amounting in the aggregate to \$167.58, which is carried to the credit of Profit and Loss).

To the reduction of this indebtedness to G. & H. Cameron, the bills and accounts receivable remaining uncollected at that time, amounting together to \$12,427.50, would be properly applicable. But these notes and accounts are admitted to be against insolvent parties. They are therefore charged to profit and loss, making the balance to the debit of that account \$12,259.92, which balance, or net loss, is chargeable in equal proportions to the partners, viz.: to each \$6,129.96.

The accounts of the partnership are thus reduced to three general items—the debt due to G. & H. Cameron, and the respective liabilities of the two co-partners in regard to this debt.

The amount due to G. & H. Cameron without interest as stated above is..... \$31,695 47

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*Of this sum George S. Cameron is liable according to Mr. Heriot's statement C. for his individual account on the books	\$ 5,901 96
Also for A. Johnson's accounts said to have been assumed by him	8,822 36
And for his half of loss by bad debts, as above stated.....	6,129 96
	<hr/>
In all	\$20,854 28

And Stephen Watson is held liable for his individual account on the books.....	\$ 4,548 79
Also for S. & J. Watson's account	758 33
For W. & J. E. Fort & Co.'s account (for which it was assumed that he was liable,)....	518 72
And for one-half of loss by bad debts	6,129 96
	<hr/>
Total	\$11,955 80

From which is deducted the balance due him on his capital account	1,114 61
	<hr/>

Making the amount of Mr. Watson's liability in respect to the indebtedness of the concern according to statement C.....	10,811 19
Which added to the liabilities of G. S. Cameron.....	20,854 28
	<hr/>

Makes the gross amount of the indebtedness of the concern..... \$31,695 47

This statement, Mr. Heriot says, is made exactly from the books, and without interest being charged or credited to either of the three parties.

Interest accounts to 30th June, 1854, how-

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ever, have been *prepared by Mr. Heriot, and are herewith filed, marked D. to J. inclusive. By these accounts

The indebtedness to G. & H. Cameron is increased to	\$38,978 61
Of which George S. Cameron is made liable for	\$28,269 59
And Stephen Watson for.....	10,708 02
	<hr/>

Not varying materially (as to defendant) from the account without interest. There being a difference of only \$133.17, in the two statements.

In presenting the accounts, of which the above are abstracts, Mr. Heriot states, that in making these accounts he "has not settled any principle involved in this case beyond those of the ordinary rules of book-keeping and customs of merchants;" that "he charged Adam Johnson's debt to Geo. S. Cameron, because he understood it to be a transaction for which he was alone responsible," and that "he charged S. Watson with W. & J. E. Fort & Co.'s debt, because he understood it to be a transaction for which he was responsible only."

To these accounts, prepared by Mr. Heriot, numerous objections have been urged before me. On behalf of the defendant it is con-

tended, that after the dissolution of the partnership, on the 1st July, 1842, the books of the concern, as kept by the plaintiff, should not be made the basis of a settlement between the partners, because, as it is alleged, a very different result from that arrived at by Mr. Heriot, from the books, would appear, if the plaintiff, as partner in liquidation, be charged as of the date of the dissolution, with the debts of the concern, to the extent of his own and of Adam Johnson's indebtedness, and of the value of the stock, of which he was the purchaser, and be required to apply to the extinguishment of the remaining debts of the partnership the assets of the concern as fast as they were realized.

Mr. Heriot, as I have already said, was, on motion of the Solicitors of the parties to this cause, appointed to state the accounts of the partnership of Cameron & Watson

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from the *books of that concern. I believe it is allowed on both sides, that he has fairly and impartially done that for which he was employed. He states, in his testimony, that in making up the accounts, he did nothing more than exhibit what was in the books; that the entries in them appeared to be genuine, and the accounts well and justly kept; that he found a few clerical errors, which being corrected, the books balanced; and that he discovered nothing to excite suspicion as to their fairness. His examination, in connection with sundry accounts prepared for the defendant, (and differing in their mode of statement and results from those submitted by Mr. Heriot,) he says, confirms him in the opinion that the books are correct.

But assuming that after the dissolution the defendant was not bound by the partnership books (although open for ten years to his examination and correction, without complaint on his part,) nor bound by the subsequent statements made from the books by an accountant of his own selection, (although these books are proved by that accountant to have been fairly and correctly kept.) Assuming this, and that the defendant has a right to claim that a different mode of stating the accounts be adopted, I do not see that a different result would be attained.

At the dissolution, the debts of the partnership amounted to.....	\$62,984 68
Apply immediately to the reduction of this indebtedness,	
the private acc't of Cameron.....	\$ 5,709 48
The account of Johnson.....	8,822 36
And the value of the stock.....	19,503 92
	<hr/> 34,435 76

And there still remains an indebtedness of \$28,548 92

Which, according to the books, appears to have been reduced as fast as the outstanding notes and accounts were collected. But, leaving the books out of the question, (al-

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though their *correctness must be presumed

until the contrary appear,) Mr. Heriot says that the difference in the amounts of the bills and accounts receivable in 1842 and 1852, was applied to the payment of the debts of the concern; that various sums of interest were charged on this outstanding indebtedness up to 1852, and that

Mr. Cameron appears to have advanced between 1842 and 1852.....	\$13,303 64
In working off this indebtedness.	
If to this sum be added the balance of debts above shown.....	28,548 92

The indebtedness is increased to.....	\$41,852 56
If from this be deducted the entire collections, as claimed by the defendant, of bills receivable and open accounts, from 1842 to 1855.....	29,831 33

There would still be a deficit of assets of \$12,021 24

Which, if made the basis of an interest account between the parties, to be computed according to the rule of Bank accommodation, the result as to the defendant's indebtedness would considerably exceed the sum for which he is found liable by the accounts prepared by Mr. Heriot.

But, while I have adopted, generally, the accounts of Mr. Heriot, as the basis of this report, there are objections to several of the items which I consider well taken.

First, as to the debt of W. & J. E. Fort & Co., which is charged by Mr. Heriot to S. Watson, as an individual transaction, for which he is alone responsible, there is nothing in the books to warrant this charge. The account is against W. & J. E. Fort & Co., and shows a balance against them, at the date of the dissolution, of \$1,250, and in 1852 of \$518.72. There is no evidence, either from the books, or from any of the written statements of the plaintiff, that the account against these parties was ever transferred to Stephen Watson. Nor does the parol and written testimony introduced upon the references as to the original transaction, satisfy

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me that it is a *proper charge against the defendant. Copies of three letters addressed to Fort & Co. by Watson, Crews & Co., dated in November and December, 1840, were produced, by which it appears that three drafts of George S. Cameron for \$700, \$300 and \$250, respectively, were remitted by Watson, Crews & Co. to Fort & Co., to be invested in cotton and shipped to Savannah, to the order of the former house. A. J. Crews, one of the firm of Watson, Crews & Co., was examined, and testified that the above transactions were for Watson's exclusive benefit; that it was agreed between Watson and the other members of the firm of Watson, Crews & Co., that the firm should not be mixed up with the old concern of Watson; and that in February, 1840, Mr. Watson went to Macon and formed business transactions with the firm of Fort & Co. I am not satisfied that Mr. Crews, in this evidence, intended to say that the transactions with Fort & Co. were

for Watson's exclusive benefit, in respect to the firm of Cameron & Watson, but rather in respect to Watson, Crews & Co., inasmuch as he (Crews) cannot reasonably be supposed to have been informed of the private arrangements between the partners of the former firm in relation to this, or any other transaction. He, at least, does not state that he has such information. If Mr. Cameron had considered the drafts remitted, through Watson, Crews & Co. to Fort & Co., as a charge against S. Watson, it seems to me that the amount would have been placed to the debit of S. Watson. This, however, was not done; the drafts were charged to Fort & Co., and the indebtedness reduced by sundry payments by Fort & Co., showing that Mr. Cameron regarded it as a debt due by Fort & Co. to the concern of Cameron & Watson; and I so find. And as the debt is admitted to be bad, I have charged it to Profit and Loss, and in this respect reformed the account prepared by Mr. Heriot.

On behalf of the defendant, it is further objected, that Mr. Heriot's statements of the amount of stock purchased by G. Cameron & Co. does not include the value of 98 crates, which went into their possession. The testi-

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mony of B. H. Brown *is full and explicit on this point. He says such packages are always charged for by manufacturers, and that two dollars each would be a reasonable charge if the stock were sold out. That it would be a proper charge unless there was a special agreement to the contrary. I have, therefore, charged the concern of G. Cameron & Co. with this item, amounting to \$193.

Another objection refers to the wages allowed by Cameron after the dissolution, for a negro packer (Isaac) owned by the firm. It is claimed that the wages allowed are insufficient. The testimony of Edward J. Folger, I think, establishes that the wages allowed (\$10 a month,) are sufficient. This objection, I believe, is not insisted upon.

It is further objected to the account, that the notes to Payne are put down at \$1,221.34 each, instead of \$1,071.34½ each. That these notes are entitled to a credit of \$600, being the value of certain Rail Road Bank Stock taken by Payne at that sum. If the fact be, as alleged by the defendant, and not contested by the complainant, that this stock is embraced in the amount of said notes, as first above stated, then it is clear that the defendant has been charged twice with the stock, for it certainly appears to the debit of S. Watson's private account, on the Ledger of the concern. I have reformed the statement of Mr. Heriot in this particular, according to the facts as above assumed.

It is further contended on the part of Mr. Watson, that he should be allowed interest on his capital account after the dissolution of the partnership. I do not think so. By the

articles of partnership Mr. Watson was to receive no interest on the capital put in by him. It was to be considered as an equivalent for the personal services of Mr. Cameron. These services were continued after the dissolution. Mr. Watson, in respect to third parties, was bound as well as Mr. Cameron to wind up the affairs of the concern, and it seems to me, should contribute to the expense of doing so. Again, the capital could not properly be withdrawn until the debts were all paid; this has not yet been done.

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According to the books, *all the available means were required to meet the outstanding demands against the partnership; and until these demands were paid, there was nothing due to the defendant upon his capital.

This view being taken, it is claimed on behalf of plaintiff, that Mr. Watson should be charged with interest on the capital withdrawn by him before the debts of the concern were paid, and in consequence of which withdrawal the interest account against the concern was greatly increased. Although apparently inconsistent with the view above taken, I have also disallowed this claim. It is true, that the capital put in by Watson was to bear no interest, in consideration of the services of Cameron; but after the dissolution the extent of these services is reduced, and it seems equitable that the equivalent for these services should be likewise reduced. But the answer to this claim is, that Cameron consented to the withdrawal of Watson's capital, and that Watson, by the accounts, as submitted by Mr. Heriot, is made liable for one half of the large accumulations of interest which the withdrawal of the capital mainly occasioned, by necessitating the extended Bank accommodations for the payment of the debts of the concern, the interest upon which would have been saved, if the entire capital had been left to meet the liabilities of the partnership.

And lastly, it is contended by the defendant that G. S. Cameron & Co. should be charged interest on the stock purchased by them from the date of the dissolution, when the stock was taken. There is no evidence that any credit was agreed upon between the partners in the sale of the stock. It appears from the evidence of Mr. Heriot, and from the books, that the debit item of \$19,903.92 in account of G. S. Cameron & Co. for stock purchased, was paid in 1842, 1843, and balanced in 1844. In the absence of proof that credit was to be allowed on this purchase, either by agreement or custom, I have considered the transaction a cash one, and charged interest from the date of the dissolution.

The accounts of the partnership having

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been, as stated in *the beginning of this report, reduced by Mr. Heriot to three, one creditor account and two debtor accounts,

and the settlement being between the two partners, and each having been already charged with one half of the net loss, it is only necessary to charge the partner against whom the charges are made in this report with one half of the sum here allowed, and credit the said half to the account of the other partner in whose favor it is to operate.

Upon this principle the following account is made up, taking the result of Mr. Heriot's accounts as the basis, and making the alterations and additions necessary to conform S. Watson's account to this report. The result is, that the defendant is indebted to the plaintiff upon a settlement of the partnership affairs on the 30th June, 1854, in the sum of \$7,635.56, arrived at as follows:

Balance due by S. Watson, 30th June, 1854, as per statement C.....	\$10,708 02
1. Fort's debt, as per statement C \$ 518 72 Interest to 30th June, 1854, (C.) 1,050 39	
	<hr/>
	\$1,569 11
2. 98 Crates, at \$2.....	196 00
Interest from 31st July, 1842, to 30th June, 1854.....	163 50
3. Balance Interest on stock to 1st June, 1845, (L.).....	1,484 47
Interest on this sum from 1st June 1845, to 30th June, 1854, 9 years 1 month.....	943 85
	<hr/>
	\$4,356 93
Of this Watson is to be credited with ½	\$ 2,178 46
	<hr/>
	\$8,529 56
4. Bank Stock charged twice..... \$ 600 00 Interest from 1st July, 1847, to 30th June, 1854, 7 years.....	294 00—\$ 894 00
	<hr/>
Am't due by S. Watson, 30th June, 1854	\$ 7,635 56

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*The complainant filed the following exceptions:

1. Because the Master ought to have charged to the separate account of Stephen Watson, the debt of W. & J. E. Fort, the same having been a transaction of said S. Watson, entirely distinct from the partnership.

2. Because the capital put in by S. Watson was a contribution by him to the business of the concern in the use and hazard of that amount of money; that if it remained safe after payment of the debts of the concern, he was entitled to take it back; but that for any part which was sunk, he had no claim upon his co-partner for indemnity, and that the Master ought so to have stated the account.

3. Because, even if Mr. Watson be declared entitled to any return of capital from Mr. Cameron, it cannot be until after a final settlement; and that the Master ought to have charged against Mr. Watson, interest on all money withdrawn in advance of such final settlement.

The defendant also objected to the report upon the following grounds:

1. Because the Master has adopted the

books of the complainant, compiled and made subsequent to the dissolution, without vouchers or proofs, and upon such evidence alone has charged the defendant with results which are inconsistent with the data, which the books themselves furnish.

2. Because the Master has omitted the sum of five hundred and forty-four 51-100 dollars (\$544.51) charged to Cameron & Co. (Journal Folio 234, Ledger Folio 445) for stock and sundries purchased by them and received by the complainant.

3. Because the Master has charged the defendant with a disputed debt of S. & J. Watson without any proof whatever.

4. Because the Master has neglected to state an interest account with the complainant, with Adam Johnson and with the defendant prior to the 1st July, 1842, and to strike balances on that day.

5. Because Mr. Cameron never was in ad-

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vance to the partnership or to the defendant at any time, but was always indebted to both from the dissolution to the present time.

6. Because an intelligible account wherein Mr. Cameron shall be charged on one side with his debt at the date of the dissolution, and with each amount collected by him on the date at which it was received, and on the other side, credited with each payment made by him on the debt due by the partnership at the time of the dissolution, at the date such payment was made, with interest on each side, will make him a debtor to a large amount, and the Master should have so reported, and such account ought to be stated with annual balances as is usual among merchants.

7. Because the Master has disallowed interest to the defendant on his capital after dissolution of the partnership.

8. Because on taking a full, fair and correct account from undeniable data furnished by the books of Mr. Cameron himself, and by Mr. Heriot's statement "B." of the books of the partnership at the date of the dissolution, the complainant, so far from being a creditor, is indebted to the defendant in a large sum of money as appears by the accounts and statements herewith submitted.

9. Because the entries in the complainant's books charging four notes of twelve hundred and twenty-one 35-100 dollars (1,221.35) each to J. S. Payne, is fictitious. The notes to Mr. Payne were for an amount of six hundred dollars (600) less than charged.

10. The defendant craves from the Master a report upon the evidence in the case, stating as matter of fact, how much complainant owed at the date of dissolution, including the amount for the stock in trade and for Adam Johnson's debt, and how much the complainant collected of the partnership assets during the first year of his administration, to wit: before the 1st July, 1843, and whether these amounts were not sufficient to pay all

the debts as stated by Mr. Heriot; and also to return to Mr. Watson the balance of capital after deducting what he had already received prior to the dissolution, and to *leave at that date a surplus for division between the partners.

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The Master made the following report on exceptions; and first on the complainant's exceptions:

The points presented in the exceptions of the complainant, are considered in my report, to which I beg leave to refer for the evidence bearing upon them, and my reasons for now overruling them.

Upon the argument before me of the third exception, it was admitted, that the notes given by Cameron to Payne, and charged to Watson's capital account, bore interest from their date at the rate of six per cent. In the statements of Mr. Heriot, no interest is computed on these notes until after their maturity. The result of a change of the accounts in this respect, will be to increase the indebtedness of the defendant \$341.40, as appears by the following statement:

Note dated 1st January, 1845, due 1st January, 1846, \$1,071 34, 1 year.....	\$ 64 28
Note dated 1st January, 1845, due 1st January, 1847, \$1,071 35, 2 years.....	128 56
Note dated 1st January, 1845, due 1st January, 1848, \$1,071 35, 3 years.....	192 84
Note dated 1st January, 1845, due 1st January, 1849, \$1,071 35, 4 years.....	257 12
Amount of interest.....	\$642 80
But the interest included in said notes and paid, having been charged to interest account in the books, and S. Watson having already been charged with one half, this must be deducted.....	321 40
	<u>\$321 40</u>

Report on exceptions of defendant:

1. The exceptant objects to the accounts submitted by the Master, because, as it is alleged, they are made up from the books of Cameron & Watson without vouchers or proofs, and that the defendant is charged with results inconsistent with the data furnished by the books themselves.

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*For the reasons set forth in my report the books referred to in this exception were adopted by me in making up the accounts of the partnership. Mr. Heriot had been selected by the parties to state the accounts from these books. This he did; and upon his statement of their contents I based my report, without further proof of their correctness than that furnished by the books themselves and the testimony of Mr. Heriot. The principle on which Mr. Heriot has made up the accounts may be incorrect; but I believe it is admitted that, with a single exception, he has not gone out of the books for the charges and credits embraced in his statements. And it may be proper, as contended by the defendant, that the principle applicable to executors' accounts should be

adopted in this case. The books I believe furnish all the data necessary for such an account, and several have been prepared in this case, but I have not had sufficient time to test with particularity their correctness; and I would add, that it is a work of time, rather than of difficulty, to make up the accounts after this manner:

2. This exception alleges the omission of a charge of \$544.57 in the account of Cameron & Co.

This charge appears in the journal of Cameron & Watson under date of 15th August, 1842, and is as follows:

George S. Cameron debtor to sundries.

To charges.

For Insurance on \$1,000 at 1¼ per cent. per annum from 1st July, 1842, to 4th May, 1843	\$ 10 ¼
For Insurance on \$6,000 at 1 per cent. per annum from 1st July 1842, to 4th May, 1843..	50 63
For Insurance on \$4,000 at 1 per cent. per annum from 1st July, 1842, to 17th June, 1843	38 17
For 1 month's Rent of Store from 1st July to 1st August, at \$1,100 per annum.....	91 96
	<u>\$119 11</u>

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*To Horse and Dray Account:

For two Horses, Dray and Harness.....	\$350 00
To C. & J. Beall,	
For this amount included in their note of Aug. \$46 10	3 10
	<u>\$346 90</u>

In the statement (B.) of the debtor balances on 1st July, 1842, the above charge is not included in the amount of \$19,903.92, appearing to the debit of George S. Cameron & Co. at that date. The entry on the books was made subsequent to that date, to wit: on the 15th August, 1842, and consequently the charge could not appear in any statement made up from the books to a previous date. But the exceptant errs in supposing that the charge has been omitted by me. It is included among the debit items of George S. Cameron & Co.'s account after August, 1842, and the defendant has had the benefit of the charge in the result of the accounts submitted with my report, which are made up to July, 1854. But it may be important to ascertain the entire liability of George S. Cameron & Co. at the date of the dissolution, and it is likely that the exception is submitted with this view. From the nature of the items composing this charge (with the exception of the last, \$3.10.) I am of opinion that it was an existing liability of Cameron & Co. at the time of the dissolution, and should so appear in any account made up to that period.

3. This exception objects to the defendant being charged with a disputed debt of S. & J. Watson, as it is alleged, without proof.

The following is the proof upon which I charge the defendant with this debt.

The articles of co-partnership contain the following clause: "It is agreed that S. Watson shall furnish a capital of \$10,000 to be used for the use and benefit of the concern,

or he shall furnish goods on a credit fully equal to that amount which is considered an equivalent; but the said Stephen Watson shall not be entitled to receive any interest

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on the capital account *so to be furnished; that being considered an equivalent for the time and labor of Mr. Cameron."

The books show that from July, 1838, to August, 1839, the concern of Cameron & Watson made purchases of merchandize from S. & J. Watson, to the amount of over \$30,000; that the balance of indebtedness of the former to the latter firm on the first of August, 1839, beyond the sum of \$10,000 was liquidated by the notes of Cameron & Watson, and that the last mentioned amount remained to the credit of S. & J. Watson until 1st July, 1843, when it was transferred to the capital account of S. Watson. From this statement it appears that the contribution of S. Watson to the capital of Cameron & Watson was not made in cash, but in goods, as allowed in the articles of agreement, and as alleged by the complainant in his bill.

It further appears from the books that on the 1st August, 1839, when a settlement was made with S. & J. Watson, a balance of interest found in their favor of \$707.42 was placed to their credit on the books of Cameron & Watson, and S. Watson charged with \$758.33, being thirteen months interest on \$10,000, from July, 1838, the commencement of the co-partnership, to 1st August, 1839, the date of the settlement with S. & J. Watson. If the fact be, that interest was paid by Cameron & Watson on their account with S. & J. Watson for purchases from July, 1838, to August, 1839, including the \$10,000 regarded as the contribution of S. Watson to the partnership, (and I think the books establish this) then it seems to me to be proper that S. Watson should be charged with the interest so paid, to the extent of the capital, which by the articles of co-partnership he was to furnish without interest. The reason for the transfer, appearing on the books in January, 1845, of the above charge of \$758.33, from the account of S. Watson (where I think it properly belonged) to the account of S. & J. Watson, has not been explained. In statement K, which was made up to 1st July, 1845, and which, according to the evidence of Mr. Crews, was furnished by Cameron to Mr.

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*Watson, this charge is stated as an individual indebtedness of S. Watson; and so I regard it. The charge against S. & J. Watson was made after the dissolution, and must, I think, be considered an irregular entry, unless its relation to some transaction of the partnership within the period of its existence be shewn. The individual liability of Mr. Watson in respect to this charge was created, if at all, during the period of the partnership, and properly entered at the time in the books of the concern. The irregularity of the sub-

sequent entry by the complainant, I do not regard as sufficient to relieve the defendant from his liability, if any originally existed.

4. The exceptant claims an interest account with the complainant, Adam Johnson, and the defendant, prior to the 1st July, 1842, and contends that balances ought to be struck on that day.

An interest account with each of the parties named in this exception has been made up to the 1st July, 1854, and filed with the report. See statement C.

The amount due by the complainant for principal and interest on the 1st July, 1842, was	\$6,962 20
Amount due by Adam Johnson for principal and interest on 1st July, 1842.....	9,619 37
Amount due by defendant for principal and interest on 1st July, 1842.....	3,420 29

5, 6 and 8. These exceptions refer to results, which, it is claimed, are attained by a different mode of stating the accounts.

In support of these exceptions sundry accounts have been submitted to me, and the items embraced in them compared with the books. My reasons for not reporting on these accounts are indicated in what is said, in connection with the first and tenth exceptions.

7. The question of interest on capital, presented by this exception, I have considered in my report.

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*9. The error in the books, as to the amount of the notes given to Paine, referred to in this exception, I have corrected in the report.

10. I am asked in this exception to report specifically the following items:

Plaintiff's debt with interest at time of dissolution	\$ 6,962 20
Stock in trade, (including \$541.41, hereinbefore reported,)	20,445 33
Adam Johnson's, debt with interest at time of dissolution	9,619 37
Collections by plaintiff during the first year after dissolution, (according to the defendant's statement submitted with his exceptions,)	\$23,028 78
Debts due by partnership at the time of dissolution	\$52,984 68
Capital put in by Stephen Watson.....	10,000 00
S. Watson's debt and interest at dissolution	\$ 3,420 29

The above items taken alone do not, I think furnish the necessary data for a correct determination of the question with which this exception concludes. This, it seems to me, will be manifest, when it is observed that the assets assumed to be available in the hands of Cameron for the payment of the liabilities of the partnership at the time of the dissolution, were available at two different periods of time, and that no notice is taken of the increase of liabilities within these two periods. I am asked to state how much the complainant collected of the partnership assets during the first year of his administration, to wit: before the 1st July, 1843, and whether these collections added to the amount owed by the complainant at the time of the dissolution "were not suf-

ficient to pay all the debts as stated by Mr. Heriot," &c. These collections were made between July, 1842 and July, 1843, during which two periods the liabilities of the partnership were increased several thousand dol-

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lars, for interest, rent, discounted *notes, included in acknowledgment of bills receivable paid, but afterwards protested, expenses of collection, and other liabilities not embraced in Mr. Heriot's statement of the debts of the concern at the time of the dissolution. These additional liabilities had to be paid out of the collections made during the first year after the dissolution, and the balance only of these collections remaining after the payment of these liabilities, is the true amount to be charged as assets in the hands of the complainant, for the payment of the debts of the partnership in July, 1842. The exception takes no notice of the liabilities for interest, expenses, &c., accruing after the dissolution.

Again, I am requested to report how much the complainant owed at the date of the dissolution, including the amount for the stock in trade, and for Adam Johnson's debt, and to apply this indebtedness to the extinguishment of the liabilities of the partnership as stated by Mr. Heriot. The whole amount due by the complainant for his private account at the time of the dissolution, cannot, I think, properly be held assets in his hands for the payment of the debts of the partnership. At the date of dissolution the private accounts of the respective partners should be equalized, and the excess of one partner's account over the account of the other, is the amount to be considered assets for the payments of debts. The fact that Mr. Watson had \$10,000 in the concern as capital, does not, I think, prevent the application of this rule to this case. The capital was not a debt, and could be claimed only after all the liabilities of the concern to third parties had been paid. For the payment of these liabilities the private account of Watson was as much assets as the account of Cameron.

Other considerations might be presented to sustain the position that the facts upon which I am requested to report, cannot, taken alone, be properly made the basis of an account.

I beg leave to state, that it was my intention to prepare an account in accordance

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with the principles contended for by *the defendant, because the operation by which the debt was contracted was made by him outside the scope of the partnership, and on his own account, and for his own benefit.

The Master has overruled this exception; and in overruling it, has referred to his report upon the accounts, where his reasons are fully given; (vide.) I disagree with the Master in his conclusion, and think that the

debt of W. & J. E. Fort should be charged to Watson's separate account.

It is not denied that this debt originated in a transaction entirely foreign to the objects of the partnership. It was in fact a cotton speculation. It is charged in the bill, that losses were sustained by operations conducted by the defendant, "as for instance, the loss of the sum of \$1,250, (or thereabout) funds of the partnership received by the said Watson, and lost by him in the purchase of some exchange;" alluding most obviously to the transaction with W. & J. E. Fort. This allegation, the defendant in his answer does not deny, but makes recriminations upon the plaintiff, in which he charges him with having entered into unauthorized cotton speculations, and thereby lost \$10,000 of the capital of the firm. This is not denied by the plaintiff, who has assumed upon himself the liability of making good the sum lost by him in the aforesaid cotton speculations. And at the filing of the answer I do not suppose that the defendant meant to controvert his individual liability for the loss incurred in his own private speculations.

The debt with W. & J. E. Fort arose in this way: There was a draft of the plaintiff upon D. Butler, Cashier of the Macon Bank, dated 14th November, 1840, for \$700; another draft of the same upon the same, for \$300, dated 30th November; and another draft of the same upon the same, for \$250, dated 19th December, 1840. These drafts were forwarded about their dates, respectively, by Stephen Watson, in the name of Watson, Crews & Co., to W. & J. E. Fort & Co., at Macon, Georgia, with directions to invest the proceeds of the same in cotton, and to forward the cot-

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ton to the order of *the defendant, and only abandoned this intention when it became apparent that to meet the reasonable expectations of the parties to this cause, in respect to said account, would involve the neglect of duties made imperative by the present sitting of the Court.

To make up the partnership accounts, with any degree of accuracy, in the manner claimed by the defendant, would require an examination of every entry in the books subsequent to the dissolution. Without this, I do not see how it can be ascertained, with reasonable certainty, what items are to be allowed as legitimately pertaining to the liquidation of the partnership, and what are to be rejected as improper or irregular in the view of such liquidation.

The exceptions of the defendant are not sustained.

The Circuit decree is as follows:

DARGAN, Ch. The plaintiff and defendant were mercantile partners in the purchase and sale of China and Crockery-ware generally, and carried on their business in the city of Charleston. This is a bill for an account, and for the settlement of the part-

nership affairs. The accounts have been referred to the Master, and he has made a report thereon. To this report both parties have taken exceptions, and the case comes on for trial on the report and exceptions. These exceptions I will consider in their order, and first the plaintiff's exceptions:

The plaintiff's first exception is, "because the Master ought to have charged to the separate account of Stephen Watson, (the defendant,) the debt of W. and J. E. Fort, the same having been a transaction of said S. Watson, entirely distinct from the partnership." To explain this exception, a statement of facts is necessary. The business of the firm was carried on in the name of George S. Cameron only, Watson being a dormant partner. On the books, there is an account against W. & J. E. Fort for \$1,250, which has not been realized, and has been lost by the insolvency of the said debtors. The plaintiff contends that this amount should be charged

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to the account of *Watson, Crews & Co., of which firm Stephen Watson, the defendant, was a member. It is not disputed, that the funds upon which these drafts were predicated, were the property of Cameron & Watson. Fort & Co. realized the drafts, but did not invest the proceeds in cotton; or if they did, did not forward the cotton. They became insolvent, and the debt was lost. The question is, shall the loss be charged to the profit and loss account of Cameron & Watson, or to the individual account of Watson. A. J. Crews, (a member of the firm of Watson, Crews & Co.) alluding to the dealings with Fort & Co., says, "these transactions were for Watson's exclusive benefit; the cotton and bagging operations were on account of Watson." This would seem to be conclusive, and to leave no room for doubt. But it is argued, that this is not a proper construction of what the witness said, and that when he spoke of the transactions being for Watson's exclusive benefit, he spoke in reference to the firm of Watson, Crews & Co. This is sophistical; on this supposition, why did he not say it was for the benefit of Cameron & Watson? And if the operation was for the benefit of Cameron & Watson, why was it not carried on in their name? why was it carried on in the name of Watson, Crews & Co.?

There is one further fact which may have some bearing, and to which I will allude. Statement K. of the report is an exhibit of the assets of the firm of Cameron & Co., rendered by the plaintiff to the defendant, 1st July, 1845. In this statement, the debt of Fort is thus put down: "W. and J. E. Fort & Co., (or S. & J. Watson,) \$1,250." Here is an intimation that the plaintiff intended to hold the defendant liable for the Fort debt, (though I believe that J. Watson was at that time dead, and could not have any thing to do with the transaction.) With this intimation, the defendant never contro-

verted his liability. I think he never intended to controvert it, and that it is a fair and just charge, that should be set down to his individual account. The plaintiff's first exception is sustained.

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*(The plaintiff's second exception is: Because the capital put in by S. Watson was a contribution by him to the business of the concern, in the use and hazard of that amount of money; that if it remained safe after the payment of the debts of the concern, he was entitled to take it back; but for any part of it which was sunk, he had no claim upon his co-partner for indemnity, and that the Master ought so to have stated the account.")

The first proposition involved in the exception is certainly true. As between creditors and the members of the co-partnership, the capital invested is certainly liable, and further, with a personal and individual liability as to the private estate of each member. But unless otherwise provided for by the articles of co-partnership, each party, on winding up the affairs of the company, is entitled to receive back the capital which he contributed, with interest thereon.

In this case, Watson contributed \$10,000, and Cameron contributed his services only. It was stipulated in the articles of co-partnership, that Cameron was to manage the business, and that his services in such management was to be considered the equivalent for the use of Watson's capital. Watson was to have no interest on the capital which he contributed during the continuance of the partnership. The Master reports that the whole capital has been lost; and besides this loss, there has been a large amount of debts of the firm which have been paid by Cameron, beyond the assets which were in his hands, and of which he claims that Watson shall pay his share.

But the question made in this exception, is, whether Watson, on the loss of his capital, is entitled to contribution, and if so, for how much, with or without interest? And if with interest, with interest from what time?

A participation in the profits and loss will make the partners liable as such to all persons dealing with the firm. And no stipulation to the contrary would exempt them from this liability which the law imposes up-

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on them. Consistently with *this rule, and as among themselves, they may modify and vary their rights in any manner they may think proper. The terms of the contract of co-partnership, will become the law by which their rights and liabilities, as among themselves, will be determined.

In this instance, whether Cameron, who put in no capital, but was to receive half the profits, is to contribute to Watson for the loss of the capital which he put in, and

which has been sunk in the operations of the firm, the contract is silent, except in the way of an implication, which I will hereafter notice. I am, therefore, left to decide this question, not so much upon a construction of the contract, as upon the general law of the land applicable to the subject. The paucity of authorities bearing directly on this point has surprised me. Neither has the argument, nor have my own researches, furnished me with any thing authoritative or reliable. In the absence of any decision, or precedent, by which I might be guided, I must appeal to principles more general and comprehensive.

A participation in profit and loss enters into the nature of a partnership. It is this which renders each member of the firm liable to creditors in respect to his individual estate, without reference to the amount of the capital which he contributes, or the share of the profits which he is to receive. The partners may stipulate among themselves, that one shall receive any given share or proportion of the profits, and sustain none of the loss. But I apprehend, that in the absence of any stipulation to this effect, the general idea of a partnership must prevail, namely, that each member is entitled to a share of the profits, and is liable to bear a share of the loss. And in the absence of any such stipulation, as would become the law of the contract upon the subject, the proportion which the partners were to receive of the profits, (if profits were realized,) would furnish the true and just criterion by which their respective proportions of

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the loss should be determined. And, inasmuch as the plaintiff was by the agreement to have received one-half of the profits, he is, in my judgment, liable to contribute to the defendant for one-half of his lost capital.

An inference leading to this conclusion, may, I think, be considered as arising by implication from the contract of co-partnership. The second article is as follows: "It is agreed that S. Watson shall furnish a capital of ten thousand dollars, to be used for the use and benefit of the concern; or he shall furnish goods on a credit fully equal to that amount, which is considered an equivalent. But the said Stephen Watson shall not be entitled to receive any interest on the capital so to be furnished—that being considered an equivalent for the time and labor of Mr. Cameron." Here is a stipulation, that Cameron's time and labor is to be considered an equivalent to the interest on Watson's capital. It is not to be inferred that Cameron's services were also to be considered as an equivalent for the hazard of Watson's capital, in the successful employment of which Cameron was to receive of the profits. The implication is the opposite of this. Expressio unius, Exclusio alterius. (The plaintiff's second exception is overruled.)

(The plaintiff's third exception is "Because, even if Watson be declared entitled to any return of capital from Cameron, it can not be until after a final settlement; and because the Master ought to have charged against Watson interest on all money withdrawn in advance of such settlement.")

It is expressed in the articles of agreement, that Watson was not to be entitled to interest on the capital which he agreed to advance. But this obviously means, that interest was not to be charged during the continuance of the partnership. There was no provision in the contract as to interest. But the right to interest arises *ex equo et bono*. Where the contributions of the partners are equal, an interest account is unnecessary. But inequalities of contribution can only be

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*fairly adjusted by an interest account; and except under special circumstances, which I do not conceive to exist in this case, the interest account should commence at the dissolution.

But for the terms of the contract, Watson would have been entitled to interest from the commencement of the operations of the firm. He agreed, however, that Cameron's services should be considered an equivalent for the interest on the capital that he had invested. After the dissolution, Cameron's services in a measure ceased; and, of course, when the equivalent is withdrawn, the interest should commence. It is said that Cameron rendered services after the dissolution, in settling the affairs of the firm. This has no bearing on this question. If he rendered such services, and is entitled to compensation, it would be on the *indebitatus assumpsit*, for what such services were worth. It would not be under the agreement of partnership. After the dissolution, Watson would be entitled to interest, and Cameron to compensation for his services, which should not be as much as he was to receive during the partnership. After the dissolution, he did not devote the whole of his time to the affairs of Watson & Cameron. He entered into other business, and earned profits in that way. The third exception of the plaintiff is overruled.

Having disposed of the plaintiff's exceptions, I will now proceed to consider the exceptions of the defendant.

The first is, "because the Master adopted the books of the complainant compiled and made subsequent to the dissolution, without vouchers or proofs, and upon such evidence alone has charged the defendant with results which are inconsistent with the data which the books themselves furnish."

By the articles of agreement, the partnership was to continue for three years from the first day of May, 1838. At the expiration of that time, it was continued by mutual consent for one year longer, and then expired by its own limitation. The plaintiff was appointed agent, or liquidating partner, to set-

the affairs of the firm. He remained in possession of the stock in trade, and of the

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assets, sold, collected, paid debts, &c., as he was authorized to do. The exception is not taken to the books of the partnership that were kept during the four years that the partnership continued, but to the books and entries of the plaintiff kept or made by him after the dissolution of the firm, and during the period of the plaintiff's agency.

When the books of a partnership are admissible in evidence, they prima facie prove and establish the transactions entered, or recorded therein. In such cases, it is, of course, competent for a party whose interest it is to do so, to disprove the correctness of the entries—to surcharge and falsify. The onus probandi is upon him who disputes the correctness of the books. The prima facie presumption is a strong vantage ground for the party in whose favor it operates.

The books of a partnership are admissible, and generally conclusive in favor of strangers who have dealt with the firm by whomsoever the entries have been made. This is upon the principle, that the act of one partner is the act of all. And if the entries have been made by a clerk, then they have been made by the agent of the firm, and are their acts. But the admissibility of the books of a co-partnership on questions arising between the partners themselves, is founded upon a different reason. It is founded upon the right of each partner to have access to the books, and to inspect them; and upon the presumption that he has in fact inspected them. It is not to be supposed that he has failed to exercise a privilege so important to his interests, and so necessary for his protection. If he discovered errors, or false entries, to his prejudice, he would of course immediately make objections, and adopt the proper measures for their correction. His acquiescence amounts to an implied acknowledgment of, or tacit assent to the correctness of the books. He cannot afterwards dispute that which he has thus admitted. This is a fair and reasonable rule, and is analogous to the well settled principle, that if a creditor presents to his debtor his account, or a statement of his demand, and the debtor examines it, or retains it for examination, and

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makes no objection within a reasonable time, it is an admission of the debt. These remarks apply to books kept during the existence of the partnership. But after the dissolution, I apprehend, the circumstances are different, and the rule is different. Books kept by one of the partners after the dissolution, or entries made in the original books, ought not, and can not be binding upon the other partners, without their acknowledgment, express or implied, or some further and satisfactory proof of the correctness of such entries. And more particularly would

I consider such evidence inadmissible in a case like this, where one of the partners (the plaintiff) was appointed the agent, or liquidating partner, (as he is sometimes called,) and the other members of the firm engaged in other occupations, and have personally nothing to do with the transactions which the books record. For although all the members of the co-partnership, after dissolution, so far retain their original powers or rights, as to be able to receive and discharge debts due to, or to pay debts due by the firm, (which is by virtue of their rights as co-partners,) such liquidating partner is but an agent, and can be regarded in no other light. It would be absurd to say, a man situated as the plaintiff was, should be allowed to manufacture evidence for himself, by entries made by himself, in books kept by himself, without check or supervision on the part of them whose interests are to be affected thereby. It is clearly settled that the books of an agent, though they may be used to charge him, are inadmissible to discharge him. His accounts must be vouched, as in the case of any other accounting party. I will cite but one case—*Williams and others v. Gregg*, 2 Strob. Eq. 297, which seems to be directly in point.

(Upon the abstract proposition, therefore, whether the books and entries of a party situated as was the plaintiff, in reference to his co-partner, the defendant, are admissible as evidence in his favor, and against the defendant, for the foregoing reasons, I am decidedly of opinion that such books and entries are not admissible for such purpose. But it does not appear that the defendant

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ever objected to the admissibility of the books until after the filing of the Master's report. The books now disputed were made the basis of the examination, and of the statement of the account, without an exception being taken as to their competency. The Master states this verbally to the Court, and his statement is amply corroborated by extracts from his minute book, with which I have been furnished. There are contradictory statements on this point from the Solicitors of the parties. The Solicitors of the plaintiff, and of the defendant, being at issue as to the facts, I say now, as I said at the trial, I will have to rely on the statement of the Master, and on the extracts from his minute book. Some of these I quote: "13th April, 1853, account submitted by defendant; books by consent referred to Heriot." "Mr. Petigru proposed the appointment of an accountant, by each party, to make up account from books, and Mr. P. named Mr. Heriot." The other side consent to such reference, and name same referee; whereupon ordered, that the books of Cameron & Watson be referred to W. B. Heriot, to make up account, and that said account be basis of Master's report. "Ordered that this refer-

ence to Mr. Heriot is not intended to prevent either party from offering evidence before the Master extrinsic of books, to invalidate account when rendered by Mr. Heriot."

Thus it appears, that these books, now so strenuously objected to, were admitted in evidence before the Master, and were referred to an accountant to state an account from them, which was to serve as the basis of the Master's report, with no other reservation or objection than that either party should have the privilege to offer "evidence extrinsic of the books to invalidate account when rendered by Mr. Heriot." After an expensive and protracted investigation—after the accountant has made his statement from the books, and the Master has made his report on the basis of that statement, as agreed on by the parties, it is insisted that these very books are inadmissible as evidence. The objection comes too late, and for this reason the exception is overruled.)

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*The defendant's second exception is, "because, the Master has omitted the sum of \$544.51, charged to Cameron & Co. for stock and sundries, purchased by them and received by the complainant."

It seems, from the Master's report on exceptions, that this exception is founded on misapprehension, and that the charge has not been omitted. The exception is overruled.

The defendant's third exception is, "because the Master has charged the defendant with a disputed debt of S. & J. Watson, without any proof whatever." For the reason stated by the Master in his report on exceptions, the third exception of the defendant is overruled.

The fourth exception of the defendant is, "because the Master has neglected to state an interest account with Adam Johnson, with the complainant, and with the defendant, prior to 1st July, 1842, and to strike a balance on that day." It seems that the Master has done what it is claimed in this exception he should have done; (see report on exceptions.) The defendant's fourth exception is overruled.

The defendant's fifth exception is, "because Mr. Cameron never was in advance to the partnership, or to the defendant, at any time, but was always indebted to both from the dissolution to the present time." This is an assumption which has not been verified. One of the defendant's solicitors wished me to go into an examination of the partnership books, for the purpose of shewing that the ground taken in this exception is true. This I refused. The exception is overruled.

Passing by the sixth exception for the present, I will next consider the seventh exception of the defendant, which is "because the Master has disallowed interest to the defendant on his capital after the dissolution of the co-partnership." In commenting upon the plaintiff's third exception, I have already ex-

pressed my views on the defendant's seventh. My judgment is, that the defendant is entitled to interest on his capital from the dissolution. By the terms of the agreement, he was not to have interest during the existence

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of the partnership, the *services of Cameron being considered an equivalent. But after the dissolution, interest is not inhibited by the articles. This principle seems to be conceded in the Master's report. But he considers the services of Cameron, after, as before the dissolution, an equivalent to the interest on the defendant's capital. The defendant is entitled to interest on his capital from the dissolution, and the plaintiff is entitled to compensation for his services. He ought to have whatever they are reasonably worth. But it does not seem reasonable that he should have as high compensation after the dissolution, when he was pursuing other profitable avocations, as before the dissolution, when he devoted his undivided labor and attention to the business of the partnership. This exception is sustained.

The defendant's eighth exception is, "because on taking a full, fair and correct account from the undeniable data furnished by the books of Mr. Cameron himself, and by Mr. Heriot's statement B., of the books of the partnership at the date of the dissolution, the complainant, so far from being a creditor, is indebted to the defendant in a large sum of money, as appears by the accounts and statements herewith submitted." Generalities and gratuitous assumptions. The exception is overruled.

The defendant's ninth exception is, "because the entries in the complainant's books, charging four notes of twelve hundred and twenty-one and 35-100 dollars each, to J. F. Payne, is fictitious. The notes to Mr. Payne were for an amount of six hundred dollars less than charged." In reference to this exception, the Master in his report on exceptions, says: "the error in the books, as to the amount of the notes given to Mr. Payne, referred to in this exception, I have corrected in the report." This exception is sustained. Let the error be corrected, if that has not been already done.

The sixth and tenth exceptions, I shall consider together. The sixth is, "because an intelligible account, wherein Mr. Cameron shall be charged on one side with his debt, at the date of the dissolution, and with each

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amount collected by *him on the date at which it was received; and on the other side credited with each payment made by him on the debt due by the partnership at the time of the dissolution, at the date when such a payment was made, with interest on each side, will make him a debtor to a large amount, and the Master should have so reported; and such account ought to be stated with annual balances, as is usual among merchants."

(The tenth exception is as follows: "The defendant craves from the Master, a report upon the evidence in the case, stating, as matter of fact, how much the plaintiff owed at the date of the dissolution, including the amount for stock in trade, and for Adam Johnson's debt; and how much the complainant collected of the partnership assets during the first year of his administration, to wit: before the 1st of July, 1843; and whether these amounts were not sufficient to pay all the debts as stated by Mr. Heriot, and also to return Mr. Watson the balance of his capital after deducting what he had already received prior to the dissolution, and to leave at that date a surplus for division between the partners.")

I am not satisfied that justice has been done by the manner in which the accounts have been stated. I confess, that to me, the statements that have been submitted are not very intelligible, which may be owing to my want of familiarity with the mode of stating mercantile accounts. I think the defendant is entitled to have an account stated according to the principles assumed in his sixth exception, which will be more intelligible and satisfactory than the statement made by the accountant. Whether this mode of stating the accounts will make the plaintiff a debtor to a large amount, as affirmed in the exception, remains to be seen. But it is a mode familiar to lawyers, and common in Chancery. The defendant is also entitled to have the statements made by the Master which he claims in his tenth exception. It cannot be doubted that such statements will enlighten the Court, and be subservient to the ends of justice. The sixth and tenth exceptions are sustained.)

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*The case is referred back to the Master, and he is directed to state the accounts, and to conform his report with this decree. He will base his statement and his report upon the evidence furnished by the books, and such other evidence as is already taken. It is so ordered and decreed.

The complainant appealed on the grounds:

1. Because it is respectfully submitted, that his Honor erred in overruling the complainant's second exception to the Master's report, by which it was insisted that the capital "put in by the defendant was a contribution by him to the business of the concern, in the use and hazard of that amount of money; that if it remained safe after payment of the debts of the concern, he was entitled to take it back; but that for any part which was sunk, he had no claim upon his co-partner for indemnity, and that the Master ought so to have stated the account."

2. Because, it is respectfully submitted, that his Honor erred in overruling the complainant's third exception, by which it was insisted, "that even if Mr. Watson be declared entitled to any return of capital from Mr. Cameron, it cannot be until after a final

settlement; and that the Master ought to have charged against Mr. Watson interest on all money withdrawn in advance of such final settlement."

3. Because, it is respectfully submitted, that his Honor erred in sustaining the sixth and tenth exceptions of the defendant to the Master's report, and referring it back to the Master to take a further account as there suggested before a decree. Whereas, it is submitted, that after the proceedings in the cause, when the account had been fairly and fully taken by the accountant selected by the defendant himself, re-examined before the Master, and reported on by him, his Honor should have sustained the report, except in such particulars as to which some specific error or mistake had been shown.

The defendant also appealed upon the grounds:

1. Because the complainant's book-entries

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after the dissolution, without proofs or vouchers, or affidavit, were received in evidence against defendant, but not in his favor, (as in the charge against S. & J. Watson,) and the entries were not made at the time of the transactions they purport to record, and are discredited by other irregularities.

2. Because, a disputed claim against S. & J. Watson, not charged to defendant in complainant's books, is charged to him in the decree, and with no other evidence concerning it than the entries of complainant, where it is first charged to S. & J. Watson, then to defendant, and finally re-charged to S. & J. Watson; stating on the face of the entry, that it had been charged to defendant erroneously, and the pleadings do not warrant trial and judgment upon the merits of a claim against S. & J. Watson.

3. Because, the decree charges a debt due by W. & J. E. Fort to defendant.

4. It is respectfully submitted that G. S. Cameron is not entitled to charge the other partner for winding up the partnership estate, there being no evidence of any contract or agreement for such a charge, and the fact that no such charge was made by the complainant himself either in his intercourse with the other party, or in his bill, or in the accounts kept by him, is conclusive against it.

5. That if such a charge, in the absence of contract, could be allowed, Mr. Watson would be equally entitled to charge for his endorsements or the use of his credit or any other services rendered after the dissolution.

Mitchell, for complainant.

Petigru, Campbell, contra.

The opinion of the Court was delivered by

DUNKIN, C. It will be convenient to consider the questions involved in this appeal very much in the order in which they are discussed by the Chancellor. Upon the subject

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of the *amount lost by the default of W. &

J. E. Fort, the Chancellor has arrived at a different conclusion from the Master. In November, 1840, the co-partnership, represented by the plaintiff, had funds in the Macon Bank of Georgia. If these funds were appropriated by Watson to his own account, he is responsible. If, on the other hand, the transaction was only a mode adopted by Watson with the consent and co-operation of Cameron, to remit the funds, any loss accruing properly falls on the co-partnership. The evidence is susceptible of either construction. It is very clear that Cameron knew of the transaction in its inception, for he made the draft in favor of Watson, Crews & Co., which was directed to be invested in cotton and consigned to the order of Watson, Crews & Co., at Savannah. Crews says in his evidence the operation was on Watson's exclusive account. Crews was one of the firm of Watson, Crews & Co. When he states "the transaction was on the individual account of Watson," the Court understands him only to mean that, though the cotton was to be consigned to the address of Watson, Crews & Co., that firm had no interest or concern in the matter. The debt of W. & J. E. Fort & Co. was originally \$1,250—it was afterwards reduced by payments carried to the credit of the co-partnership, and, in 1852, stood on the books at a balance \$518.72, which is charged by the Master to profit and loss account. In consequence of the difficulties in exchange, merchants are, not unfrequently, induced to adopt this mode of remitting funds. It is well illustrated by what is called in the accounts "the Adam Johnson debt," charged by the master to the plaintiff's individual account, and without objection on the part of the plaintiff. The co-partnership had purchased goods in England and were indebted for them. Under such circumstances the ordinary mode of payment is by remittance in sterling exchange—but it sometimes happens that bills are at a high premium and cotton comparatively low, and it may be more advantageous to make payment by shipments to Liverpool. If, in this case, the plaintiff,

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with the knowledge and *consent of his co-partner, had purchased cotton here, and had it consigned to his commercial friends in Liverpool, with instructions to sell, and with the proceeds pay the debt of the firm in Staffordshire, or wherever else their creditor might be, this operation would have been at the risk of the firm, which would be properly so chargeable, if loss accrued. But, so far as the Court can perceive, and it seems to be so conceded, the purchase of cotton made by the plaintiff was wholly without the knowledge or participation of the defendant, and was for an amount for exceeding the debt due by the firm to their English creditors. The Master has accordingly charged the loss to the individual account of the plaintiff, and he has acquiesced in the judgment. The debt of Fort

is analogous; except that it was a mode of procuring a remittance of funds, in another State, belonging to the firm, and not of paying a debt due by the firm abroad. The consequence is different, because it is manifest that, in the Georgia transaction, the plaintiff had knowledge and participation, and it must be inferred that it was with his consent and approbation; and so he seems to have regarded it when his bill was filed. In advert- ing to the complaints of the defendant on account of the losses incurred by the plaintiff, he says that "if losses occurred from transactions conducted by him, that some losses were also sustained from those conducted by the defendant; for instance, the loss of the sum of \$1,250, or thereabouts, funds of the said partnership, received by the said defendant, and lost by him in some purchase of exchange" (manifestly referring to the Fort debt); and then adds "that, in no case, can partners be thus held responsible for the result of their business operations." Such is, also, the view which this Court entertains under the circumstances disclosed by the testimony, and are of opinion that the exception should have been overruled.

The subject next considered is in relation to the amount of money or goods to be furnished by the defendant, as provided by the articles of co-partnership. The plaintiff was

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a young *man, without pecuniary means, but having some experience and probably skill in the conduct of a business of this character. The defendant was a merchant of large resources, and the house of S. & J. Watson & Co., of which he was a member, were also importers of the articles of the character of those in the sale of which the new co-partnership was to be employed. The defendant undertook to put into the concern ten thousand dollars, or that amount in goods. The plaintiff was to conduct the business in his own name, the defendant being only a dormant partner, and the plaintiff was to devote his personal services to the management of the concern. No interest was to be allowed on the sum of money, or value of goods, furnished by the defendant, which was to be used for the benefit of the concern. Each party was to receive one-half of the net profits arising from the business. No provision was made for the contingency that no profits might be made; and no stipulation as to the adjustment of losses as between themselves, in the event that it should prove a losing business. In a note to the S. 26, Story on Partnership, the commentator cites, with apparent approbation, what is stated in another treatise on the same subject: "For in partnerships, where, on the one side, labor is contributed, and on the other, only the use of money, that partner who contributed the money, does not always admit the other to a share of the principal, but only to his share of the profit, which such labor and money

joined together might produce. And if A, for instance, who furnishes labor only, hath no title to any part of the money advanced upon dissolving the partnership, so B alone should be liable to the risk of the money as owner thereof; for, in such a case, it is not the money itself, but the risk which it runs, and the probable gain which may accrue from it, that are to be compared with the labor." After stating a rule which might be adopted, the writer continues: "According to this rule, if there should be nothing gained by the partnership concern, A would lose his labor, and B his interest, which would be equal and

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just. And should the *original stock be diminished, by the same rule, A loses only his labor, whereas B would lose interest and a part of the principal."

In this case, the ten thousand dollars was advanced by the defendant, in the hope, and with the reasonable expectation, of realizing from it large profits. At the dissolution, he was entitled to claim it before any division of profits. His co-partner could claim nothing as profits until the amount put in by the defendant was returned. On the other hand, if it was not there, the defendant who had thus risked his property must submit to the loss. At the dissolution of this co-partnership, in 1842, if an assignment of their effects had been made to a third person, it would have been the duty of the assignee to have sold off the stock, collected the assets, and paid the debts of the concern. If the amount realized proved sufficient to pay the debts and return the amount put in by the defendant, and no more, the concern would have made no profits. The defendant would lose the interest on his money, and the plaintiff would have lost his labor and services for four years. If the assets proved only sufficient to pay the debts and not return the amount put in by the defendant, the deficiency would be his loss, as the plaintiff would have no right of participation, if it had been returned.

But the parties were probably well aware of the ruinous consequences which would attend this summary mode of closing their concern. As has been remarked, the plaintiff's pecuniary means were very limited, while the credit and resources of the defendant were ample. In order to wind up the affairs of the co-partnership in the most advantageous manner, to preserve the credit of the parties, to pay their debts, return the amount put in by the defendant, and save what could be saved for distribution, the plaintiff undertook, by means of the aid and credit of the defendant, or of his firm of S. & J. Watson, through their indorsement of his paper in bank, to settle up the co-partnership affairs. This was continued for a series of years, certainly until 1845; dur-

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ing *which time loans were made from the

banks, through the credit of the defendant, large accumulations of interest accrued, but nearly the whole amount put in by the defendant was paid to, or withdrawn by him, with the assent of the plaintiff. In stating the accounts, the defendant has been charged with his proportion of this accumulation of interest, and of the other expenses attendant upon this mode of closing the business. The Master states that the large accumulations of interest arose from "the extended bank accommodations required for the payment of the debts of the concern," and that the defendant was made liable in the account, for one half of this accumulation. He has, accordingly, recognized this arrangement of the parties, regarded the premature withdrawal or refunding of the capital of the defendant as made, with the assent of the plaintiff; and while he has refused to allow interest on the defendant's capital, he has declined to charge interest against the defendant on the amount withdrawn by him. The Court approves the views taken by the Master, and is satisfied with his conclusions thereon.

In respect to the admission of the books and their effect as evidence, the Court deems it necessary to add little to what is said by the Chancellor. It may be remarked, however, that, pending the reference before the Master, these books were, for about six weeks, in the exclusive possession of the defendant. Since that time, (April, 1853,) ample opportunity has been afforded for the most searching scrutiny, as well by the parties and the accountants engaged, as by the Master of this Court. No error is even now suggested in the entries of these books, except one of six hundred dollars, which is satisfactorily explained, and a doubt as to a charge made in 1841, during the existence of the co-partnership, when (as appears not to be questioned) the books afforded, at least, prima facie evidence of the transactions therein entered.

But the Chancellor, in concluding his decree, observes that "the manner in which the account is made up is not very intelligible to him, probably (as he says) from his want

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of *familiarity with the mode of stating mercantile accounts, and that he is not satisfied that justice has been done by this manner of stating the accounts." He therefore sustained the defendant's exceptions as to the mode of stating the accounts. From this part of the decree the plaintiff has appealed, because, as he submits, after the proceedings in the cause, when the account had been fairly and fully taken by the accountant selected by the defendant himself, re-examined before the Master, and reported on by him, the Chancellor should have sustained the report, except in such particulars as to which some specific error or mistake has been shewn.

These proceedings, for an account, were instituted in 1851. Several pleas were interposed, which were overruled by Chancellor Johnston, October, 1852, and a decree to account made, which was sustained by this Court in January, 1853. The case was referred to Master Tupper, and his minutes of the proceedings before him were in evidence before the Court. From these it appears that, after several preliminary proceedings in February, March and April, 1853, on 13th April an account was submitted by the defendant, and the counsel of the defendant proposed the appointment of an accountant for each party, to make up account from the books; and the defendant's solicitor named, on his part, Mr. Heriot; the other side consented to the reference proposed, and named the same referee. Whereupon, under the act of 1840, which authorizes Masters or Commissioners to make all such orders as may be necessary to prepare causes for hearing upon the merits, the following orders were made, with the assent of the parties: Ordered, That the books of Cameron & Watson be referred to W. B. Heriot to make up account, and that said account be basis of Master's report. Ordered, That this reference to Mr. Heriot is not intended to prevent either party from offering evidence before the Master, extrinsic of books, to invalidate the account when rendered by Mr. Heriot. Ordered,

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That the Master hear evidence as to the value of the wages of a packer, and direct accountant as to the proper entries to be made in the account when desired—each party to furnish statement if they please. The books and papers were accordingly placed in the hands of Mr. Heriot, and the sum of five hundred dollars was paid to him by the parties. He kept the books, &c., for some thirteen months, and, on 17th May, 1854, his account was submitted. According to the order of April, 1853, this account was made the basis of the Master's report, which, after various references, was filed on 12th June, 1855.

Mr. Heriot was admitted to be one of the most experienced and skilful accountants in the city of Charleston. The exceptions filed by the defendant present no objections to his ability, or the fidelity with which he discharged his duty. So far as the Court can understand, no account was made up by the defendant, or by any accountant, upon the principles which he suggests. In the course of the argument it was urged that, after the dissolution in 1842, it was the duty of the plaintiff to have closed the concern, as an executor or administrator would have managed the estate of his testator, or intestate, and that the account should be now stated as if he had proceeded in this manner. But the answer to this is, that the defendant sanctioned and approved a different mode of proceeding on the part of the plaintiff. As

has been already stated, this was probably done fully as much for the purpose of protecting his own interests as those of the plaintiff after the dissolution. The notes of the plaintiff in bank, discounted, as the Master states, for the purpose of paying the debts of the concern, were regularly indorsed by the defendant, or his mercantile firm. "These indorsements," says one of the witnesses, "were a mere continuation of the paper existing before the dissolution, or made to take up the old liabilities. After the dissolution (says the witness) Watson continued frequently to confer with Cameron as to the business of the firm. These renewals continued to 1845, and several years longer, and also the consultations of Watson

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with *Cameron in relation to the business of the firm; and Cameron continued to render him accounts of the concern and its business." Another witness (who became a partner of the defendant in mercantile business in 1839,) testified that, "he knew of plaintiff's rendering accounts of the firm of Cameron & Watson to the defendant, from their dissolution in 1842 to about 1st June, 1847, and that the account (K) was one of them, and of the form in which they were usually made." Under these circumstances it is no matter of surprise that, at the reference before the Master in April, 1853, the defendant, after several weeks scrutiny of the books in which the transactions were entered, instead of arraigning the course of proceeding pursued by the plaintiff in winding up the affairs of the concern, proposed, through his counsel, that an accountant should be appointed "to make up the account from the books," and coöperated in obtaining the order thereafter made, that the account, so to be made, should "be the basis of the Master's report." To prevent any misconception or conclusion of either party, it was further provided that either party might offer evidence before the Master "extrinsic of the books, to invalidate the account, when rendered by the referee;" and further, the Master was instructed to take evidence on a particular subject not embraced in the books, and direct the accountant as to the proper entries when desired. The account was accordingly made from the books, and forms the basis of the Master's report. After what had thus passed, we are all of opinion that it was too late for the defendant to repudiate what had been done, and to require a new account to be made up, framed upon different principles, and applicable to a course of proceeding essentially different from that which he had himself sanctioned.

After a review of the several exceptions on the part of the plaintiff and defendant to the Master's report of 12th June, 1855, and without intending to impugn the abstract propositions affirmed in some of them, the Court is of opinion, that the same should have been

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overruled, and that the report, *as corrected by his report on the exceptions, 29th June, 1855, should have been confirmed and made the judgment of the Court. It is now so ordered, and decreed, and the decree of the Circuit Court is reformed accordingly.

DARGAN and WARDLAW, CC., concurred.
Decree reformed.

10 Rich. Eq. *109

*W. B. S. HORRY and Others v. EDWARD FROST and Others.

(Charleston. Jan. Term, 1858.)

[*Covenants* ⇨ 16.]

A covenant may be as obligatory when expressed by way of recital as if contained in the formal part of the agreement.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 13; Dec. Dig. ⇨ 16.]

[*Judgment* ⇨ 739.]

F. covenanted to pay of the debts of H., deceased, a certain amount included in a statement referred to, and also one-seventh of any other debts not included in said statement through error or ignorance of the same. A decree was afterwards made for specific execution of the agreement, and F. was decreed to pay the amount included in the statement: *Held*, that F. was not protected by the decree from liability to pay one-seventh of a debt afterwards ascertained and established against the estate of H.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1267; Dec. Dig. ⇨ 739.]

Before Wardlaw, Ch., at Charleston, January, 1857.

Wardlaw, Ch. The plaintiffs are the four children (another having lately died, infant and intestate) of Mary S. Horry, second wife, widow and executrix of Elias Horry, and one of them, Wm. B. S. Horry, is executor of his mother, who is dead, testate; and they filed this bill Dec. 22, 1853, to enforce an agreement made by the defendants with their mother and themselves, and sanctioned by this Court, so as to compel the defendants to pay two-sevenths of a debt lately established against the estate of Elias Horry.

Most of the estate of which Elias Horry was in possession at his death was derived from his father, Thomas Horry, and it seems that the said Thomas, on October 6, 1817, executed an instrument purporting to be his will, whereby he gave the bulk of his estate to his son Elias, for life, with remainder to the defendants, Harriet and Thomas, (and a sister, Ann B., since deceased) children of said Elias by his former marriage. It seems to be clear that this will should have been admitted to probate, but in point of fact it

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was rejected by the Ordinary *and it has never been formally proved in the proper tribunal; and Elias Horry during his life

acted as executor of a will bearing date in 1810, with very different provisions. The litigation likely to arise on this subject was quelled by a compromise between the defendants and Mary S., executrix of Elias, in 1835.

This agreement, signed by the defendants only, recited first, that the instrument of Oct. 6, 1817, was the will of Thomas Horry. Second, that the defendants, influenced by affection towards said Mary and her children, had agreed to relinquish their interests under this will, and to accept in commutation certain plantations, and respectively one-seventh of the residue of the estates of said Thomas and Elias, to be selected by defendants at appraised value, (household furniture, and carriage and horses being excepted,) which selection having been made, was specified in the recital—the share of Judge Frost and wife “subject to the payment of one-seventh of the debts of said Elias,” their own debt of \$11,000 constituting a portion of what they were to contribute towards debts; and the share of Thomas L. Horry, which was to be conveyed to Judge Frost on specific trusts, being liable to deduction “for one-seventh of the debts due by said Elias at his death,” reckoning the debt due to said Thomas; and that the said Mary S. had stipulated that absolute estates should be assured to the defendant respectively for the lands and chattels reserved and selected by them respectively, under proceedings in Equity if necessary, concluding herself and children. “And the said Edward Frost engaged when the said property was delivered to him and the title thereto assured to him as aforesaid, that he would liquidate and discharge debts due by the said Elias Horry to the amount of \$27,580 74, being the amount found chargeable to him by a statement made in pursuance of said agreement, and also one-seventh of any other debts which may not have been included in such statement through error or ignorance of the same.” Thereupon the parties covenanted, that Mary S., executrix, in consideration of the cove-

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nants of defendants “hereinafter expressed,” should procure absolute estates to be assured to defendants in their selected shares under the sanction of this Court; the share of Thomas to be conveyed to Judge Frost as trustee on trust for his use for life and afterwards for his issue, if any, and contingently for the benefit of Mrs. Frost and her children; and that the defendants, when the said Mary had executed the covenants on her part by necessary deeds, should release all their interest and claims under the will of Thomas Horry in trust for the creditors of Elias Horry, and for the use of said Mary for life, with power of sale and appointment by deed or will among her children.

In execution of this agreement, Mary S. Horry, executrix, filed her bill, May 13, 1835,

against her children and the present defendants: and on June 1, 1835, a decree was rendered "that the agreement be specifically executed," "and that the Commissioner of the Court execute to Edward Frost and wife conveyances of an absolute estate of the real and personal property mentioned in said agreement as the consideration of the release by them of their claims under the will of Thomas Horry, when the said Edward Frost shall have liquidated, or provided in a manner satisfactory to the Commissioner for the liquidation of the amount of the debt assumed by him; and that conveyances be also executed by the Commissioner to Edward Frost as an absolute estate in the property real and personal, mentioned in the said agreement, as the consideration of the release by Thomas L. Horry of his claims under the will of Thomas Horry, on which last mentioned conveyances, shall be limited the trusts in said agreement mentioned in that behalf."

This decree was fully executed, according to the state of facts then apparent, by Judge Frost's paying or securing the portions of debt ascertained to be owing by him, and receiving for himself and wife, and for himself as trustee of Thomas L. Horry, conveyances from the Commissioner in fee for the

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*shares of estate mentioned in the agreement, and by the defendants execution of a release to Mary S., executrix, of all other claims under the will of Thomas Horry.

Afterwards a judgment was obtained in the Court of Common Pleas, in the name of Mendenhall, Ordinary, in behalf of the representatives and distributees of William Washington's estate, for \$5,983 55, besides costs and expenses, against the said Mary S. Horry, executrix, for the liability of said Elias Horry as surety of Josiah Taylor on the latter's bond as administrator of William Washington's estate. The existence of this debt, and the ignorance of the parties concerning it at the time of the decree of 1835, are conceded for the purposes of the argument before me. And the controversy of the parties is concerning the liability of defendants for contribution towards this debt.

This statement is incomplete, but the state of my employments compels me to leave complaining parties to supply my defects from the voluminous pleading and documents of the cause.

The defendants, not interposing the Statute of Limitations, or the lapse of time, insist for defences, that they are not and never were under obligation to contribute to the payment of the debt in question; and that their executory agreement was consummated by the decree of June, 1835.

It is plain that the agreement of defendants must be interpreted in the light of surrounding circumstances, and that whatever may be its form, it was a liberal benefaction

by defendants to plaintiffs for securing the position and harmony of the family. Still it cannot be legally considered as a mere donation on the part of the defendants, without any valuable consideration; for undoubtedly they secured benefits, in the allowance of particular estates to them, and in selecting at the appraisement equal shares of the residue of the estates, and in the avoidance of litigation as to the will under which they claimed. The agreement must be construed as a family

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*compromise. Considered in this aspect, there is no force in the objection that the formal covenant of the defendants is merely to release certain interests in the estates of Thomas and Elias Horry. A covenant may be as obligatory when expressed by way of recital as if expressed in the formal part of the agreement. The recital of a fact in a deed, the existence of which the executing party is presumed to know, is a covenant of the existence of the recited fact. Platt on Cov. 33; 2 Cow. & Hill's Phil. Ev. 1237. Here the defendants recite their stipulation to pay proportional parts of the debts of Elias Horry, and may be properly held to covenant to pay such parts, as consideration of the covenants in their behalf.

Next, defendants insist that all which was executory in their agreement was executed by the decree of 1835, and that having paid what was then exacted from them they are no further liable. The principle of *res judicata* is properly favored by Courts as tending to the peace of society, but it would be an abuse to hold a party concluded by a judgment where he neither presented nor had the opportunity of presenting his claim. In the present case the decree as to doctrine was that the agreement should be specifically executed, and as to result, was that all the debts of Elias Horry then ascertained, should be paid according to the covenant of the parties. But the debt now in question, although protected by the agreement of the parties and the doctrine of the decree, could not be brought within the practical execution of the decree, for by concession it was unknown to the parties. When the court adjudged that the defendants should pay their stipulated portions of Elias Horry's debts, and that the agreement should be executed, it contemplated that all these debts, as well those then ascertained as those omitted by "error or ignorance," should be paid. No exclusion of debts then unknown could have been intended.

It is adjudged that Judge Frost and wife pay one-seventh of the debt against Elias

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Horry's estate, ascertained since the *decree of 1835, and that Thomas L. Horry or his trustee, Judge Frost, pay another seventh: and it is referred to Master Gray to ascertain and report the amount of such debt with costs and expenses, and the extent and man-

ner of the payments to be made by defendants on the principles of this decree.

The defendants, Edward Frost and wife, appealed on the grounds:

1. For that the covenant and release under which complainants claim the relief now prayed, was in effect a sacrifice of their interests voluntarily made by the defendants, so recognized and accepted at the time, by which great advantage was secured to the complainants, and such an instrument should not for their further advantage, be extended beyond its strict interpretation to increase liabilities so voluntarily assumed by the defendants.

2. That the said covenant was only intended to be executory until it should be carried out through the interposition of the Court of Equity; and the general terms as to other debts were intended for such debts as might be discovered in the meantime.

3. That according to any proper legitimate construction of such covenant and release, defendants could only be held responsible for such amount of the debts of Elias Horry as was ascertained and specified in the instrument itself, and a certain proportion of any other debts omitted that might then have been ascertained and specified, which would not include the present claim.

4. That whatever may have been the proper construction of the covenants and agreements of the parties, yet when they came under consideration in a cause before this Court and a final decree had been made, the decree must be regarded as superseding such previous claims and demands which thereby pass into *rem judicatum*, so that no claim can now be set up under the covenant

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unless recognized and protected by the *decree, which clearly only provides for demands against the estate of Elias Horry then existing and capable of being ascertained.

On behalf of the defendant, Thomas S. Horry, it was besides submitted.

That there is no engagement or even recital in the covenant relied upon which can affect him with any debt against the estate of Elias Horry not then ascertained, all which are necessarily excluded as to him by the mode adopted to ascertain the proportion he was to receive; for otherwise the agreement could not have been carried into effect as to him, until all the proportion of the debts that he was to answer for had been ascertained.

Mitchell, Petigru, for appellants.

Yeadon, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. In the Circuit decree, this case is considered almost exclusively in reference to the liability of Judge Frost, and as if the predicament of Thomas L. Horry were identical. The Chancellor's course of

argumentation and judgment, however deficient in circumspection, was natural enough; for the burden of discussion before him was as to Judge Frost's liability, and his attention was not specially invoked to differences in the cases of the co-defendants. On appeal, however, the case of Thomas L. Horry, is distinctively presented; still in the shape of appendix to the grounds of appeal.

We have carefully conferred and deliberated as to this appeal, and we concur in the Chancellor's judgment as to Judge Frost and wife, and consider it superfluous to extend his reasoning. We merely add some authorities that a covenant may be made by way of recital. *Hollis v. Carr*, 2 Mod. 91; *Seymour and Clerkes case*, Leonard's R. 122; 3

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Keble, 304; 2 *Black R. 820; 2 Lord Raymond, 683, 1242, 1480; 1 Phil. Evid. 355.

We differ from the Chancellor as to the liability of Thomas L. Horry. Judge Frost was adjudged liable on his covenant to "liquidate and discharge debts due by Elias Horry to the amount of \$27,580.74," ascertained by the Master's statement, "and also one-seventh part of any other debts which may not have been included in such statement through error or ignorance of the same." But Thomas L. Horry made no such covenant. He does not in any form contract for liability for debts not included in the Master's statement. He agreed to accept in satisfaction of his claims under his father's will, one-seventh part in value of the estates of his father and grand-father, with specific exceptions, deducting from the estimated value of his share one-seventh of the debts of his father. All of these debts were then supposed to be mentioned in the Master's statement. In execution of this agreement specific property was delivered to him, and his share of the debts was paid. He received in the arrangement, estate of much less value; for example, about sixty negroes fewer than the share of his co-defendants. The adverse parties, for some reason, retained a portion of the estate to which he was apparently entitled under his father's will, and exacted no engagement on his part for future contingent liability. His unfitness for the conduct of business may have been the inducement for consummating at once the compromise, so far as he was concerned, while it was left partly executory as to his brother-in-law. It would be unsafe, under such circumstances, to involve him in a covenant to pay debts omitted from the statement, by extending the construction of equivocal words in the recital of his covenant. We are satisfied of the intention of the parties, that the whole arrangement concerning his share should be complete and ended at the date of the covenant. Where the obligation of a party exists only by virtue of a covenant, whether formally expressed or de-

duced from a recital, its extent is measured

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by the words or fair intendment *of the covenant, and greater effect is not given to such a covenant in equity, than it has at law. Sumner v. Powell, 2 Meriv. R. 36.

It is adjudged and decreed that the Circuit Decree be reversed as to Thomas L. Harry, and in other respects be affirmed.

DUNKIN and DARGAN, CC., concurred.
Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1858.

CHANCELLORS PRESENT. (a)

HON. BENJ. F. DUNKIN,
HON. FRANCIS H. WARDLAW,
HON. GEORGE W. DARGAN.

10 Rich. Eq. *118

*JOHN J. MARTIN and Others v. WILEY J. JEFcoat, Adm'r of Wm. O. Martin.

(Columbia. May Term, 1858.)

[*Executors and Administrators* ⚡86.]

Where an administrator neglects, in good faith, to litigate a doubtful claim of his intestate, whereby it is lost to the distributees, he is not liable; to make him liable, fraud or negligence must be shown.

[Ed. Note.—Cited in *Pope v. Mathews*, 18 S. C. 448.

For other cases, see *Executors and Administrators*, Cent. Dig. § 353; Dec. Dig. ⚡86.]

Before Johnston, Ch., at Lexington, June, 1857.

Johnston, Ch. This suit is brought on behalf of the children of William O. Martin, deceased, against the administrator of his estate, for an account. On reference to the commissioner, much testimony has been taken; and he has reported against the com-

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plainants' demands. The case comes *up on complainants' exceptions to the report of the commissioner.

The material facts, as shewn by the testimony, are as follows: William O. Martin died intestate in the year 1839, leaving a widow and six infant children. Shortly after his death, the defendant, Wiley J. Jefcoat, being his wife's brother, administered on his estate. There were in the possession of William O. Martin, or of his wife, at the time of his death, three slaves, Esther, Hector and Jack. These slaves had been acquired by Mrs. Martin, in the following manner: In the year 1811, her grand-father, John Hoover,

er, by deed, gave certain slaves, and other property, to his daughter, Jerusha Jefcoat. The deed provided that the property should be delivered to Jerusha Jefcoat "instantly after the death" of the donor—"to have all the above named property, both real and personal forever. Should my beloved daughter Jerusha Jefcoat, die before her husband, Elijah Jefcoat, then he is to have all the above named property during his natural life, and at his death, the property above mentioned, both real and personal, the heirs of my beloved daughter, Jerusha Jefcoat, is to have the same, without any manner of condition whatever, forever." Jerusha Jefcoat died in 1818. Her husband, Elijah Jefcoat, survived her, and is still living. John Hoover died in 1832. Upon Hoover's death, Elijah Jefcoat took possession of the slaves conveyed by the deed, and soon afterwards made a partition of them with the aid of neighbors, reserving a share to himself, and delivering six slaves, equal to each other in value, to the six children of himself and his deceased wife, Jerusha. Among these children was Martha, or Patsey, the wife of William O. Martin, whose marriage had taken place as early as the year 1828. Esther, the slave mentioned above, was delivered to Mrs. Martin, and her husband at this time. Hector and Jack were children afterwards born to Esther.

It was proved to have been the general belief in the neighborhood, that the slaves

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thus delivered to Mrs. Martin did not *thereby become the property of her husband. He, himself, at various times, disclaimed title in himself, and represented the slaves as being under the exclusive control of his wife. Aft-

(a) Hon. Job Johnston absent by leave of the Legislature.

er his death. Elijah Jefcoat interposed, and forbid that they should be included in the inventory of the estate, setting up a claim in himself for the benefit of his daughter. The Ordinary of Lexington District, Mr. Fort, advised the administrator not to interfere with them, but to leave them in the possession of the widow, and communicated to him the fact, which he proved on his examination, that he (the Ordinary) had heard the opinion expressed by three eminent counsel, that the slaves, under the deed from John Hoover, belonged to Elijah Jefcoat for life.

The property left by William O. Martin, exclusive of these slaves, was very inconsiderable. It was absorbed in the payment of a small amount of debts. But the creditors acquiesced in the proceedings of the administrator, and none of them have asked any relief.

Under the advice which he received from the Ordinary, the defendant did not include the slaves in his inventory; left them in the possession of the widow, and closed his administration.

Since the death of Martin, the woman Esther has had two more children, named Dave and Clarinda. Mrs. Patsey Martin, the widow, was married, in 1844, to Gabriel Sturkie. Before this marriage, she had sold the boy Jack to Benjamin Jefcoat. Since the marriage, Gabriel Sturkie has resided with his wife and her children at the place previously occupied by her. In 1847, Mrs. Sturkie sold the boy, Hector, to Hilliard Oliver, who paid for him \$400 in cash and \$110 in provisions. In 1853, Oliver sold Hector to a speculator in Hamburg, having become alarmed about the title. The other slaves continued in the service of Mrs. Sturkie and her family until 1853. At that time, the defendant, Wiley J. Jefcoat, became alarmed, in consequence of a decree pronounced by Chancellor Wardlaw,

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in the case of Richard Sturkie and wife *v. Elijah Jefcoat and others, which was supposed to decide, that under the deed from John Hoover, Elijah Jefcoat took an absolute estate in the slaves thereby conveyed, and that upon the partition made by Elijah Jefcoat among his children, the husbands of his daughters became entitled absolutely by virtue of their marital rights. The defendant had before this, in the year 1850, purchased from the administrator of Benjamin Jefcoat, the slave, Jack, previously sold by Mrs. Martin, as mentioned above. He now proceeded to take possession of the slaves, Esther, Dave and Clarinda, and having obtained from the Ordinary an order of sale, including Jack, as well as the three just named, he sold them all, becoming himself the purchaser of Jack and Dave (by transfer of the bid of another party); Esther and Clarinda were purchased by Wiley S. Jefcoat, to whom the defendant gave a

warranty of title. The defendant charged himself with the amount of these sales in his return to the Ordinary.

But after these transactions, Gabriel Sturkie brought actions of trover against the defendant, Wiley J. Jefcoat, for the boy, Dave; and against Wiley S. Jefcoat, for Esther and Clarinda; and the defendant, in the suit was vouched by Wiley J. Jefcoat, to defend the action brought against him. And in these actions of trover, Gabriel Sturkie recovered verdicts for the full value of these slaves, which the defendant in this suit has paid.

Upon the termination of this litigation in the court of law, the complainants have filed their bill, to make the defendant accountable to the extent of their distributive shares (to wit: two-thirds) of the value of the five slaves, Esther, Jack, Dave, Hector and Clarinda, claimed to have been a part of the estate of William O. Martin, together with hire or interest.

The deed from Hoover presents a question whether, notwithstanding the absolute terms in which the estate is conveyed to Jerusha Jefcoat, a life estate in Elijah Jefcoat does not arise by way of a springing use. I pass by this enquiry, for the present, because

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with regard to the greater part of the *matter in controversy, I think that the complainants are not entitled to recover, even if it be conceded that Elijah Jefcoat, by virtue of his marital rights, took an absolute estate, as contended on behalf of the complainants.

It is the duty of executors and administrators to manage the trusts committed to them prudently, diligently and faithfully. It is essential that they be permitted to exercise a just and reasonable discretion with regard to doubtful claims. They are not bound to litigate every possible question of right; nor, if upon the best consideration and advice, they deem it inexpedient to incur the risks of litigation, are they to be held liable to make good every loss that may possibly ensue, and be placed in the perilous position of gratuitous insurers. If such were the rigor of the law, the estates of persons deceased would be commonly derelict, and widows and orphans would be deprived of the aid and protection which the law aims to bestow upon them.

Tried by this rule, the defendant is not found to have offended. He appears to have endeavored to discharge his duty honestly, faithfully, and under advice which he was bound to respect. The intestate himself had disclaimed title in the slaves. Can the administrator be blamed for acquiescing in that disclaimer? The children of the intestate derive their rights from him, and cannot complain of that act as an injury, which he himself by his own conduct had authorized. It would have been wrong for the defendant to do otherwise than as he did, in leaving

the possession of the slaves to the widow. Her possession, if her children were entitled to a share with her as tenants in common, was their possession and for their benefit. And on her second marriage, whatever possession her husband, Gabriel Sturkie, acquired, remained subject to the same trust. Up to the time, therefore, when the defendant proceeded to take possession of the slaves and sell them, he is not chargeable with any negligence or misconduct. And although it is unfortunate for him that he took possession of the slaves under the apprehension excited

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*by the decree touching the construction of Hoover's deed, yet his conduct clearly shews his honest intentions. The strongest proof he could give of such, was his voluntarily surrendering the slave, Jack, previously purchased by him, under the supposition that he was obtaining a good title, and charging himself with the value of Jack, as well as of the other slaves.

In the subsequent proceedings of the defendant there is nothing to be blamed. There is no evidence whatever to shew any want of diligence, or of earnest effort, in defending the actions of Trover. The defendant was defeated by a title against which he could not successfully contend. It may easily be conceived that the plaintiff, Gabriel Sturkie, brought his actions relying on the title under the deed of John Hoover, but on the trial defeated the defendant by evidence of adverse possession. After the defendant has, under compulsion of the law, paid these verdicts to Gabriel Sturkie, can the complainants, with any justice, call upon the defendant to pay them over again the same amount which has been wrested from him when he was struggling to the utmost to save it for them? I think not. With regard to the slaves, Dave (now in the defendant's possession), and Esther and Clarinda (now, according to the testimony, in the possession of Mrs. Wiley S. Jefcoat, or of William Knotts), and also with regard to Hector (as to which last there is no evidence whatever that the defendant had anything to do with his sale, or removal from the State), I agree with the commissioner in holding that the defendant is under no liability to account to the complainants, and to that extent the exceptions to the Commissioner's report are overruled. That report is very full, and can be referred to for any particulars in the history of this case not set forth in this decree.

But with regard to the slave, Jack, now in the possession of the defendant, Wiley J. Jefcoat, I am not prepared to give any decisive judgment, because the proper parties

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are not before me who are entitled to be heard before a final decree is pronounced concerning him.

It is, therefore, ordered and decreed, that

so much of the bill in this case as seeks an account from Wiley J. Jefcoat for the slaves Esther, Dave, Hector, and Clarinda, be dismissed, and that the bill be retained for further adjudication in regard to the slave, Jack; and that as to him, the complainants have leave to amend their bill, by making Gabriel Sturkie and his wife, Martha, defendants thereto, with all proper and necessary charges to assert the right of complainants to distributive shares of said slave, Jack, as tenants in common with the said Gabriel Sturkie and wife.

The plaintiffs also have leave, if so advised, to seek an account from Sturkie and wife of the money received by them, respectively, on the judgments which have been mentioned, and for the proceeds of any of the slaves sold by them, or either of them.

The complainants appealed on the grounds:

1. Because the slaves in question were the absolute property of the intestate, William O. Martin, and being in his possession at the time of his death, the defendant, as his administrator, was bound to take possession of them and administer them, and is liable to account to the complainants, the children of the intestate, for two-thirds of their values and hire, and interest thereon.

2. Because the defendant, in permitting Gabriel Sturkie to dispose of the slave Hector, without any effort on his part to prevent it, or to recover the said slave, and to retain possession of the slaves, Esther, Dave, and Clarinda, until he acquired a title to them under the statute of limitations, was guilty of such gross negligence, as should render him liable to the complainants out of his own estate.

3. Because the complainants' exceptions to the commissioner's report should have been sustained upon the grounds therein stated.

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*4. Because the defendant sold the slaves, Esther, Clarinda, Dave, and Jack, under an order of the Ordinary procured by him, without any necessity or sufficient reason, there being no debts against the intestate requiring it, whereby the complainants were deprived of their remedy against the specific property.

Fair, Boozer, for appellants.

Bauskett, Gregg, contra.

The opinion of the Court, by

DARGAN, Ch. On the death of Wm. O. Martin, in November, 1839, he had in his possession three slaves—Esther, Hector, and Jack. Two children of Esther—Dave and Clarinda—were born after Martin's death. Besides these negroes, the estate of the deceased was very small, not more than \$66. Wiley J. Jefcoat became the administrator, and duly administered the small fund which came into his hands, and there is no controversy about that.

The litigation relates to the negroes. The administrator, in the honest and confident belief that the negroes did not belong to his intestate, did not reduce them to his possession, or set up any claim to them. The negroes were, undoubtedly, the property of Wm. O. Martin. It will be appropriate, on this occasion, briefly to show in what manner, or by what title, Martin became possessed of them. He got them by his wife, Patsey Martin, who received them from her father, Elijah Jefcoat. The latter derived them under the deed of one Hoover, who, reserving to himself a life estate, conveyed the ancestors of the negroes in question to his daughter Jerusha, the wife of the said Elijah Jefcoat, in terms which he supposed would give his daughter a life estate, and at her death a life estate to Elijah Jefcoat, if he was the survivor, with a remainder, at his death, to the children of his daughter Jerusha, of whom Patsey, the wife of the in-

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testate, was one. This was the disposition which the donor intended, and thought he had accomplished. But the deed was couched in language that, after the termination of the donor's life estate, would give Jerusha Jefcoat an absolute estate, upon which the marital rights of her husband, Elijah Jefcoat, attached; investing him with an absolute estate. But the parties all thought differently, and acted in conformity with their construction. Elijah Jefcoat himself, believing that he had only a life estate in the negroes, and that after his death, his children by his first wife, Jerusha, would be entitled to the negroes, as purchasers, under the deed of Hoover, made a compromise with them, by which he was to retain three, and the rest were to be divided, presently, among the children of his wife, Jerusha. It was in this way that the intestate, in right of his wife, became possessed of the negroes in controversy, they being her share in the said division. This was in the year 1832. The intestate did not claim any right to the negroes. He said he had nothing to do with them. There was a great deal of evidence on this point, which impresses my mind with the conviction that William Martin, in his life time, and up to the day of his death, honestly believed that he had no right or title to the negroes, and disclaimed any such right. At the appraisement of the estate, old Mr. Elijah Jefcoat appeared and set up a claim to the negroes as his own, during his life, and after his death for his daughter, Mrs. Martin. It was also in proof, that it was understood not only in the family, but in the whole neighborhood, that these negroes were not Martin's, but that they belonged to his wife; with much more evidence to the same effect. Upon no proper construction of the deed of Hoover, could such an opinion be supported, particularly after the division. But there was much in the terms of Hoover's

deed, calculated to mislead the common, uninstructed mind, and by which one unlearned in the law might arrive at anything but the right construction. He consulted with the Ordinary, and was instructed by him to leave the negroes where he found them, and he told the administrator that he had con-

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sulted *with three of the most eminent men then at the bar, who gave it as their opinion that, under the Hoover deed, Elijah Jefcoat had a life estate in the negroes. Thus advised and instructed, the administrator forbore to include the negroes in his returns, or to set up any claim to them. He left the negroes where he found them, that is, in the possession of the widow of the intestate, who, in 1844, married one Gabriel Sturkie.

Jerusha Sturkie, one of the children of Jerusha Hoover, who had intermarried with Richard Sturkie, for some reason, was left out in the division of 1832. In 1850 Elijah Jefcoat was about to emigrate to Alabama, Richard Sturkie and wife, believing that they had an interest in the negroes by way of remainder under the deed of Hoover, to fall in on the death of Elijah Jefcoat, filed against him a bill, in the nature of a bill quia timet, asking for security that the negroes should not be removed, and for the usual remedy in such cases. This case, in 1852, came on to be heard before Chancellor Wardlaw, who decided "that upon the death of Hoover," (who had reserved to himself a life-estate in the negroes,) "the estate became absolute in Elijah Jefcoat." Then, for the first time, those parties became enlightened as to their true rights and interests under this deed and the partition. Then it occurred to the administrator that if Elijah Jefcoat was the absolute owner of the negroes, the division which he made in 1832 was valid, and could not be gainsaid.

The administrator now endeavored to retrieve his former error. He acted vigorously. He seized the negroes, that up to that time were in the possession of Gabriel Sturkie, returned them to the Ordinary; procured from that officer an order for their sale, and did actually sell them, charging himself in his accounts with the proceeds of the sale and returning the same to the Ordinary. In this sale he also included one of the negroes, which he had purchased at a sale made by the administrator of Benjamin Jefcoat, which shews in a strong point of view the integrity of his heart. At the sale, he bought one of the negroes himself and sold

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two to Wiley S. Jefcoat, *for fair prices, with which he charged himself, as has been stated. But his awakened energy was too late. Sturkie brought actions at law for the negroes which had been taken from him, and recovered verdicts for their full value. These verdicts with the costs of suit have been paid by the administrator.

This suit has been instituted by the children of defendants' intestate, or by some of them for an account of W. O. Martin's estate, and the object is to charge the administrator for the value of the negroes, which belonged to the estate of his intestate, and have been lost in the manner stated. The question for the Court is, whether under the circumstances he should be held accountable.

The negroes, as I have already said, were unquestionably the property of the intestate. The error of the defendant was in leaving them in the possession of Sturkie so long, that he acquired a title to them by adverse possession and the statute of limitations.

A great deal of discretion must necessarily be vested in executors and administrators, as to embarking in litigation on behalf of the estates they represent. Certainly, no legal obligation or rule obliges them to litigate for doubtful claims. If they litigate in good faith, they will be reimbursed for their expenses. If they do not litigate, in an attempt to make them liable for non-action, the question will be whether they acted in good faith. "An executor or administrator is not bound in all cases, and under all circumstances to litigate his testator's or intestate's title to goods found in his possession at the time of his death, but which are claimed by other persons. He is entitled to exercise his discretion on the question of property, and if he surrender the goods, he cannot be made liable for the value, except upon proof of negligence or fraud." *Chappell v. Brown*, 1 Bail. L. 528.

The error of this administrator consisted in leaving the negroes in the possession of Sturkie until he acquired a title by the statute of limitations. After he discovered the

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right of his intestate he acted with a great degree of energy. For his original error I think he is excusable. He did not take into his possession property, the title to which his intestate disclaimed. This disclaimer was in consonance with the general opinion of the neighborhood. He sought counsel from a quarter on which he might well suppose he could confidently rely. He was instructed by the Ordinary to let the negroes alone. The Ordinary professed to have founded his opinion upon the advice of three eminent men of the law. Indeed, if the rule which I have cited is not to be reversed, and the administrator is not to be made liable in all cases where the right to property in his intestate's possession at his death, is contested and he fails to bring or stand a suit, the defendant is to be excused. Not to hold him excusable would be to deny him any discretion. He committed an honest mistake. He acted throughout in good faith. He vigorously endeavored to retrieve his error, but failed. And this was done at a sacrifice of his own interest.

It is ordered and decreed, that the circuit decree be affirmed and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *130

*WILLIAM H. GARVIN and Others v. BENJ. F. INGRAM and Others.

(Columbia. May Term, 1858.)

[*Husband and Wife* ⚭48.]

A wife may, under the Act of 1795, indirectly convey her inheritance to her husband; that is, she may join her husband in conveying to a third person, who, by previous understanding, may immediately re-convey to the husband.

[Ed. Note.—Cited in *Oliver v. Grimbail*, 14 S. C. 569; *Glenn v. Glenn*, 21 S. C. 312.

For other cases, see *Husband and Wife*, Cent. Dig. § 243; Dec. Dig. ⚭48.]

Before Wardlaw, Ch., at Barnwell, February, 1857.

Every thing necessary to a full understanding of this case, may be found in the Circuit Decree, which is as follows:

Wardlaw, Ch. Lucy E. born Dunbar, married 1st, Patrick, who died intestate, leaving some estate of which his widow, Lucy, and two daughters, Caroline, who became the wife of W. W. Garvin, and Laura, who became the wife of J. J. Wood, were the distributees. 2nd, Minor, her overseer, who died without issue of the marriage and intestate, leaving her lands improved in value by his good management; and 3d, on July 15, 1847, B. F. Ingram, her overseer, at which date she was well advanced in years, and he a very young man. This last marriage was distasteful to her daughters, but it is admitted that Ingram is a respectable and worthy man, and that he uniformly treated his wife with courtesy and kindness.

At the date of this marriage, she was seized of about 5,000 acres of land, and afterwards, on February 2, 1848, her husband and herself joined in executing a release of 2,035 acres of this land to her brother, George R. Dunbar, and ten days after, she formally renounced her inheritance, and on May 31, 1848, the release and renunciation were duly recorded. On July 1, 1848, Dunbar recon-

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veyed the land to B. F. Ingram, *in fee, and the conveyance was recorded in the month of October next, succeeding. Both of these deeds express a valuable consideration of \$2,000, but it is admitted that in neither instance was any money paid or promised, and that although the formalities prescribed by the Act of 1795, 5 Stat. 256-7, were strictly observed, the whole purpose of the deeds was to vest the fee of the land in the husband by gift of the wife; still, that whatever may be the legal presumption as to marital

coercion, the wife acted throughout from the dictates of her own will. Lucy E. Ingram died February 19, 1856, intestate, seized undisputedly of 2,400 acres of land, subject to distribution among her distributees, her said husband, B. F. Ingram, three children of her pre-deceased daughter, Caroline Garvin, and eight children of her daughter, Laura Wood; the husband of said Laura pre-deceasing, by a few days, the death of her mother, and Laura, although surviving her mother, dying a few days after the date of her mother's death.

The bill is for partition of Lucy Ingram's lands, and it is undisputed that B. F. Ingram is entitled in the 2,400 acres to one-third, the children of Caroline Garvin among them to one-third, and the children of Laura Wood to the remaining third among them; and the question in the case submitted for judgment is, whether these distributees be entitled in the same proportions, to the 2,035 acres conveyed by the deeds aforesaid, or B. F. Ingram be exclusively entitled to this tract; in other words, whether a wife, by pursuing the forms of the Act of 1795, can give her real estate to her husband.

This question was ably discussed by the counsel on both sides, yet my original impression remains unshaken, that the fee in the tract in controversy was well conveyed to the husband, conceding to the fullest extent the propositions, that by marriage the wife loses to a great extent her free agency, and becomes subject to the dominion of her husband; that she cannot contract with her husband or other person, except to such extent as some

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deed of settlement may empower her to *deal with her separate estate as a feme sole, or the Legislature may authorize her to deal with her estate generally; that her executory agreement concerning her estate, even if lawful, cannot be usually enforced against her when she becomes discover; that her dealings with her husband are watched with jealous suspicion; and these were the general topics most strongly urged for the plaintiff, and others in the same interest. The inference is not consequential, that she cannot convey to her husband, if they unite in pursuing the mode prescribed by the Legislature. Her disability by common law has been removed to such extent as the Legislature has chosen to enact. Even in England, the fatherland from which we have derived most of our institutions, a wife is not precluded from conveying or encumbering her inheritance for the benefit of her husband, where her deliberate purpose to this end has been duly manifested. Upon marriage the husband's real estate continues to belong to him exclusively, subject to a contingent right of dower, and the wife has no power to alien or encumber any part thereof; in her unsettled real estate, the wife, during coverture, ceases to have control or disposition, except with the husband's consent; and

he, as lord of the house, acquires dominion and right to charge or alien, except as to her ultimate fee, where this by statute or custom is reserved to her. Her power over her estate is large where she co-operates with her husband considerably and freely—very slight without his consent. By joining her husband in levying a fine, or suffering a common recovery, the law allows her to pass her estate absolutely for his benefit, or to charge it as security for his debts, provided her desire to do so be deliberately formed, and be expressed to a Court of Justice, upon private examination, after proper information to her of her rights, and of the effect of her proposed act: 1 *Rop. Hus. & W.* 139, 2 *Vent.* 30, 12 *Co.* 123, 124, 10 *Co.*, 43 a, 10 *Ves.* 587. Our older acts of conveyancing, of 1731 and 1785, and, to some extent, our Act of 1795, have been judicially treated as legislative substitutes for fines—

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Gough v. Walker, 1 *N. & *McC.* 469; *Kottman v. Ayer*, 1 *Strob. L.* 552. Passing by our older Acts, as substantially abrogated, the Act of 1795, (while it provides, as safeguards, for the wife's freedom of action, that she shall join her husband in releasing her inheritance, that she shall, after the lapse of a week at least, express her free consent to the conveyance, upon private examination before a judge or magistrate of the vicinage, and that the conveyance shall not be complete until recorded,) no longer requires that the joinder and voluntary action of the wife shall be matters of record in a Court of Justice, according to the procedure in fines and recoveries. The general design of the Legislature, in this enactment, seems to be, while protecting her from actual coercion of the husband, to make more facile the means by which she may, with their common consent, dispose of her estate, or in other terms, to increase her opportunities of exhibiting intelligence and will in the disposal of her estate, and not to diminish her previous power when demanded by affection and duty, of coming to the aid of the head of the household with her own inheritance. The Act says, that any married woman, of mature years, entitled to inheritable real estate, who may be desirous to join her husband in conveying the same "to any other person," may effect her purpose by pursuing the forms prescribed. It is not required that the conveyance be on valuable consideration, but it is argued that as the conveyance must be to a third person, not one of the grantors, the purpose to benefit the husband is unlawful, and annuls a conveyance nominally to a third person, really for the husband's profit. This conclusion is illogical. The Act makes no change of the common law inhibiting one from conveying to himself, *Fryerson v. Fryerson*, 3 *Strob. L.* 461, but it authorizes, or at least does not inhibit the power of a wife to bestow her estate upon her husband indirectly. In many cases it is politic and dutiful;

that such power should be exercised. I trust that it may never be considered improper for a wife to contribute, by all lawful means, to the success of her husband's enterprises. In

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the present instance the conveyance of husband and wife, was to another person, as required by the act, the brother of the wife under natural obligation to maintain the interest of his sister. I loath the motion of imposing upon a wife, any restriction on her desire to aid and cherish her husband, which common law and statute have not imposed. It is clear that she may mortgage her estate for his convenience, and on like reasoning she may surrender her ultimate interest in an estate to which she has a present title in freehold. Dr. Blackstone remarks, 2 Bl. Com. 88: that donees of fees conditional were careful to alien the estate as soon as they had performed the condition of having issue, and afterwards re-purchased the estate to enable it to descend to heirs general by the common law, and Judge Evans, in *Kottman v. Ayer*, 1 Strob. L. 570, says: "I have known more than one case where the forms of law (of 1795) have been observed merely to invest the husband with the fee of his wife's land, by a re-conveyance from a pretended purchaser." Judge Evans expresses no condemnation of this practice, on the contrary he proceeds to demonstrate the error of his opinion on circuit, that the wife, on her private examination before a magistrate, was required to say that her conveyance was bona fide, and not pretensive, a real sale and not a mere color to transfer her inheritance, and, with the consent of his brethren, adjudges that bona fide execution of the instrument in the act, truly means previous execution for at least a week.

Without further pursuing an argument by no means exhausted, I announce my opinion that B. F. Ingram is absolutely entitled to the 2,035 acres conveyed to him.

It is ordered and decreed that a writ of partition be issued to partition the 2,400 acres, of which Lucy Ingram died seized, allotting one-third to B. F. Ingram, one-third among the children of Caroline Garvin, and one-third among the children of Laura Wood. Survey and plats may be necessary, but this is within the discretion of the commissioners of partition.

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*It is further ordered, that the costs of this litigation be paid from the lands ordered for partition, by the parties proportionately to their interests.

The complainant appealed, on the ground that, by a proper construction of the A. A. 1795, the wife cannot renounce her inheritance to her husband, and, therefore, the children of Caroline Garvin and Laura Wood take the same interest in the 2,025 that they do in the 2,400 acres, and the writ of par-

tion should have been ordered accordingly, for a partition of both tracts.

A. P. Aldrich for appellant.
J. T. Aldrich, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. It is very difficult to add anything to the reasoning of the circuit decree, or the authorities there cited. The Act of 1795 was not intended to violate any principle of the common law. In *Durant v. Ritchie*, 4 Mason, 45 [Fed. Cas. No. 4,190], the subject is discussed by Mr. Justice Story with his usual ability and diligence of investigation. After noticing that, by the common law, the only mode by which a wife could make a valid conveyance of her real estate, was by fine or common recovery, he states that the reason of her general disability may have arisen from the artificial rule that her separate existence is merged or suspended during the coverture; or (as he says) what is more probable, from the fear that her acts, during the coverture, might be exacted by the influence or compulsion of the husband. The exception introduced in favor of fines and common recoveries, countenances the latter supposition. For though, in their origin, these were presumed to be adversary suits, yet the principal reason assigned in the books for their conclusiveness upon the estate of the wife, is that her voluntary assent is ascertained by the secret examination of the Court." Again, at p. 61. "the feme coverte is not disqualified by the common law

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from conveying; but her conveyance is required to be by some solemn act of record, whereby her consent, upon examination, may be known to be free and voluntary." In reply to the objection that, by the common law, the husband cannot convey to the wife, or the wife to the husband, he says: In respect to the common law, the unity of persons, which arises from the relation of husband and wife, certainly prohibits a direct and immediate conveyance from one to the other from having any legal effect. But either may, at the common law, indirectly convey to the other through the medium of a trustee, or by any conveyance which operates a transmutation of possession. He instances among others, the case of a fine, "where the husband and wife may declare the uses of the wife's estate, either to the husband, or husband and wife, as well as to any third person. In short, they have as effectual power to declare the uses in such case as any third person. So that (he adds.) so far as the objection rests on a general disability by the common law, it is not sustained, for it does not exist. The estate of the feme coverte, whenever it can be conveyed by her at all, can be conveyed to any uses whatever, and as well to the use of the husband as to any other use." Such was the condition of the common law in respect to

to efficacy of a fine. The first legislative enactment in South Carolina was the Act of 1731, 3 Stat. 303, which recognizes a pre-existing usage in the province, and declares that conveyances, by husband and wife, of the wife's estate, certified by the Chief Justice as to the separate examination, &c., and recorded in the office of Pleas, "shall be deemed as effectual and valid in the law, to all intents and purposes whatsoever as any fine passed in due form of law in his Majesty's Court of Pleas, at Westminster, for conveying of lands in Great Britain." The Act of 1767, (7 Stat. 196,) did no more than to extend the authority of the Chief Justice to any of the assistant Judges, and thus stood the law until the Act of 1795, (5 Stat. 257.) In the meantime, so far as the books shed any light upon the subject, the practice

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of the country and *the understanding of the profession had been uniform. *Lloyd v. Inglis*, 1 Dess. 333, was a case of great interest, in which the most able and experienced counsel were marshalled on either side. It was twice heard before the Chancellors in 1793. Alexander Inglis "being desirous of having the real estate of his wife (formerly Mary Deas) vested in himself," conveyances were drawn from Inglis and wife, to John Lloyd, and from Lloyd back again to said Inglis, in order so to vest the state in Inglis. Sometime afterwards Mrs. Inglis died, and, at no distant period, her husband followed her. The bill was filed by the children of Mrs. Inglis, who were represented by General Pinckney and Thomas Parker, Esq. The allegation was that the conveyances were intended to have been in trust for the benefit of the children, and the claim was successfully opposed by the creditors of Inglis, represented by Mr. Pringle and Mr. Rutledge. But if the deeds between Inglis and wife and Lloyd had not been as valid as a fine passed in the Courts of Westminster, the right of the children to the lands was patent and irresistible. So, in the recent case of *Smith v. Hilliard*, 3 Strob. Eq. 211. Isham Williams and wife, by lease and release, twenty-seventh and twenty-eighth September, 1793, conveyed her real estate to Thomas Rivers. On third October, Mrs. Williams regularly renounced her inheritance, which was duly certified and recorded. Rivers reconveyed to Williams, reciting the purposes of the parties. These papers were all prepared by General Pinckney. It was adjudged by the Court of Appeals that "Isham Williams had a fee simple estate in the wharf described in the pleadings." In that case it is true that the argument turned upon the estate which Mrs. Williams took under her father, Edward Shrewsbury's will, and which was adjudged to be a fee simple; but, neither at the bar nor in the several opinions delivered, was any doubt expressed as to the

effect of the deeds in vesting the wife's real estate in her husband. Then the Act of 1795 purports, by its title, to provide a mode of

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facilitating the *conveyance of real estate. The preamble recites that the conveyance by lease and release is expensive, and is found by many of the inhabitants of this State to be very inconvenient; for remedy whereof, a more simple mode is prescribed and declared to be effectual. By the same Act a manner of barring the inheritance of a feme covert is prescribed. Every precaution is adopted for securing her separate examination and affording her time for reflection, as well as for giving publicity to the transaction, while, at the same time, the conveyance of her interest is facilitated by extending to Justices of the Quorum the authority to take her acknowledgment, &c. This is the whole purpose and effect of the Act of 1795. By the common law she and her husband might, by fine, declare the uses of her estate either to her husband, or to any third person. The unity of their persons prohibits a direct conveyance from one to the other; but, as Mr. Justice Story remarks, either may, at the common law, indirectly convey to the other through the medium of a trustee. No part of the Act of 1795 discountenances such proceeding, or intimates any restriction on the power of the wife, or incapacity on the part of the husband.

It is ordered and decreed that the appeal be dismissed.

DARGAN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *139

**L. B. HANKS v. JAMES DUNLAP.*

(Columbia. May Term, 1858.)

[*Bills and Notes* ⇐211.]

The payee indorsed the note in blank and delivered it to B., his agent, to be discounted in Bank. B. owed W. for money lent to game with, and in consideration thereof, transferred the note to W. who, before it fell due, transferred it to D. one of the drawers, for value, and without notice: *Held*, that D. was entitled to the note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 500; Dec. Dig. ⇐211.]

Before Wardlaw, Ch., at Kershaw, June, 1856.

Wardlaw, Ch. In November, 1854, the plaintiff, a merchant at Sumterville, endorsed in blank and delivered to Andrew G. Baskin an attorney at law, then residing in Camden, to be discounted in the Branch Bank of the State, a promissory note in the following terms: "Camden, S. C., April 18, 1854, \$213.50 twelve months after date, we or either of us promise to pay L. B. Hanks, or order, at the Bank of Camden, S. C., two hundred

and thirteen fifty one-hundredths dollars, with interest from date for value received. J. F. Southerland, James Dunlap." This note had been accepted by plaintiff in satisfaction of two several judgments obtained by him through the attorneyship of Baskin against one D. S. Sargent. A few days after obtaining possession of the note, Baskin offered it as his own to Southerland for redemption at the price of \$200 00, but Southerland, not having the money on hand, declined to pay before the maturity of the note; and as defendant states in his answer, Baskin offered it to him on like terms and with like result. In the course of November, 1854, Baskin borrowed, for the purpose of gaming at faro, the sum of \$675 00 from one Watson, who was also addicted to gambling

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and lost the money at the *game, some of it in the presence of Watson. The latter, Watson, held the money as the price of a negro he had sold for J. J. Dunlap; a week afterwards, on representation of this fact to Baskin, Baskin delivered to Watson the note in question; a due bill on defendant James Dunlap; and perhaps other demands, towards reimbursement of the loan, leaving a sum unpaid. Early in January, 1855, Watson delivered the note to James Dunlap, who was the agent of J. J. Dunlap, in part payment of his debt to J. J. Dunlap; and James Dunlap advanced the amount of the note upon a demand in the Bank, which was pressing against J. J. Dunlap, and took the note as his own. In December, 1854, Baskin became utterly insolvent from gambling; and about the end of January, 1855, he and Watson left Camden as bankrupts. Until a time within a few days of his leaving Camden, notwithstanding he was known generally to be a gambler, Baskin was reputed to be efficient and punctual as a collecting attorney and in ordinary matters of business.

The plaintiff, Hanks, seeks by this petition to compel the payment of this note from the defendant, James Dunlap. Baskin and Southerland are among the witnesses. In his answer the defendant denies all notice or suspicion; that at the time of the transfer of the note to Watson and himself, Baskin was not the bona fide owner of the note, and he claims the position of an innocent endorsee for valuable consideration of a note endorsed and transferred to him before maturity.

His denial of notice of Baskin's fraud is not rebutted by the evidence.

Repayment of the money lent by Watson to Baskin for the illegal purpose of gaming could not be enforced, and a note or other security given by B. to W. for the loan would be void in the hands of an innocent holder, *Mordecai v. Dawkins*, 9 Rich. 262. But if B. has repaid the loan, neither he nor any one in his right can recapture the money by

reason of the unlawful consideration for the

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loan. The note in suit is *not infected with any unlawful consideration, and the only question is whether the delivery of it to an innocent holder before it was due, endorsed in blank, for value, by one who obtained possession of it with the assent of the owner, passes the title of the instrument. The unauthorized delivery of notes payable to bearer, or of notes payable to order endorsed in blank, gave a bona fide holder, ignorant that the person transferring has no right to pass the note, or is guilty of any breach of trust in doing so, complete right to the instruments against all other parties, *Byles on Bills*, 24—112. It is no defence in a suit by such a holder that the bill or note was accepted for a gambling debt; (*Edwards v. Dick*, 4 Barn. and Ald. 212) nor that it was obtained from the payee fraudulently, *Sims v. Stewart*, 1 Hill, 39 [26 Am. Dec. 155]; *Peacock v. Rhodes* Doug. 632.

A distinction is made in some of the cases concerning the valuable consideration given by the holder, between actual payment of money or other thing of value at the time of transfer and the extinction of a pre-existing liability on the part of him who transferred, *Codrington v. Bay*, 20 Johns. 637; but this distinction is not to be much pressed in any case, and is without application here, for the defendant paid in money for the transfer of the note to him. Defendant has the law with him and equal equity. It is ordered and decreed that the petition be dismissed.

The complainant appealed on the grounds:

1. That the facts in evidence were sufficient to establish the presumption of notice to the defendant, that the note was the property of complainant, and likewise that it had been received by Watson in remuneration of money knowingly lent to game with.

2. That the consideration upon which defendant received the note, was not such as to entitle him to the position of having paid valuable consideration for the same.

3. That from the facts of the case, the de-

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fendant is not entitled to the position of holder for valuable consideration, without notice against the equities of the complainant.

4. That the laws against gaming invalidated the possession and right of the defendant.

Mayrant, for appellant.

Shannon, contra.

PER CURIAM. This Court concurs in the decree of the Circuit Court, which is hereby affirmed and the appeal dismissed.

DUNKIN, DARGAN and WARDLAW, CC.
Appeal dismissed.

10 Rich. Eq. *143

*WILLIAM KNOTTS v. JOEL BUTLER,
Adm'r. and Others.

(Columbia. May Term, 1858.)

[Guaranty \hookrightarrow 24, 105.]

A guaranty given to protect future liabilities, and containing a stipulation that it may be revoked on written notice, is not revoked by the death of the guarantor, nor by the neglect of the creditor to give notice to the administrator.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 27, 115; Dec. Dig. \hookrightarrow 24, 105.]

[Limitation of Actions \hookrightarrow 49.]

The cause of action of one surety against his co-surety arises only when he has paid the debt; and the Statute of Limitation commences to run only from that time.

[Ed. Note.—Cited in McCrady v. Jones, 44 S. C. 411, 22 S. E. 414.]

For other cases, see Limitation of Actions, Cent. Dig. § 271; Dec. Dig. \hookrightarrow 49.]

Before Wardlaw, Ch., at Orangeburg, February, 1857.

Wardlaw, Ch. In 1847, and for some time afterwards, Sanders Glover, Sanders L. Glover, and William R. Davis, conducted the business of factors, in the city of Charleston, as partners, under the style of Glovers & Davis. For the credit and accommodation of the firm, some of their friends in the country signed the following guaranty:

"To the President and Directors of the Bank of the State of South Carolina:

The subscribers hereby guarantee, jointly and severally, the payment of all drafts or notes made, or to be made, by Messrs. Glovers & Davis, factors, of Charleston, and of all drafts accepted by them, which may be discounted by you; and we declare this to be a continuing guaranty, and that it is to remain of force till revoked by written notice to the President or Cashier of said bank; and we waive notice of the acceptance of this guaranty. This guaranty to take effect from the date hereof, and our liability thereunder not to exceed five thousand dollars.

Charles Glover,
William Knotts,
V. D. V. Jamison,
James Grimes."

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*The guaranty is undated, except by a pencil mark, September, 1847; and it is conceded that it was delivered to the Bank about that time.

In August and September, 1852, Glovers & Davis made five notes for the aggregate sum of \$19,300, payable at the said Bank of the State, which were discounted by said Bank, and not being paid at maturity were protested for non-payment.

On February 9th, 1854, the Bank brought an action of assumpsit against the plaintiff, Knotts, in the Court of Common Pleas for Orangeburg, for recovery of so much of said unpaid notes as was protected by the guaranty; and at Spring Term, 1856, of said

Court, recovered judgment against him for \$5,000, with interest from October 1, 1852, and costs. On January 12, 1857, plaintiff Knotts satisfied this judgment in full, viz.: \$5,752.40.

Charles Glover, one of the guarantors, died intestate, February 11, 1848, and administration of his estate was committed to the defendant, Joel Butler, April 6, 1848, who published the proper notice for twelve months to creditors to present their demands. He avers that he had no notice of this guaranty until the commencement of the suit against Knotts. The Bank presented no claim against intestate's estate, and gave no notice to the administrator.

Glovers & Davis are insolvent; and so also are two of the guarantors, V. D. V. Jamison and James Grimes. The estate of Charles Glover is ample, and much of it remains undistributed in the hands of the administrator.

Plaintiff filed this bill January 12, 1857, against the administrator of Charles Glover, and against Jamison and Grimes, to compel contribution for his payment in extinguishment of their common guaranty.

Defence is made only in behalf of Charles Glover's estate. By the express terms of the guaranty, it was continuing as to existing and future drafts and notes of Glovers & Davis, discounted by the Bank, until revoked

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ed in a special mode by writ*ten notice to the President or Cashier. The liability of the guarantors was limited only as to the amount. The statute of limitations, which is pleaded, but not urged, is inapplicable between the Bank and the guarantors, and there is no pretence of improper delay on the part of the plaintiff in seeking a remedy. It is supposed, but without reason, that he is in some fault for not giving notice to the administrator of the liability of intestate's estate; but he and intestate were equal joint contractors, bound by the same law and equities, and without any special duty on his part to intestate. Until he discharged the guaranty, his laches could not begin.

It is urged, however, that the death of intestate, more than four years before the debt to the Bank protected by the guaranty was created, and the notice of administrator to creditors, are together equivalent to the special revocation of the guaranty stipulated in the instrument, as equity looks to substance and not form; consequently that the liability of intestate to the Bank and to the plaintiff had ceased. The notice to creditors required by our Act of 1789, is intended for the protection of an administrator who proceeds to make regular distribution of the estate, in ignorance of some dormant debts of his intestate; but until he has made distribution, and so long as he retains assets for the satisfaction of all debts, it is quite immaterial

to creditors and to himself whether or not he may be informed of particular claims, not brought specially to his attention within a year. An administrator becomes a debtor by relation and not by his own contract, and does not necessarily know, nor is bound to know, all demands created by his intestate; and this affords an adequate reason why he should not suffer in his private estate from the laches of creditors in bringing forward their claims, but where the reason is inapplicable, the unnecessary protection ceases. Here there was no debt, no breach of the guaranty, at the death of the intestate. Intestate contracted for an indefinite space of time to indemnify the Bank in discounting certain drafts and notes; and no principle requires that his contract should terminate

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*with his life. The guaranty is not the mere delegation of an agency to the Bank to deal, instead of Charles Glover, as principal, with Glovers & Davis in certain matters, which would cease at the principal's death; but it is a contract to indemnify against certain acts of third persons, and to assume a future contingent liability, if these acts be done. What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked, how long shall such a guaranty continue in force? and the answer is, until it be ended according to its terms. The administrator on whom the liability devolved, might have given the written notice to the President or Cashier, prescribed by the instrument. I am of opinion that the plaintiff is entitled to contribution from the defendants; and that the case is governed by the doctrines of McKenna v. George, 2 Rich. Eq. 15. As to the costs of the law case, as there is no evidence that Knotts defended except for his own accommodation, or of any agreement on the subject, or of any benefit from the defence to the guarantors, plaintiff is not entitled to contribution on that score.

It is adjudged and decreed, that the plaintiff, William Knotts, recover from the defendant, Joel Butler, administrator, one moiety of the sum paid by the plaintiff in extinguishment of the guaranty, with interest from January 12, 1857. It is further adjudged that a lien be created on the estates of V. D. V. Jamison and James Grimes, respectively, for their equal shares in liability under said guaranty; and it is ordered that, if when the defendant, Butler, as administrator, shall have paid said moiety, the said defendant and the said plaintiff may have execution against said Jamison and Grimes, to compel contribution; care being taken that actual contributions be kept equal, and that no party be exempt from one-fourth part of the sum covered by the guaranty.

It is further ordered, that the parties have

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leave to apply, at *the foot of this decree, for further orders in execution of the decree.

The defendant, Joel Butler, appealed:

1. Because it was the right of each of the several guarantors to end his own liability at any time by giving written notice to the President or Cashier of the Bank, and it is submitted that the death of Charles Glover, the defendant's intestate, in February, 1848, more than four years before any liability under the said guaranty had attached, and public written notice by his administrator to the creditors of the said Charles Glover to render their demands, were in substance equivalent to the notice required by the said guaranty, and released the estate of the said Charles Glover from future responsibilities.

2. Because, if the death of the said Charles Glover, and the subsequent call on his creditors by his administrator, were not sufficient to discharge his estate, then his death destroyed the equality of rights and liabilities which the said guaranty contemplated, and put it in the power of the surviving guarantors, by releasing themselves, to throw the entire responsibility on the estate of the said Charles Glover.

3. Because, if the obligation of the guaranty continued and followed the estate of the said Charles Glover after his death, the means provided by the said guaranty of avoiding them, was the right of his administrator; it is, therefore, submitted that the failure of the Bank to give him notice of the existence and nature of his intestate's obligation, and of the important right therein reserved to him, released his estate.

4. Because, if the Bank could not have recovered from the estate of the said Charles Glover in January, 1857, when the complainant [paid the amount for which he seeks contribution, the complainant] can have no right against the estate of the said Charles Glover, for he has removed from it no common burthen nor conferred on it any benefit.

De Treville, for appellant.

Bauskett, contra.

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*The opinion of the Court was delivered by

DUNKIN, Ch. All the grounds of appeal, except the last, seem sufficiently answered by the decree of the Chancellor. The fourth and last ground is founded on a misapprehension. The implied contract for contribution between co-sureties is entirely different from the contract between the creditor and the principal debtor, or the creditor and the sureties. As between the creditor and a surety the liability may be discharged, and yet the right to contribution against the same surety on the part of his co-sureties may re-

main. This is well illustrated by Lord Eldon in *Ex parte Gifford*, 6 Ves. 805.

The right, of the co-surety to contribution is not founded upon any original contract; but arises out of a principle of equity that, when one surety has paid the debt of the principal for which all were equally bound, he shall have a right to call upon his co-sureties to re-imburse him for what he has paid beyond his proportionate share. A question has sometimes arisen whether the surety may call on his co-sureties before he has paid the entire debt, but no such question is here presented. In *Davies v. Humphreys*, 6 M. and W. 152, the subject is fully discussed by Baron Parke, and it is there ruled that the cause of action of the surety against his co-surety, arises, not when the cause of action of the creditor against the principal of sureties arises, but when the surety has paid the debt, or more than his proportion thereof, and that the Statute of Limitations, as between him and his co-sureties, commences to run from that time. In this case, Knotts, the plaintiff, filed his bill for contribution on the same day that he paid the debt to the Bank.

It is ordered and decreed that the appeal be dismissed.

DARGAN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *149

*JOSEPH M. HARPER v. DAVID M. BARSH and Others.

(Columbia. May Term, 1858.)

[*Mortgages* ⚭489.]

In a bill to foreclose a mortgage given to secure the payment of a bond, the plaintiff cannot recover beyond the penalty of the bond, although the principal and interest should largely exceed it.

[Ed. Note.—Cited in *Ellis v. Sanders*, 34 S. C. 240, 13 S. E. 417.

For other cases, see *Mortgages*, Cent. Dig. § 1426; Dec. Dig. ⚭489.]

[*Mortgages* ⚭58, 171.]

A mortgage with only one subscribing witness is void as a legal mortgage, and is not such an instrument the recording of which will raise the presumption of notice to a purchaser from the mortgagor.

[Ed. Note.—Cited in *Lynch v. Hancock*, 14 S. C. 89; *Williams & Co. v. Paysinger*, 15 S. C. 174; *Bredenberg v. Landrum*, 32 S. C. 223, 10 S. E. 956; *Arthur v. Screven*, 39 S. C. 80, 82, 17 S. E. 640.

For other cases, see *Mortgages*, Cent. Dig. §§ 153, 402; Dec. Dig. ⚭58, 171.]

[*Mortgages* ⚭30.]

[Cited in *Hutzler Bros. v. Phillips*, 26 S. C. 148, 1 S. E. 502, 4 Am. St. Rep. 687; *Parker v. Carolina Savings Bank*, 53 S. C. 584, 596, 31 S. E. 673, 69 Am. St. Rep. 888, to the point that the mere deposit of title deeds as security does not create an equitable mortgage.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 59; Dec. Dig. ⚭30.]

Before Wardlaw, Ch., at Orangeburg, February, 1857.

Wardlaw, Ch. This is a bill for the foreclosure of a mortgage of lands, and it was filed January 11, 1856.

On January 14, 1833, David W. Barsh, of Orangeburg, executed a bond to Catherine M. Barsh, of Columbia, in the penalty of \$4,742.21½, conditioned for the payment of \$790.45 on January 1, 1837, the like sum on January 1, 1841, and the like sum on January 1, 1845, with interest from the date, on the whole, payable annually; and, to secure the payment, the obligor, on February 14, 1833, executed to the obligee a mortgage of two adjoining tracts of land in St. Mathew's parish, one granted to Moses Thompson, October 7, 1755, for 350 acres, and the other granted to John Wooten, November 28, 1771, for 200 acres. This mortgage was attested by one witness only, and was recorded in the Register's office for Orangeburg, November 23, 1833.

On November 19, 1834, the said Catherine M. Barsh, in contemplation of intermarriage, shortly afterwards had, with Abner Lewis Hammond, settled and assured to David W. Barsh, as trustee, for her separate use, (with

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certain limita*tions over,) certain negroes, and \$1,500 of the money secured by said bond. This settlement was recorded in the office of the Secretary of State, at Columbia, February 10, 1835, but it has not been recorded in the Register's office.

On November 18, 1834, credits were indorsed on the bond for \$871.35 of the principal, and for all the interest to January 1, 1835. No subsequent payment appears to have been made.

On November 19, 1834, Catherine M. Barsh, by indorsement under seal, assigned to David W. Barsh \$1,500, the balance due on said bond in trust for her benefit, "agreeably to the terms, uses, trusts and conditions contained" in the marriage settlement that day executed by her, Hammond and Barsh.

On February 2, 1854, Catherine M. Hammond, in pursuance of a power reserved in the settlement, substituted the plaintiff, Joseph M. Harper, as her trustee, in place of the former trustee.

By deed, executed December 10, 1834, David W. Barsh conveyed the said two tracts of land in fee simple to Joel Butler, for the recited consideration of \$2,500. This conveyance was recorded in the Register's office for Orangeburg, January 1, 1838. Joel Butler has been in the actual, exclusive and adverse possession of the land ever since the date of his conveyance, more than twenty-one years before the filing of the bill.

The bond and mortgage were placed in the hands of Mr. Bellinger, August 12, 1847, "on consideration," and on May 31, 1853, he presented the claim arising from them to

Butler, and requested him to confer with counsel on the subject.

David W. Barsh has been insolvent for several years, and the bill is taken pro confesso against him.

The marriage settlement is invalid against third persons, (generally,) for lack of recording in the Register's office, (*Barsh v. Riols*, 6 Rich. 162,) and it is used in the case only to show that the office of trustee has been reg-

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ularly conferred *on the plaintiff. For this purpose, and as to the parties to it, it is efficacious.

Joel Butler, in his answer, denies actual notice of the mortgage when he accepted a conveyance and entered into possession, and insists that the recording more than six months after its execution, of a mortgage of land not attested by two witnesses, is insufficient to raise the implication of notice to him. He claims to be a bona fide purchaser for value, and he relies upon the lapse of more than twenty years both to fortify his possession and to raise the presumption of satisfaction of the bond.

The plaintiff objects that the defence of bona fide purchaser is not well pleaded, because the answer does not allege payment of the purchase money before notice. It is certainly a requisite of this defence, that notice before payment of the purchase money should be denied; and in good pleading all the requisites of the defence should be set forth with convenient certainty, and not rest in intendment or vague statements—*Cummings v. Coleman*, 7 Rich. Eq. 520 [62 Am. Dec. 402]. Still the same exactness of averment may not be indispensable when the defence is corroborated by lapse of time as when it stands alone. Here the defendant avers that Barsh, for a valuable consideration by him received, duly granted and conveyed to this defendant, December 10, 1834, the tract of land, etc., and defendant went into immediate possession, and at the execution of the conveyance was not advised of the existence of any lien by way of mortgage; on the contrary, was induced by Barsh to believe no incumbrance existed, etc.; and that defendant purchased the premises for a valuable and bona fide consideration. Considering the defendant's long possession, and that the plaintiff could not pretend any surprise, these averments may be treated as substantially including the allegation supposed to be omitted. The payment of the purchase money, at the time of taking possession, must be presumed from defendant's long possession. The title of the plaintiff is of that equitable character to which the plea is

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applicable. *But after all, this equivocal defence may be waived, and the judgment rested on other grounds.

If there were not another ground which is more satisfactory to me, the defence would

be sustained, for the reason, that from the long possession of the defendant, not disturbed by any demand of payment from him, and without any actual payment, by any person, of any part of the bond during the whole term, the presumption of satisfaction of the bond must be deduced. And this presumption would arise whether the defendant had actual or implied notice of the bond or not. Several cases in our courts, *Thayer v. Cramer*, 1 McC. Eq. 395; *Nixon v. Bynum*, 1 Bail, 148; *Smith & Cuttino v. Osborne*, 1 Hill Eq. 342; *Wright v. Eaves*, 5 Rich. Eq. 81, have settled that the alienee of the mortgagor with notice of the mortgage, cannot protect himself by his possession under the statute of limitations, nor perhaps under the presumption from lapse of time, so long as the mortgage debt, by partial payments, or other equivalent circumstances, is kept subsisting. But all of these cases imply that the presumption of satisfaction of the debt, from lapse of time, must be applied where the continuing efficacy of the bond has not been exhibited for twenty years. See, also, *Drayton v. Marshall*, Rice Eq. 373 [33 Am. Dec. 84]; *Sims v. Autery*, 4 Strob. Eq. 117; *Tucker v. Hunt*, 6 Rich. Eq. 189, 193; 4 Kent C. 189; *Giles v. Barremore*, 5 Jno. C. 552. No circumstance appears in this case adequate to rebut the presumption.

Lastly, I entertain the opinion firmly that the defence of Butler must prevail, that during his long possession of the land before suit, he had no notice of the debt with lien claimed by the plaintiff. This defendant had no actual notice; and recording of a mortgage incomplete in execution, for lack of proper attestation, did not fix him with implied notice, so as to impose on him the character of trustee for the mortgagee. As I have elsewhere said, *Cummings v. Coleman*, 7 Rich. Eq. 519 [62 Am. Dec. 402], "where one has notice of an instrument of conveyance, void for incompleteness of execution, for

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example, of a devise *of lands without attesting witnesses, he may safely treat the instrument as legally invalid, and in disregard of it may make a contract concerning the subject." Is, then, a mortgage of land without two witnesses, a valid and complete instrument, which may be properly recorded with the legal results of recording? An ordinary mortgage, as the present purports to be, is a conveyance in fee defeasible on the performance of a subsequent condition, the payment of the debt, 2 Jacob L. D. 575, 7, 8, Coote on Mort. 8. Our Act of 1795, to facilitate the conveyance of real estates, 5 Stat. 255, prescribes a form of release, which shall be valid and effectual, to convey the fee, "if the same shall be executed in the presence of, and be subscribed by, two or more credible witnesses." It is provided in the Act that it shall not be construed to restrain the grantor from inserting such

other clauses as may be deemed proper by the purchaser and seller. In *Allston v. Thompson*, Chev. L. 271, it is held by the Court of Errors that a deed like the present, except as to the condition, is not valid to convey land; and in *Craig v. Pinson*, [Cheves] p. 272, it is held by the same Court, that such a deed, with only one subscribing witness, is equally invalid. A mortgage is equally within the scope of the general terms employed in the Act of 1795 as an absolute conveyance; it was equally within the mischiefs of the old law, and equally needed the remedies provided by the Act. The 45th section of the County Court Act of 1785, 7 Stat. 232, under terms quite as general as those of the Act of 1795, embraced mortgages for the purposes of registry. *Steele v. Mansell*, 6 Rich. L. 440. And the Act of 1797, 5 Stat., 311, in amendment of the Act of 1791, ib. 169, enacts, that a release by the mortgagor to the mortgagee, of the equity of redemption, shall consummate the legal title of the mortgagee, and seems to imply that the mortgagee previously had title, to some extent, conveyed by the usual formalities. In *Pledger v. Elberbe*, 6 Rich. L. 266 [60 Am. Dec. 123], Judge Frost expressly decided that a mortgage of land could be made only by the same forms and solemnities as an absolute conveyance,

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and that the mortgage *there was invalid, because it was attested by a single witness; and his decision was not controverted on this point by the Court of Appeals, although that Court ordered a new trial on another ground, that the plaintiff was estopped by proceedings for foreclosure, to which she was privy, from denying the validity of the mortgage.

The Act of 1791, 5 Stat. 169, inhibits a mortgagee from maintaining a possessory action against the mortgagor, even after condition broken, and declares that the mortgagor shall still be deemed owner of the land, and the mortgagee owner of the debt secured, with right to proceed for foreclosure; and it is urged for the plaintiff, that this Act changes altogether the character of a mortgage from a conveyance of the land, and makes it a mere security for the debt, not controlled by the provisions of the Act of 1795. I shall not stop to discuss whether or not the Act of 1791 is applicable to such a case as the present, where the mortgagor has been so long out of possession, but concede for argument that the Act is applicable. The provisions of the Act had long before been recognized as doctrines of Equity, and the main purpose of the Act was to extend these doctrines to the Court of Law, and to provide an easy method of foreclosure in certain cases in that Court. *Durand v. Isaacks*, 4 McC. 55. Nothing is enacted or intimated as to any change in the form and requisites of mortgages, and the legislation is limited to declaring the effect of such instruments when executed with due formalities. They are still

left conveyances of the fee in form, although declared to operate only as securities for debts. In Equity, an unattested agreement to mortgage, or a mere deposit of title deeds may be set up as a mortgage, but it was never suggested that the recording of such an equitable mortgage would affect purchasers with notice—so an absolute conveyance or instrument in almost any form, if demonstrated according to the rules of evidence to be intended by the parties to be a mortgage, will be treated in Equity as a mortgage; but none of these doctrines, nor the language of the

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Act of 1791, disturbs *the conclusion that, when a mortgage is presented to the Court for consideration as a legal instrument, and as having the consequences by recording, or otherwise, of a legal mortgage, it must possess the requisite formalities of a complete mortgage. I am of opinion that a mortgage of land, attested by one witness only, is incomplete in execution and not entitled to be recorded. No stress had been laid on the fact, that the mortgage was not recorded within six months from its execution, for I understand *Steele v. Mansell* to decide such delay to be immaterial for most purposes, and that a regular mortgage recorded out of time still affects with notice from the date of recording.

It is adjudged and decreed that the bill be dismissed with costs as to the defendant, Butler.

The defendant, Barsh, makes no defence, and I suppose the plaintiff is entitled to a decree against him, but not beyond the penalty of the bond, although the debt now largely exceeds the penalty.

It is ordered and decreed that the defendant, David W. Barsh, pay to the plaintiff, as trustee, the sum of \$4,742.21½, and that plaintiff may proceed for the execution of the same by fi. fa. or attachment.

The complainant appealed and moved this Court to modify the decree so as to make the defendant, Barsh, liable for the whole amount due on the face of the bond, with annual interest, even though the same should exceed the penalty thereof—which amount is \$5,648, due 1st January, 1857. And, also, to reverse the decree of the Chancellor in favor of the defendant, Butler, on the grounds:

1. Because no presumption of payment or satisfaction of the debt did or could arise in this case the instalments sued for being due in 1841 and 1845, and the bill filed in 1856.
2. Because the defendant, Butler, was not protected by his possession against the lien of the mortgage.
3. Because the mortgage (though attested by only one witness) was valid and complete.

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- *4. Because the registration of this mortgage was sufficient and legal notice to the defendant, Butler, as subsequent purchaser.
5. Because on the case, as made by the

pleadings and proof, the complainant was entitled to a decree of foreclosure for the whole amount due on the bond, viz.: The second and third instalments, (unpaid,) with annual interest since 12th January, 1836, twenty years, less one day, prior to the filing of the bill, which amount is \$5,530, due 12th January 1857.

PER CURIAM. This Court concur in the decree of the Chancellor. The appeal is dismissed.

DUNKIN, DARGAN and WARDLAW, CC., concurring.

Appeal dismissed.

10 Rich. Eq. *157

*CECILIA A. McKNIGHT and Others v. A. ISAAC McKNIGHT and Others.

(Columbia. May Term, 1858.)

[Trusts \S 234.]

Where the trustees are to hold the property, negroes, for the sole and separate use of a married woman and her children, and to receive the rents and profits and pay them over to her, it is no breach of trust to permit the negroes to go into the possession of the husband for the benefit and support of the wife; and if the husband should run the negroes off without the knowledge of the trustees, they will not be liable.

[Ed. Note.—Cited in *Dunn v. Dunn*, 1 S. C. 257.

For other cases, see Trusts, Cent. Dig. \S 340; Dec. Dig. \S 234.]

Before Dargan, Ch., at Williamsburg, February, 1857.

Dargan, Ch. On the 18th Dec., 1853, Isaac McKnight being indebted to the value of his estate, entered into a post nuptial settlement. He executed a deed bearing that date, to his mother, Jane J. McKnight, and his brother, Joseph E. McKnight, by which he conveyed to them all his negroes, and these twelve or fifteen in number, for the sole and separate use of his wife, and for the support and maintenance of his children, with various conditions and limitations, not necessary to be particularly noticed. The deed was not fraudulent and void, for it recognized the rights of creditors. It declared that after the payment of his debts, the property was to be held for the uses of the trusts, or words to that effect. During the interval, after the execution of the deed, and the time of his leaving the State, Isaac McKnight continued in the possession of the negroes. In October, 1855, he absconded, and left the State, taking with him all the negroes conveyed in the said deed of trust, except such of them as the Sheriff had previously sold.

This is a bill by the cestui que trusts, namely, Mrs. Cecilia McKnight, the wife of Isaac McKnight, and his three infant children, against Isaac McKnight, who has been

made a party defendant by publication, and

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against Jane J. McKnight and *Joseph E. McKnight, the trustees, for the purpose of subjecting the said trustees to an account of the trust property, because of their alleged breach of trust and fraudulent complicity with Isaac McKnight, in the removal of the property beyond the limits of the state. The allegations of the bill are broad and sweeping—charging in direct terms that the said trustees did abet and assist Isaac McKnight in escaping from the State with the property, to the defrauding and injury of the plaintiffs. If the facts charged had been proved, the trustees most clearly would be considered as guilty of a breach of trust. But the evidence has not supported the allegations of the bill: so far from its showing that the said trustees abetted, aided, and assisted Isaac McKnight in the removal of his property, it goes very far towards maintaining a negative of that proposition. If the possession by Isaac McKnight of the trust property does not constitute a breach of trust, (and the plaintiffs themselves have not assumed that ground,) the trustees have committed no breach of trust. The circumstances relied on to prove the complicity of the trustees in the abduction of the trust property are entirely uncertain, and are not sufficient to create a suspicion tending to that conclusion. It is ordered and decreed that the bill be dismissed.

The complainant appealed and now moved this Court to reverse the decree on the grounds:

1. Because the evidence was fully sufficient to charge the trustees (Jane J. McKnight and Joseph E. McKnight) with a breach of trust, and with negligence in the discharge of their duty, as well in allowing A. Isaac McKnight to have possession and control of the trust property, as in conniving at, and aiding in, his escape and abduction of the property, and in adopting no measures to prevent the same.

2. Because the said decree is contrary to evidence, equity and law.

Bellinger, Rich., for appellants.

Dargan, Dozier, contra.

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*The opinion of the Court was delivered by

DARGAN, Ch. The only breach of trust charged in the bill, is that the defendants accepted the trust, and took possession of the negroes and combining and confederating with A. Isaac McKnight, did aid, advise, assist and procure the removal of thirteen of the negroes, conveyed to them by the deed of trust. This charge was set forth with various changes and modifications as to language, namely, that this removal of the negroes, was with the approbation, advice, consent and procurement of the trustees, the defendants, and that the loss occasioned by

said removal, ensued from their carelessness, negligence, and utter disregard of the rights of the complainants.

To these charges, the defendants answered, and the cause proceeded to trial on the issue thus made. No sufficient evidence was adduced to sustain the allegations of the bill. A decree was rendered in behalf of the defendants, dismissing the bill. An appeal is now brought before this court, and for the purpose of setting aside the decree, on an issue not presented in the pleadings, which the defendants were not called upon to answer, which the Circuit Court did not, and was not asked to consider, and about which, not one word was said on the circuit trial. Nor has the only question discussed on the circuit trial been mentioned or alluded to on this trial. Surely, a court that would entertain a ground of appeal made in this way, and under these circumstances, may be considered as indulgent. It must not be construed into an authoritative precedent for a similar loose practice. No objection was made from the adverse party. And it has been considered by the court *ex gratia*. I will now proceed to consider the ground of appeal (so called) which has been much discussed and insisted on in this court. The defendants are the trustees of a post nuptial marriage settlement of A. Isaac McKnight in favor of his wife Cecilia McKnight, and her children, who are the plaintiffs in this suit. The deed conveyed sundry negroes, and the trusts declared were, that the trust-

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tees should *hold the negroes for the sole and separate use of Mrs. McKnight and her children, and that they should receive the rents and profits and pay them over to her. I am stating the trusts of this deed substantively. The brief does not contain a copy, but I feel assured that I am stating the trusts of the deed, with sufficient precision, for every purpose of this appeal.

McKnight and his wife and children lived together. He had a plantation. Some of the trust negroes were domestic servants, and served in the family. Others were field negroes, and children too small to work. The trustees permitted McKnight to remain in the possession of the negroes, some of whom were used as domestic servants and some were employed in field labor. Some of the negroes were sold by the Sheriff under executions that bound the property. Isaac McKnight absconded to parts unknown, and carried with him the residue of the trust negroes, thirteen in number (I believe) and evaded the pursuit of the Sheriff, and of the agent of the trustees. This suit was first conceived with the view of making the trustees liable for conniving at, aiding, abetting and procuring the fraudulent abduction or the trust negroes by McKnight. Failing to make out by the evidence a case, that can excite even a suspicion of the infidelity of

the trustees in that regard, and changing their ground, they now contend, that without any connivance on their part, in the escape of McKnight, and his abduction of the negroes the bare fact of their permitting the trust property to remain in the possession of McKnight, together with the loss of the negroes, is such a breach of the trust as to render them responsible to the plaintiffs for the value of the slaves. This Court is of opinion, that the simple fact relied on, is not sufficient to subject them to liability. The deed of trust did not inhibit such a course of management on the part of the trustees. Mrs. McKnight, the plaintiff, kept house. She had three little children. Surely the trustees could not have done better, than to allow her the use of her own domestic

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*servants, instead of hiring them out to strangers, and with the proceeds of their hire, procuring other servants for Mrs. McKnight and her children. And if Mrs. McKnight, from convenience and for her comfort, could have, and was entitled to have the use of her domestic servants, so of the field hands, who were employed on a plantation whence the family supplies were derived. What is the difference, so far as a faithful execution of the trust is concerned? Whether the trustees hired out these field negroes and from their wages procured Mrs. McKnight her necessary provisions, or suffered them to be employed directly in making those provisions, they (the trustees) having no complicity whatever with McKnight, in carrying the negroes off.

A deed like the one in question invests the trustees, with a sound and a very proper discretion, as to the mode of managing the property. If the husband misuses the wife, so as to deprive her of the services of her negroes, or the proceeds of their labor, when employed in her immediate service, the trustees can interpose and it would be their duty to do so. In such a case by paying into her hands the income of her trust estate, they could secure to her some enjoyment of it. While the husband and wife live together, (and it is never the purpose of these trusts to sever the marriage ties,) she can not enjoy her separate property, without his participation. If her estate enables her to live in a fine house, furnished in a costly manner, he not only lives in it, but is master there, as regards the internal economy and management of the household. If she keeps a sumptuous table, he is more than a guest or dependant. He is entitled to preside at the head of his table and to enjoy the luxuries which her wealth and bounty supply, to fully as great an extent as she can possibly do. If she has troops of domestics, does law or propriety forbid that they should wait upon him? Or if she has some slaves employed in making provisions for her household, where is the harm

of the husband superintending and directing their field occupations, with the consent of the wife? More particularly is this a prop-

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er view of the subject when the trustees stand ready armed, with authority, to interpose whenever the misbehavior or mismanagement of the husband render it necessary. McKnight was living in harmonious domestic relations with his wife and family. There was no suspicion that he was about to abscond and carry off the trust negroes. The removal of the property might have been effected even though he did not have the possession. In truth, at the time of the abduction the negroes may be considered to have been more immediately in the possession of Dr. Bradley, (the plaintiff's father) than that of McKnight, by virtue of a power of attorney which the trustees had executed to Dr. Bradley for the purpose of enabling him to arrange with the Sheriff and the creditors of McKnight, who had claims upon the trust property.

To the Court it does not appear that there was any devastavit or breach of trust on the part of the trustees.

It is ordered and decreed that the decree be affirmed and the appeal be dismissed.

DUNKLE, WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *163

*REBECCA E. HAIR v. IRVINE R. HAIR.

(Columbia, May Term, 1858.)

[*Divorce* ⇨237.]

There are, it seems, but three causes for which alimony will be granted in this State: 1. For cruelty or savitia. 2. For desertion, and 3. For obscene and revolting indecencies practiced in the family circle.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 668, 669; Dec. Dig. ⇨237.]

[*Divorce* ⇨237.]

Mere words of reproach or insult will not amount to savitia—there must be actual violence inflicted or threatened.

[Ed. Note.—Cited in *Briggs v. Briggs*, 24 S. C. 380; *Wise v. Wise*, 60 S. C. 431, 432, 38 S. E. 794; *Levin v. Levin*, 68 S. C. 125, 46 S. E. 945.

For other cases, see *Divorce*, Cent. Dig. §§ 668, 669; Dec. Dig. ⇨237.]

[*Husband and Wife* ⇨3, 283.]

Desertion must be legal. The husband has the right to choose his home, and the wife is bound to go with him if he offers to take her. If she refuses to go she has no ground of complaint.

[Ed. Note.—Cited in *Cone v. Cone*, 61 S. C. 520, 39 S. E. 748.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 7, 1067; Dec. Dig. ⇨3, 283.]

[*Contracts* ⇨76; *Frauds, Statute of* ⇨2.]

A promise before marriage not to take the wife away from the neighborhood of her mother and friends, is not legally binding on the hus-

band, and will not be considered in determining the question of desertion.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 359; Dec. Dig. ⇨76; *Frauds, Statute of*, Cent. Dig. § 2; Dec. Dig. ⇨2.]

[*Husband and Wife* ⇨283.]

If the husband makes a bona fide offer to take back the wife, and treat her with kindness, alimony will not be further allowed.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1067; Dec. Dig. ⇨283.]

[*Husband and Wife* ⇨283.]

Adultery of itself is no ground for alimony in this State.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1065; Dec. Dig. ⇨283.]

[This case is also cited in *Levin v. Levin*, 68 S. C. 130, 46 S. E. 945; *Gordon v. Gordon*, 91 S. C. 247, 74 S. E. 360, as to temporary alimony.]

Before Wardlaw, Ch., at Barnwell, February, 1858.

Wardlaw, Ch. This is a suit for alimony.

The plaintiff is daughter of Mary, wife of W. B. Matheney, by the former marriage of said Mary with Seth Askew. The parties in the cause intermarried October 13, 1853. They resided, until December 9, 1854, with Matheney, and then removed to a small farm within half a mile, which plaintiff had purchased. At Matheney's a daughter was born to them, September 11, 1854, who survives. The defendant, as husband, received from Matheney, as guardian of plaintiff, the slaves, Ann, (who has since had a child, named Josephus,) and Hagar, and about \$100 in money.

In the bill, filed October 8, 1857, the claim of plaintiff to relief is rested on two grounds. 1. That in the treaty of marriage, and as a precedent condition to marriage, the defendant solemnly promised the plaintiff and her mother, not to remove the plaintiff without her consent from this State, nor from the

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*vicinage of her relatives and familiar friends; and, 2. That defendant, having secretly rented out the land on which the family resided, and sold most of his chattels, clandestinely deserted the plaintiff and their daughter, at midnight of Sunday, September 27, 1857, and took with him abroad the slaves Ann and Josephus, and attempted to take Hagar, but she escaped from his custody.

After hearing of the bill, defendant returned to this State from the Parish of Bienville, Louisiana, to which he had removed; and on January 11, 1858, filed an answer. As to the first ground, he denies that he ever made a promise, either to his wife, or her said mother, not to remove his said wife out of this State without her consent; that if he had done so, he should have felt it incumbent on him, as a moral obligation, to remain here himself; that his wife, and her mother endeavored to induce him to make such a promise, and he replied, that he had bargained for his said tract of land, and did not then entertain any purpose of removing; and he now

disavows "any purpose, past or present, of removing his said wife from this State, without her consent." Such reply tended, and was intended, to deceive and mislead those treating with him in a matter of great and lasting interest, and in sound ethics, imposed on him the same "moral obligation to remain here," with his dupes, as the most complete promise would have created. Moreover, the promise alleged by plaintiff, is sufficiently proved by the witnesses, Mary Matheney, Lewis O'Dom, and Darling Hair. Some of the promises of a suitor to conciliate his mistress may not bind his conscience, as when they are made playfully, or would serve, if fulfilled, to impair the obedience she owes to a husband, by law and religion; and many of such promises are deemed in law to be absorbed by the contract of marriage. From the nature of the conjugal relation, and by the law of all civilized states, the wife obliges herself to follow the husband wherever he may judge fit to establish a permanent or temporary residence. Still an antenuptial

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agreement, by parol, that the domicil of *the wife shall not be changed, may overcome all opposition to a marriage, and prevent any marriage settlement, and thus afford a reason for the favorable consideration of the wife's claim for maintenance, when the husband violates his engagement. In *Hatcher v. Robertson*, 4 Strob. Eq. 182, Chancellor Dargan affirms, that antenuptial articles for the settlement of property, founded on the consideration of marriage, though resting in parol merely, may be enforced against the husband, and volunteers under him, and even against purchasers for value who have notice of the wife's equity. This is reasonable doctrine as to property, which at the time is a proper subject of settlement, and it may be extended without straining, to property which is kept from settlement by trust in the perfidious words of the intended husband. In [*Brown v. Wood*] 6 Rich. Eq. 168, Teasdale v. Teasdale, Sel. Ch. Ca. 59, is quoted, which held, in effect, that a father, unknowingly entitled in fee to an estate after the life of a son, who permitted this son to settle upon his intended wife a jointure in fee out of this estate, was concluded by his acquiescence; for if the father had understood his title, he might have joined in the settlement, or otherwise the match might not have been effected. In the present case, the evidence does not indicate that any settlement was projected, but it is pretty clear that the defendant obtained his wife, and her property, by inspiring confidence in his assurance that he would not emigrate. My general conclusion as to the first ground taken by plaintiff, is to reject it, as, in itself, a basis for relief, but to use it as an aggravation of defendant's marital conduct in other particulars.

2. A husband's desertion of a wife is adequate cause for a decree for alimony in her

behalf. In this case defendant admits the desertion, and most of the circumstances of aggravation; but while admitting that he sold his hogs and growing crops absolutely, and his land for a term, he alleges in excuse, that he left some horses, (of very small value by the proof,) and some remnant of provisions, and that he hoped his mother-in-law would afford refuge and support to his wife

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and *daughter for a time, until his wife's interest and affection should induce her to follow him abroad, where prospects of success in agriculture were brighter, and that he left at night without adieu, "to avoid a scene," fearing the effects of his wife's affectionate persuasions to remain here contrary to their interests, knowing from the result of frequent importunity on his part, that she was not then minded to remove; yet trusting that in a few months her fondness and isolation would constrain her to follow him and the slaves. He further asserts a malign influence of the mother of his wife in his domestic reign; yet the evidence, so far as it goes, is to the contrary, and leaves only that lurking suspicion of such influence which frequent examples thereof in humble life may raise in the mind of an observer. This is a brief of much declamation by defendant on this point. Assuming that every title of this excuse be true, it affords a paltry palliation of the unmanly conduct of this husband. He admits the clandestine desertion of his wife and child, and does not intimate that he warned her of the undue influence of her mother, or of his purpose to follow lucre, and leave his consort, and their helpless offspring, without shelter or sustenance. It appears that he had the means of supporting his family in comfort here; indeed, that he was prosperous in comparison with many of like mediocrity of possessions. It required no uncommon extent of frankness or boldness in him to forewarn his wife of his determination to prosecute his fortunes elsewhere, whether she followed or abided; yet he leaves her at midnight on Sunday, without saying farewell, and takes with him the laborers who might contribute to her support. It is needful that I restrain myself from declamation.

The bill contains no charge of cruelty by the husband to the person of the wife, and contrariwise affirms that the couple, while together, lived in general harmony, disturbed only by such casual miffs as are sometimes found among consorts in their sphere of life. In the answer, defendant adverts to the fact, that the complaint was exhibited on the

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eleventh day *after he left the State, and uses it as evidence that plaintiff acted without proper reflection; whereas, the plaintiff in argument, uses the same fact as an excuse for the meagreness of her complaint, and the omission of statements of acts on his part, of the character of cruelty. The defendant fur-

ther tauntingly vaunts that his said wife does not venture to charge him, by her said bill, with having been wanting to her in tenderness, respect and affection, or with having conducted himself otherwise than as a man of good moral character in all the relations of life, (except in the alleged desertion,) and this defendant challenges proof to the contrary. He further complains, "that he had hardly left the State, before the Church, of which he was a member, expelled him unheard;" and renews the offer, previously made verbally, to take his wife and child with him to Louisiana, and provide for them to the best of his ability. In reply to this challenge and offer, proof is made that defendant had * * * * *

I think that, under the circumstances of this case, a wife is not bound to return to the society of a husband who deserted her. His oral offer to take her back was abrupt and rude, and his offer, in the answer, is gingerly.

It is ordered and decreed, that it be referred to the Commissioner of the Court, to enquire and report what allowance should be made out of the defendant's estate for the maintenance of the plaintiff, with her child, from September 27, 1857, and as to the mode and terms of payment.

It is further ordered and decreed, that the defendant be enjoined from aliening or hiring his land and the slave Hagar, and that the allowance to the plaintiff constitute a lien on this estate.

Parties have leave to apply for further orders at the foot of this decree.

The defendant appealed, and now moved this Court to reverse the Circuit decree, on the following grounds:

1. Because it was not only proved, but ad-

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mitted, that the *defendant, long before he left this State, had repeatedly and earnestly requested and urged the plaintiff to go with him, and that she had constantly and positively refused to do so. Therefore, and because desertion is the only substantial charge contained in the pleadings, the bill should have been dismissed.

2. Because so much of the evidence as relates to * * * * *

Therefore, said evidence was inadmissible, without a previous amendment of the bill, and should have been ruled out by the Chancellor.

3. Because, it is respectfully submitted, that even with the aid of the evidence referred to in the above ground of appeal, a case for the allowing of alimony is not made out.

4. Because experience teaches, that a decree for alimony generally operates as a separation for life—as a sentence of divorce in all but its name. And inasmuch as it is against the settled policy of our laws to favor

these matrimonial causes, a decree for alimony ought not to be allowed, except for the gravest causes, and on the clearest proof.

5. Because the defendant, in his answer, renews his invitation to the plaintiff to take her place in his house as his wife, and to bring with her their child.

6. Because the decree is contrary to law and evidence.

J. T. Aldrich, for appellant.

A. P. Aldrich, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The plaintiff charges in her bill that her husband, the defendant, while paying his addresses to her and making overtures of marriage, and before the solemnization of their nuptials, entered into a solemn engagement, that if she would marry him, he would never remove her, without her consent, from the neighborhood of her

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mother, or to a *place where she could not enjoy her mother's society, and that of her friends. On this condition she married him, as she says. Her mother (Mrs. Matheney,) also obtained from him (as it is charged) a similar promise, as the condition of her assent to the marriage. The marriage was celebrated on the 13th October, 1853. From that time the young pair lived with the plaintiff's mother until the 9th December, 1854, during which period, the plaintiff bore to her husband a daughter, who is the only issue of the marriage. At the last mentioned date, the defendant, with his wife and child, went to live at a place which he had bought, about a half mile distant from that of his mother-in-law, where, as the plaintiff herself says, they "lived in comfort, peace, and harmony, up to the twenty-seventh day of September, 1857." This statement appears to be in strict conformity with the truth, except as relates to some immoralities on his part which had come to her knowledge, and which were condoned on her part by their subsequent cohabitation. After the plaintiff and defendant had gone to live at their own home, he became restless and dissatisfied, and anxious to remove to Louisiana, to which State some of his near relatives had emigrated. His land was poor, and he wished, as he says in his answer, to better his condition, by moving to a country where lands were fertile and cheap. But his wife was unwilling to go, positively refused, and pleaded his solemn engagement and promise made previous to their marriage. (It may be as well to remark here that, although this promise was denied in his answer, it was satisfactorily proved against the allegations of his answer by witnesses who had heard him speak on the subject—some of them his own witnesses and friends.) His solicitations to her for her to consent to go with him to the west, amounted to importunity. They had frequent and intemperate altercations on the

subject, he insisting that she should accompany him in his move to the west, and she pertinaciously refusing and declaring that she never would leave the place near her mother's where she then lived. Perceiving

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*that he could make no impression upon her mind, nor effect any change of her will, he announced to her his determination to go without her, unless she should choose to accompany him. She said he might go and leave her, provided he would leave her the negroes (three in number, the only ones he had, which he had acquired by his marriage with her.) She says in her bill that he consented to this arrangement about leaving the negroes. In his answer he denies it, and there is no further proof. Under these circumstances, and at this stage of the controversy, he commenced making preparations for his departure. He rented his land, sold his crop in the field, some hogs, &c., with the view of raising the necessary funds. Whether his preparations were made secretly, as charged in the bill, or not, he did not communicate to her the fact that he was making his preparation, nor his design then to go. She had no reason to believe that he was going at that particular time. It took her by surprise. In fact, it would seem that she did not believe that he would go at all, unless she consented to accompany him. Having completed his preparations, on Sunday, the 27th September, 1857, about the hour of midnight, he called his two negro women to the field, under the pretence of driving out the hogs, but, in fact, with the view of securing and carrying them off. He seized them both. They made a great outcry, which reached the ear of the plaintiff at the house. The negroes were unwilling to go; one of them (Hagar) made her escape; the other one (Ann) he tied, went to the house and got her young child. He put them both in a conveyance which he had ready, carried them to Blackville, where he put them on the cars that same night, and carried them off to Louisiana, where they yet remain. The plaintiff continued to reside, and still resides, at the same house. The tenant to whom the defendant leased his land (one Darling Hair, his relative,) has not attempted to eject her from the possession. She has with her Hagar, who, immediately after the defendant's departure, came in to the plaintiff, and continues to serve her; al-

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so the *furniture that was in the house, some provisions, wheat, flour, &c., and three horses, said by one of the witnesses to be old and of little value. On the eleventh day after the defendant's departure, the plaintiff filed this bill, setting forth the facts that have been recited, and praying an injunction to restrain him from disturbing her in the possession of the property in her possession, or from selling or disposing of the same, un-

til some adequate provision shall be made by the defendant, under the order of this Court, for the support of the plaintiff and her child.

The defendant, on learning that his wife had filed a bill against him for alimony, immediately returned to South Carolina, filed his answer, and has submitted himself to the judgment of the Court. On his return the defendant visited his wife, and made earnest overtures to her to accompany him to his new home in the Parish of Bienville, in Louisiana, promising to treat her with the kindness and affection due to her as his wife. These overtures were rejected by her with firmness and with passionate disdain; in such a manner, in fact, as to preclude all expectation or hope that a reconciliation could be effected between them on the terms proposed. She intimated that she would live with him if he would come back to the place which he had left. She said she would not go with him to the west to save his life, and that she intended to live and die where she was. The defendant, in his answer, iterates his proposals to take his wife and child with him to his home in the west, and to provide for them to the best of his ability.

These are the undisputed facts of the case, and the question for the court to decide is, whether under these circumstances, the plaintiff is entitled to a decree for alimony. The circuit decree allowed her claim for alimony, and ordered a reference. But we are of opinion, that the decree cannot be sustained upon the principles which prevail in this Court on the subject.

In the country from which we have de-

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rived the most of our *civil institutions and laws, the authority to grant alimony appertains alone to the ecclesiastical court; but to that jurisdiction only as incident to a suit for divorce. A separate suit for alimony, unconnected with an application for divorce, or for the restitution of conjugal rights, was never entertained. During the protectorate of Cromwell, the ecclesiastical courts were abolished, and Courts of Equity for the first time, exercised jurisdiction in hearing cases for alimony, by authority "expressly given to them," according to Mr. Fonblanque Fonbl. Eq. 96, 97, note. After the restoration of the Stuart dynasty, the ecclesiastical courts were re-invested with all their authority and power. They resumed their jurisdiction in cases of divorce, and its incidents, alimony, &c., and over the marriage relation generally. It does not appear, that after this period, Courts of Equity in England exercised any jurisdiction in cases of this nature.

In South Carolina, at a very early period after the revolution, the Court of Equity, without any Legislative act, or other authority, began to exercise jurisdiction in cases for alimony, *Brown v. Brown*, 1 Eq. R. 196 A. D. 1785, not as in England, as incident to suits for divorce, (for no divorce has ever been

allowed in this State,) but as a separate and distinct ground for equitable relief. *Jelineau v. Jelineau*, 2 Des. 45 A. D. 1787.

In *Rhame v. Rhame*, 1 McC. Eq. 205 [16 Am. Dec. 597], Judge Nott, in delivering the opinion of the Court, uses the following language: "In England, it appears that alimony is allowed only where a separation is decreed. And though our Courts of Equity have not the power to grant divorces, yet as the two subjects, 'divorce and alimony,' are inseparable companions in England, we must look to the causes of divorce, to ascertain the grounds on which alimony will be allowed." I apprehend that the learned Judge meant to say, that alimony would be allowed by our Court of Equity, only in cases where a divorce would be decreed by the Ecclesiastical Court of England; but not in all cases where that court would grant a divorce.

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*For adultery, there, constitutes a sufficient, and very common ground for a divorce. But there has been no case in South Carolina, where adultery of itself has been held, to entitle the wife to a decree for alimony.

When a bill is filed here for alimony on grounds which have been held in this State, to be sufficient to entitle the wife to a decree for such relief, it is proper, and pertinent to enquire, whether in Doctors Commons, the case made would authorize a decree for divorce, with its concomitant remedy, alimony. Accordingly, when a suit is instituted in this State for alimony propter savitiam, we look to the decisions of the Ecclesiastical Court, to ascertain what kind and degree of cruelty entitles the wife in that tribunal to a decree for divorce, and an allowance. Following this guidance, (see *D'Aquilar v. D'Aquilar*, 1 Hag. 329,) our Court of Equity, in the case of *Rhame v. Rhame*, cited above, held, that no words of reproach and insult amount to legal cruelty; no affront and indignity, no torture of the feelings and sensibilities, however severe, and grievous to be borne, unaccompanied by bodily injury, or a well grounded apprehension of such, will authorize the wife to leave the bed and board of her husband, and to claim thereupon from this Court a decree for alimony. But words of menace, intimating a malignant intention to inflict personal injury, that might affect the security of life or health, constitute such legal cruelty, as would justify the wife in withdrawing from the presence of the husband, and claiming against him a decree for alimony. The Court must not wait till the threats are carried into execution, but must interpose where they raise a reasonable apprehension of personal violence, and excite such terror as to make life intolerable.

In pursuance of the decisions and the practice of the Ecclesiastical and Consistorial Courts of England, in South Carolina, alimony is granted for bodily injury inflicted or threatened and impending, amounting to the savitia of the civil law, which may be de-

fined to be personal violence actually inflicted, or menaced, and affecting life or health.

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*Alimony is also granted in South Carolina for the desertion of the wife by the husband. To these may be added a third class of cases, in which, though the husband has inflicted or threatened no bodily injury upon the wife, yet practices such obscene and revolting indecencies in the family circle, and so outrages all the sentiments of delicacy and refinement characteristic of the sex, that a modest and pure minded woman would find these grievances more dreadful and intolerable to be borne, than the most cruel inflictions upon her person, she would be held justifiable in fleeing from the polluting presence of that monster, with whom in an evil hour she had united her destinies. The Court would not hold her bound to such loathsome bondage, and would regard her as driven forth from the foul dwelling of the husband by a moral compulsion more irresistible and terrible than the fear of death. This doctrine and ground of relief find ample countenance and support in the earliest reported decisions of our Court of Equity upon the subject.

Except in cases embraced within the three classes above commented on, I am not aware that a suit for alimony has been sustained in South Carolina. The plaintiff has sought to bring her case within the principles of the second class. She charges desertion, as I have already shewn. The corresponding proceeding in the Ecclesiastical Court, is a suit for the restitution of conjugal rights. Our judicial records furnish no instance of a similar proceeding. In most of the States of this Union, the remedy for desertion is divorce, provided for by statute. The utter inefficacy of a judicial decree to restore harmonious relations to, and enforce the obligations of the married state, is the reason, I apprehend, why none of the States of this Union have adopted the proceeding of a suit for the restitution of conjugal rights, and why the most of the States have, by statutory enactments, allowed divorce as a remedy for desertion. The policy of this State has ever been against divorces. It is one of her boasts that no divorce has ever been granted in South Carolina. As no jurisdiction in

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*the State is authorized to grant divorces for any cause, and the Legislature has ever refused to exercise its supreme power for such a purpose, and no proceeding could be had for the restitution of conjugal rights, it became necessary for the Court of Equity to interpose, to afford relief for a great wrong, which would otherwise be without a remedy. Thus it is that our Courts of Equity have, from an early period, exercised the power of granting relief in cases of desertion of the wife by the husband. The relief granted is a decree for alimony, which is an allowance out of the estate of the husband proportional to

its value, to be paid to the wife at stated periods, during the separation.

The question is, whether the plaintiff has made out a case of desertion. That the defendant left her and removed to another State, is beyond controversy, and not denied. But did he leave her in an unjustifiable manner? Her own declarations in her bill shew that he most earnestly solicited her for years, to accompany him. His solicitations amounted to importunity. At length, upon her persistent, I may well say, obstinate refusal, he went alone—without his wife and child. Certainly the husband, by our laws, is lord of his own household, and sole arbiter on the question as to where himself and family shall reside. But she complains that before the marriage he entered into a solemn engagement, without which, the marriage would never have been solemnized, that he would not take her away from the immediate neighborhood of her mother without her consent. This promise, she says, was also made to her mother, without which, her assent would have been withheld. The defendant, in his answer, denies these allegations. But the evidence brings the charges home to him. My opinion is that he made the promises in the manner charged in the bill. But they created a moral obligation only. It may be conceded to be very dishonorable in him to commit a breach of the promises he made, in order to obtain the hand of his wife in marriage, and the consent of her friends to that

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union, and probably by those promises *induced them to waive a settlement of her property. Such a promise is a nullity. The contract of matrimony has its well understood and its well defined legal duties, relations and obligations, and it is not competent for the parties to interpolate into the marriage compact any condition in abridgment of the husband's lawful authority over her person, or his claim to her obedience. This fact, though proven, is not to be taken into consideration in determining the question, whether the plaintiff is entitled to the relief which she seeks. It is not a sufficient and distinct ground of itself for alimony, nor is it entitled to be thrown into the scale as a make-weight, in aid of other grounds more legitimately taken, but not sufficiently made out by the proof.

Stripped of all extraneous matters, the simple question is, did the defendant desert his wife, the plaintiff? It must be a legal desertion. It is not every withdrawal of himself by the husband from the society of the wife that constitutes desertion in legal contemplation. The conduct of the wife must be blameless. If she elopes, or commits adultery, or violates or omits to discharge any of the important hymeneal obligations which she has assumed upon herself, the husband may abandon her without providing for her support; and this Court would sustain him in such a course of conduct.

The husband has the right, without the consent of the wife, to establish his domicile in any part of the world, and it is the legal duty of the wife to follow his fortunes, wheresoever he may go. The defendant, in the exercise of his undoubted prerogative, had determined to make his domicile in the Parish of Bienville, in the State of Louisiana, and wished his wife to accompany him. She, preferring the society of her mother and her relatives, refused to go—in opposition to his wishes, his importunate solicitations, his earnest entreaties. Considering the relative duties and obligations of husband and wife, as defined by the law, who, under these circumstances, is guilty of desertion? The wife, assuredly.

What I have said would constitute a suffi-

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cient ground for *refusing the prayer of the bill. Yet, there is another additional and sufficient ground of defence on the part of the husband. Within a very short period after the filing of the bill, he returned to the State, for the purpose, I must believe, of inviting his wife to his new home, which he had established in the west. He twice visited her for this purpose. To these invitations, she gave a stern, angry, and insulting refusal. To the Court, in his answer, he renews these overtures, and offers to receive his wife in his new home, and to treat her with conjugal affection and tenderness. Under these circumstances the Court could not give alimony, even if he was wrong in the beginning. Though alimony has been decreed, if the husband makes a bona fide offer to take back the wife whom he has deserted, and to treat her with conjugal kindness and affection, and the wife refuses, on application by the husband, the Court will, if satisfied of the sincerity of the husband's offers, rescind the decree for alimony.

In considering this case, I have confined myself to the issues presented in the pleadings, to which I think the investigation should be restricted. On the trial, there was evidence introduced (some of which was of a very indelicate nature,) that was not pertinent to the allegations of the bill. This evidence has not been commented on in this opinion, but it has been considered. And I will say, that if there had been allegations and charges in the bill, to which this evidence would have been pertinent, it would not have varied the result of the case. Adultery, of itself, though it is a ground for divorce in the ecclesiastical courts, is no ground for alimony in this State.

It is ordered and decreed, that the Circuit decree be reversed, and that the bill be dismissed.

DUNKIN, Ch. concurred.
Decree reversed.

10 Rich. Eq. *178

*CAROLINE T. HODGES and Others v.
REUBEN S. CHICK.

(Columbia. May Term, 1858.)

[Wills ⇨682.]

The testator directed certain property to be sold, and the surplus of the proceeds to be "equally divided in six parts, for the benefit of my six children, or the heirs of their bodies;" held, upon the construction of the whole will, that the shares of two married daughters, were intended to be settled upon the same trusts, that property specifically devised and bequeathed to a trustee for their benefit, was, in terms, settled.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1608; Dec. Dig. ⇨682.]

Before Johnston, Ch., at Chambers, December, 1856.

Johnston, Ch. This case is heard at Chambers by consent of parties.

It arises under the will of the late Dr. Burwill Chick, of Greenville.

The testator died the of 1847, leaving six children, and his will, dated the 9th of February, 1846, of which he appointed his two sons, Pettus W. Chick and Reuben S. Chick, executors.

The material clauses of his will are:

2. The second clause, by which he gives to his son, Pettus, nine slaves, by name.

3. The third, in which he gives his son Reuben, twelve slaves, by name.

4. The fourth clause, in which he bequeaths to his son Reuben, "in trust for my daughter, Maria H. Thompson, the following property," (naming eight slaves;) "also, the two lots that I live on in the town of Greenville; also, the tract of land I bought of L. Goodlett, lying on Richland Creek."

5. The fifth clause, in which he gives to his son, Pettus, "in trust for my daughter, Louisa V. Farr, and her children, the following property, to wit: (naming eight slaves);

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also, the *tract of land I bought of Sitton, containing 280 acres, lying on Saluda river, with my mills on it, lying in Pickens District; also, one other tract, bought of Wm. Hunt, lying in the Greenville side of said river, supposed to contain 125 acres."

Then comes the sixth clause in the following words: "I give to my son, Reuben S. Chick, in trust for my daughter, Caroline T. Hodges, the following property, to wit: Bill, Liggon, Daniel, Ritter, Emery and Butler, her children, negro slaves; also, one lot in the town of Greenville, where my blacksmith shop stands on."

7th. By the seventh clause, the testator gives his son, Pettus, "in trust for my daughter, Wilhelmina Chaplin, the following property, to wit:" (naming the ten slaves.)

The 8th, 9th, 10th, 11th, 12th, and 13th clauses are in the terms following:

8th. "Upon estimating (what I have) heretofore given my children, and what I have herein specially named for the benefit of each child, as well as I can judge the value of each, will be as follows:

"Pettus W. Chick's portion is \$10,810.

Reuben S. Chick's portion is 10,400.

Maria H. Thompson's portion is 10,800.

Louisa V. Farr's portion is 10,350.

Caroline T. Hodges' portion is 9,400.

Wilhelmina Chaplin's portion is 9,750."

9th. "It is my desire that my executors, hereafter named, as soon as convenient after my decease, do divide my tract of land, lying in Newberry and Union Districts, into three or four tracts, as in their judgments may be best, and sell the same on a credit of one, two and three years, bearing interest from day of sale. Also, my Sulphur Spring and Fleming tract, with all the furniture, household and kitchen furniture, be sold in the same way; also, my crop, my shares in the rolling mill; also, my furniture, at every place that I own, and all my stock at my place, and all and every thing that I possess, sold in like manner, not otherwise mentioned or given away."

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*10th. "It is my wish that each of my children, or their trustees for them, should receive, out of the proceeds of the sale of this property, a sufficient sum to equalize them with my son, Pettus W. Chick's portion, that being the largest amount, and the surplus I wish equally divided in six parts, for the benefit of my six children, or the heirs of their bodies."

11. "It is my wish that the trustees of each of my daughters shall vest all funds coming in their hands, from the provisions of the eighth article of this my will, in land, where they may think best for my daughters, or their children."

12. "If my daughter, Maria H. Thompson, should die, leaving no child, it is my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies. But in case she should have a child or children, and they live to come of age, then the property belongs to the child or children, at the death of their mother."

13. "At the death of my daughter, Caroline T. Hodges, provided she leaves no child or children, or they all die before they come of age, it is my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies. But, provided she has a child or children, and they or either of them come of age, it is their property at her death."

14th and 15th. The fourteenth and fifteenth clauses contain provisions nearly identical with the above, limiting over the shares

of testator's daughters, Wilhelmina and Louisa, in the hands of their respective trustees. (a.)

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*It appears that the sale directed in the 9th clause, has been made by the executors, and Reuben S. Chick, the trustee of Mrs.

(a) A copy of the will is as follows:

I, Burwell Chick, planter, of the town of Greenville, South Carolina, being feeble in body, but of sound and disposing of memory, do make this, my last will and testament, hereby revoking all wills made by me heretofore.

First. It is my wish that after my decease, my body shall be decently interred, and my funeral expenses, and all other just debts, be paid.

Second. I give to my son, Pettus W. Chick, the following negroes, (to wit:) Tom, Hardy, Green, old Siller, Patt, Eliza, Jim, Thurston, and Tinsley.

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*Third. I give to my son, Reuben S. Chick, the following negroes, (to wit:) Isaac, Caroline, Peter, big Tom, Did, Randal, Calep, Canada, Lucinda, Reuben, Jim, and Louisa and her children.

Fourth. I give unto my son, Reuben S. Chick, in trust for my daughter, Mariah H. Thompson, the following property, (to wit:) Harry, Lewis, John, Judy and her children, Martha and Willis, Tilda and her child Sofa, negro slaves. Also, the lots that I live on, in the town of Greenville; also, the tract of land I bought of D. Goodlett, laying on Richland Creek.

Fifth. I give to my son, Pettus W. Chick, in trust for my daughter, Louisa V. Farr, and her children, the following property, (to wit:) Lively, Clemmon, Fort, Mima, and Ann, Nora, Polina and Charles, whom is in the place of Hunter, negro slaves; also, the tract of land I bought of Sitten, containing two hundred and eighty acres, lying on Saluda river, with my mills on it, lying in Pickens district; also, one other tract, bought of William Hunt, lying on the Greenville side of said river, supposed to contain one hundred and twenty-five acres.

Sixth. I give to my son, Reuben S. Chick, in trust for my daughter Caroline T. Hodges, the following property, (to wit:) Bill, Liggans, Daniel, Ritter, Emery and Butler, her children, negro slaves; also, one lot in the town of Greenville, where my blacksmith shop stands on.

Seventh. I give to my son, Pettus W. Chick, in trust for my daughter, Wilhelmina Chaplin, the following property, (to wit:) Joe, Amsted, Charity, Harriett, Milley, Bill, Fanny, William, Tyler, Pettus and Eda.

Eighth. Upon estimating, heretofore, given my children, and what I have herein specially named for the benefit of each child, as well as I can judge, the value of each will be as follows, to wit:

Pettus W. Chick's portion is ten thousand eight hundred and ten dollars. Reuben S. Chick's, ten thousand four hundred dollars. Mariah H. Thompson's, ten thousand eight hundred dollars. Louisa V. Farr's portion, ten thousand three hundred and fifty dollars. Caroline T. Hodges' portion, nine thousand four hundred dollars. Wilhelmina Chaplin's portion is nine thousand seven hundred and fifty dollars.

Ninth. It is my desire that my executors have, after named, as soon as convenient, after my decease, do divide my tract of land, lying in Newberry and Union districts, into three or four tracts, as in their judgments may be best, and sell the same on a credit of one, two and three years, bearing interest from date of sale; also, my Sulphur Springs and Fleming tract, with all the furniture, household and kitchen

Hodges, received not only the \$1410. necessary to equalize her "portion" with that of

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her brother Pettus, but her *share also of the "overplus" and has purchased real estate in Newberry, which he holds, as her trustee.

One of the questions in the case is, wheth-

furniture, be sold in the same way; also, my crop, my shares in the Rolling Mill; also, all my furniture, at every place that I own, and all my stock at every place, and all and every thing that I possess, sold in like manner, not otherwise mentioned or given away.

Tenth. It is my wish that each of my chil-

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dren, or their trustees for them, *should receive, out of the proceeds of the sale of this property, a sufficient sum to equalize them with my son Pettus W. Chick's portion, that being the largest amount, and the surplus I wish equally divided in six parts, for the benefit of my six children, or the heirs of their bodies.

Eleventh. It is my wish that the trustees of each of my daughters shall vest all funds coming into their hands from the provisions of the eighth article of this, my will, in lands where they may think best, for my daughters, or their children.

Twelfth. If my daughter, Mariah H. Thompson, should die, leaving no child, it is my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies. But, in case she should have a child, or children, and they live to come of age, then the property belongs to the child, or children, at the death of their mother.

Thirteenth. At the death of my daughter, Caroline T. Hodges, provided she leaves no child, or children, and they all die before they are of age, it is my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies. But, provided she has a child, or children, and they, or either of them, comes of age, it is their property at her death.

Fourteenth. If my daughter, Wilhelmina Chaplin, should die, leaving no child, or children, to arrive of age, it's my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies; but, should her child, or children, live to come of age, the property is theirs at the death of their mother.

Fifteenth. My will and desire is, that if my daughter, Louisa V. Farr, should die, leaving no child, or children, to arrive of age, it's my wish that her trustee should sell the property in his hands, and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies; but, should her child, or children, live to come of age, the property is theirs at their mother's death.

Sixteenth. My wish and desire is, that should my daughter, Louisa V. Farr, wish to move from where she now lives, and her trustee thinks it advisable, he is at liberty to sell the real estate that I have put in his trust for her, provided he will lay out the proceeds in lands for her and her children, under the restriction as the land is under at this time.

Seventeenth. As George is afflicted, my wish is that he should choose which of my children he would rather serve, and whichever he chooses will take him at valuation, by two disinterested men, which will be deducted from their part of the amount coming to them from my estate.

Eighteenth. It is my wish that the contracts, whether verbal or written, entered into between myself and sundry persons, who have built

er this "overplus" is a trust fund, and, of

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course, whether the real estate purchased by the trustee, so far as the "overplus" entered into it, is properly trust property.

The will is certainly unskillfully drawn; but drawing the best construction I can from its language, I am of opinion that the "overplus" constituted an absolute legacy, unfettered by any trust or conditions.

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*My construction is, that the testator, in the first place intended to give an equitable or trust property to Mrs. Hodges, in the property set forth in the sixth clause, vesting the title of it in her brother Reuben. The value of this he defines in the eighth clause; and in the ninth and tenth clauses, he requires that it be augmented to \$10,810, out of the proceeds of sales which he directs; and, finally, after this process is observed as to all his children, he disposes of the surplus of those sales, not by creating a trust or adding to the trust he had already created, but by a simple requisition that it be divided, a sixth to each child, "for the benefit of his six children, or the heirs of their bodies;" that is to say, one-sixth to be paid to each child, or in case of the death of any of them, their shares to be paid to their children or issue.

It has been objected that the direction contained in the eleventh clause was sufficient to constitute this surplus a trust fund, and to authorize the trustee to invest it as well as the sum coming to his cestuique trust, for the purpose of producing equality. But I take a different view. A distinction is created and carefully kept in the tenth clause, between the sum given for equality, and the "overplus." The former is to be paid to the trustee, by express direction. The latter, if

intended as part of the trust fund, would naturally have received a similar direction. Instead of which, and without any allusion to a trust, it is given directly to the legatee.

It is not at all an improbable thing that the testator intended to give a trust estate of a certain value, and to bestow any thing beyond that absolutely.

Another question in the case is, whether the sum given for equality is part of the trust property, or to be considered an absolute gift. This question I have already incidentally considered and decided. The indications of intention are, in my opinion, fully clear that it was to constitute part of the trust estate.

A question remaining to be decided is, whether the real estate (the lot) included in the sixth clause, is impressed with a trust character.

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*If we confine ourselves to that clause, or to those in which provision is made, in the first instance, for the daughters of the testator, there is nothing sufficient to raise a trust out of his language.

All the property, both real and personal, is given to the sons as trustees of the daughters; no terms are used to describe the trust intended, or to regulate or define the duties of the trustee. It is a mere gift to him for the use of another. The property really belongs to the beneficiary, unless we find something else in the will. The statute of uses would give the land to Mrs. Hodges. But we are to read the sixth clause in connection with the thirteenth, where the property is limited over at the death of Mrs. Hodges, that is, the duty is imposed on the trustee to sell it at that time, and dispose of its proceeds according to the contingencies described. As I construe that part of the will, such

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houses on the Sulphur *Springs plantation, should be strictly observed. There is a written contract between myself and Mr. William Turpin, and a verbal agreement between myself and the following persons, to wit: Pettus W. Chick, Thomas Henderson, Josiah Kilgore, Philip C. Lester and Dr. Thomas Austin. My wish is that they may occupy their houses built there, free of rent, and having the use of wood and water as long as they please to do so, upon the express condition that none of them are to open boarding houses; if they do, they forfeit their claims to the house.

Nineteenth. It is my request and desire that my heirs may settle any matter of difficulty that may arise in relation to this my last will and testament, by selecting three disinterested persons, whose decision shall be final; and if any one or more of my heirs shall commence a law suit in the matter, the shares of such shall be forfeited, and revert to my other children, or their issue.

Twentieth. I hereby constitute and appoint my sons, Pettus W. Chick and Reuben S. Chick, executors to this my last will and testament, and request them to execute it to the best of their abilities.

Twenty-first. I hereby declare this to be my last will and testament, and revoke all other wills and testaments of a prior date to this.

Witness my hand and seal this ninth day of

February, in the year of our Lord one thousand eight hundred and forty-six.

Twenty-first. My executors will sell the property when they think it best, and may give only twelve months' credit on all of my personal estate; the real estate is to be sold on a credit, as above stated.

Twenty-second. My wish is, if either of my heirs should lose negro, or more, before my decease, my executors will have it appraised, and pay over to the one that lost it its valuation; and should either of them, that I have given away, have an increase before my decease, the heir that own the mother must pay over the valuation to the rest of my legatees, she or he, as it may be, being one of the legatees. If I have left out any negroes not willed, my executors will have them appraised, and let whichever of the heirs that has the family take it as so much paid them towards their legacy.

Twenty-third. I wish those that have built cabins on the Sulphur Spring tract of land, to have the use of one acre of land, whereon their building sets, and the use of wood and water, as above mentioned. Burwell Chick, [L. S.]

Witnessed in the presence of the testator, and each other by us,

Thomas Taylor,
Huenton Hawkins,
Austin Taylor.

child or children as Mrs. Hodges may leave at her death, will, at her death, acquire a vested interest in the proceeds of the trust property, to be enjoyed at their majority. If she leaves no child, the proceeds are to be delivered to her brothers and sisters then living, and if any of them be dead, leaving issue, that issue is to take the share which such deceased would have taken, if still living.

It is not necessary to decide here what distribution must take place in case Mrs. Hodges shall leave a child or children, who shall not live to attain majority.

The Commissioner has made a report that it will be to the advantage of the parties interested that sale be made of the lot in Greenville, included in the sixth clause, and also of the real estate purchased in Newberry by the trustee, Reuben S. Chick, as trust property. It appears that they are unproductive and dilapidated.

It is ordered that the Commissioner, after duly advertising the sales hereby directed, for at least twenty-one days, do sell the lot in Greenville, at Greenville Court House, and the Newberry lands, at Newberry Court House, on the first convenient sale day, each at public auction, and each on a credit of

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one, *two and three years, with interest from the day of sale; requiring so much cash from the purchaser as will pay the costs of this suit, and take the bonds of the purchasers, with at least two good sureties, and a mortgage on the premises, to secure the balance of the purchase money. The distribution of the proceeds to await further orders, to be applied for in term time.

It is referred to the Commissioner to enquire, and report at the next term, how much of the "overplus," and how much of the sum allowed for "equalization," were employed in the purchase of the Newberry lands, and what proportion of the sales herein directed, should go to the trust estate, and what to Mrs. Hodges absolutely. He will also report any special matter.

One reason for requiring the proceeds of the sale of the Newberry land to await further order, arises from the fact, that the bill is filed against Reuben S. Chick alone.

The other children of the testator may have interest, and cannot be concluded without being brought before the Court.

It is ordered that the plaintiffs have leave to amend their bill, and make the parties defendants.

The defendant appealed from so much of the decree of Chancellor Johnston as relates to the construction of that portion of the bill as directs that the proceeds of the sales of the testator's lands, &c., be paid over to the complainants, and moved this Court to reverse the same, on the ground:

That his Honor erred in adjudging that a portion of the estate, which the complainant,

Caroline, took under her father's will, vested in her absolutely, and was not held in trust for her during life; and will insist, that according to the true construction of the whole will taken together, the whole estate to which she is entitled should be held in trust by the defendant, for her during life, and at her death in default of issue, to the other legatees under the said will.

And notice was also given that a similar motion would be made to reverse so much of

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Chancellor Dargan's decree at *June Term, 1857, under the amended bill, as applies the same construction in behalf of Mrs. Maria Thompson.

Fair, for appellants.

Townes & Campbell, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The litigation in this case arises on the construction of Burwell Chick's will. The sixth clause of the will is as follows: "I give to my son Reuben S. Chick, in trust for my daughter Caroline T. Hodges, the following property, to wit: Bill, Liggon, Daniel, Ritter, Emery, her children, negro slaves; also one lot in the town of Greenville, where my blacksmith shop stands on." It will be observed that the property bestowed upon Caroline T. Hodges, is given expressly in trust.

In the eighth clause the testator says: "In estimating, heretofore given my children," (he means to say, in estimating the property which I have heretofore given my children,) "and what I have herein specially named for the benefit of each child, as well as I can judge, the value of each will be as follows, to wit: Pettus W. Chick's portion is ten thousand eight hundred and ten dollars. Reuben S. Chick's, ten thousand four hundred dollars. Maria H. Thompson's, ten thousand eight hundred dollars. Louisa V. Farr's portion ten thousand three hundred and fifty dollars. Caroline T. Hodges portion, nine thousand four hundred dollars. Wilhelmina Chaplin's portion is nine thousand seven hundred and fifty dollars."

In the ninth clause he says: "It is my desire that my executors, after named have (power) as soon as convenient after my decease (to) divide my tract of land lying in Newberry and Union Districts, into three or four tracts, as in their judgment may be best, and sell the same on a credit of one, two and three years, bearing interest from date of sale; also my Sulphur Springs and

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Fleming tract, with all the furniture, *household and kitchen furniture, be sold in the same way; also my crop, my shares in the Rolling Mill; also my furniture at every place that I own, and all my stock at every place, and all and every thing that I possess, sold in like manner, not otherwise mentioned or given away."

"Tenth. It is my wish that each of my children or their trustees for them, should receive out of the proceeds of the sale of this property a sufficient sum to equalize them with my son Pettus W. Chick's portion, that being the largest amount, and the surplus I wish equally divided in six parts for the benefit of my six children, or the heirs of their bodies."

It is equally clear, that the sum which he gives his children, out of the proceeds of this sale, for the purpose of equalizing them with the portion of Pettus W. Chick, which is \$10,800, is intended, so far as the testator's daughters are concerned to be given in trust, and to the trustees already appointed as trustees of said daughters in regard to the property given to them, specifically, in the preceding clauses of the will. This is the decision in the Circuit decree, and there is no dissatisfaction with or appeal from that part of the decree. But are the shares of the daughters, out of the proceeds of the sale of property directed to be made in the ninth clause, given to them in trust? The Chancellor who heard the cause, decided this question in the negative. From that part of the Circuit decree, an appeal has been taken; and that is the only question presented to this Court. The will is very inartistically drawn, (prepared by the testator himself, it is said,) and no one can understand the discussion of the question before the Court, without a copy of the will before him.

This Court is of opinion, that the Chancellor was in error in holding that the shares which the testator's daughters took, under the tenth clause of the will, were not given to them in trust. It will be borne in mind, that the property which the testator gave to his daughters, specifically, was given to trustees for their benefit; such, also, was the

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fact in reference to *the sums which he gave his daughters, out of the proceeds of the sale, to equalize them with the portion of Pettus W. Chick. It is not doubted that this equalizing sum was given in trust, as to his daughters, as we have already seen. It is apparent, then, that it was in conformity with the general intention of the testator, that his daughters should receive, in trust, the property which he had to bestow upon them.

In the eleventh clause, the testator says, "it is my wish that the trustees of each of my daughters shall vest all funds coming in to their hands, from the provisions of the eighth article of this, my will, in lands where they may think best for my daughters, or their children." On looking to the eighth clause, it will be perceived that it contains a recitation only, and no disposition of property whatever. In the ninth clause the testator directs the sale, and the terms of it. In the tenth, he disposes of the proceeds of that sale. When, in the eleventh clause, he

directs the trustees of his daughters to invest the funds which shall come into their hands, from the provisions of the eighth clause, he, evidently, makes a mistake, and means to refer to the tenth clause. On this construction, all difficulty on the question before the Court vanishes. It, then, becomes plain, that the shares which the daughters were to receive from the proceeds of the sale, directed in the ninth clause, should be settled upon them in trust, as were the other portions of his estate given to them by his will. The judgment of this Court is, that all the property, whatever, which Caroline T. Hodges takes, or is entitled to take, under the will of Burwell Chick, including her share of the proceeds of the sale directed by the ninth clause of said will, is given to, and is to be received by Reuben S. Chick, in trust, for the said Caroline T. Hodges, and is to be held by him for the purposes of the trusts declared in the said will.

It is ordered and decreed, that all the property, estate and funds, to which the said Caroline T. Hodges is entitled under the provision of the will of the said Burwell Chick,

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be *delivered and paid to the said Reuben S. Chick, to be held by him in trust for the purposes above declared.

The same reasoning and construction apply to the dispositions of the will in favor of Mrs. Maria Thompson, who has also appealed from Chancellor Dargan's decree, on a ground similar to that taken by Mrs. Hodges. It is therefore ordered and decreed, that all property, estate and funds, to which Maria Thompson is entitled under the provisions of the will of the said Burwell Chick, be delivered and paid to her trustee, Reuben S. Chick, to be held by him for the purposes of the trust declared in the will.

It is ordered that the circuit decree of Chancellor Johnston and that of Chancellor Dargan, be modified accordingly.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

10 Rich. Eq. *191

*ELIZABETH COLEMAN v. WILSON
COLEMAN and Others.

(Columbia. May Term, 1858.)

[*Husband and Wife* §31.]

Furniture not included in the schedule to marriage articles, *held*, not to pass under general terms and provisions contained in the body of the instrument.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 183; Dec. Dig. §31.]

[*Husband and Wife* §31.]

Marriage articles covered certain property mentioned in the schedule, and provided that all property afterwards acquired by the wife, should be subject to the provisions of the instrument. Among the property mentioned in the schedule

was the wife's interest in lands of her first husband, which had been sold for partition, and purchased by herself and R., and for the purchase money of which she and R. had given their joint bond with mortgage of the lands. On settlement afterwards had of the first husband's estate, a balance due by R. on the bond and mortgage was transferred to the wife, and then C., her husband, under executions against R., purchased his equity of redemption in the lands: *held*, that the interest acquired by the wife in the amount due by R. on their joint bond and mortgage, was subject to the provisions of the marriage articles as property afterwards acquired by her.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 188; Dec. Dig. ☞31.]

] *Husband and Wife* ☞144.]

Held, further that C.'s purchase of the equity of redemption was in his own right, and not as trustee for his wife.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 545; Dec. Dig. ☞144.]

Before Wardlaw, Ch., at Lexington, June, 1856.

Wardlaw, Ch. Most of the facts upon which the questions of this case depend are stated in the report of *Coleman v. the Bank of Hamburg*, 2 Strob. Eq. 285 [49 Am. Dec. 371], and for the grounds of my judgment, not much additional statements is needed.

Before the intermarriage of James B. Coleman and the plaintiff, now his widow, they executed a deed bearing date August 29, 1838, whereby, after reciting that the "parties are seized and possessed of and entitled to considerable real and personal estate, which they are desirous should be secured ultimately to their respective children," both of them having children by former marriages, it was covenanted and agreed between them and her son John P. Blewer, who interposed as her trustee, that in the event of

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marriage, 1. All her debts to *her son John, as ward, and all the rest of her liabilities should be "paid and discharged out of the property which she is seized and possessed of or entitled to, a schedule of which property is signed by the parties bearing even date with these presents; and is to be taken and considered as a part of this deed; "with further provisions that the estate of said "James B. shall be exempt and indemnified from liability for her debts, and that her estate shall be exempt from liability for his debts; that he shall have power, by barter or sale of her property, to discharge her debts. 2. The said James B. should hold her said property for their joint use during their joint lives, and upon the death of one of them the said property, or so much as should remain of it, should be re-vested in her, if she were the survivor, or in her children" or appointees by will, if he survived. 3. Neither party to have any share in the estate of the other by common laws or statute, except as above. 4. "All the property, real and personal, which may hereafter fall

to or be acquired by the said Elizabeth M. by deed, will or otherwise, shall be subject to the operation of this instrument of writing in the same manner as the property now owned by her." The schedule annexed to the deed specifies half of the land bought by her and Peter Redheimer, at the sale for partition of the estate of her former husband, John G. Blewer, (which land had been divided between Redheimer and herself,) and other lands and some slaves, and nothing more. In the former suit of *Coleman v. Bank of Hamburg*, the present plaintiff is joined as a party complainant with her husband, but the bill was filed in conformity to his instructions, and its statements verified by his affidavit. I suppose that the statements of the bill bind as admissions himself and volunteers claiming through him, and are not conclusive on the wife. The bill contains no mention of the marriage articles, and the execution of this instrument is not now proved as against the infant defendants, although the execution was admitted by the adult defendants, and the counsel of plaintiff probably put off his guard.

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*In the present proceeding the plaintiff claims the Redheimer tract of land, of which her late husband purchased the equity of redemption at the Sheriff's sale under executions against Redheimer in August, 1843; or that her lien on said land arising from the delivery to her by Commissioner Terry of the bond and mortgage of herself and Redheimer may be foreclosed. She also claims some small articles of furniture owned by her before marriage; and I dismiss this part of her suit at once, with the remark that the furniture is not within the reasonable intendment of the articles limiting the marital rights. Her claim to the land itself has as little foundation. Her husband bought the equity of redemption for himself, and not as her agent or trustee; and there is no merger of his title and her lien. The matter is so treated in the former case.

The serious controversy in the cause relates to the existence of a lien in her behalf upon the land for the balance due to her from Redheimer on their bond and mortgage to Commissioner Terry, delivered to her by agreement as a security. I have had difficulty in determining this point. This lien is not specifically mentioned in the articles, although the bond and mortgage from which it arises had been previously given; nor is any debt or right in action belonging to her expressly settled. Still it is provided in the articles that all property subsequently acquired by her should come under the operation of the settlement and the agreement that the lien should subsist, and Redheimer's default in payment creating the debt to her occurred after the marriage.

In the bill of *Coleman and Wife v. Bank*

of Hamburg, sworn to by him, the circumstances inducing and attending the transfer of the bond and mortgage by Commissioner Terry are fully narrated, and it is expressly mentioned that by agreement between Coleman and wife, Redheimer and Terry, the bond and mortgage were delivered to Coleman and wife September 27, 1842, "as a valid and effectual lien upon so much of the land in the said mortgage specified as had been allotted to the said Peter Redheimer

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in the aforesaid par*tition (between him and Mrs. C.) for the balance of \$1,344.42, and interest thereon," and that the bond and mortgage remained in the hands of Coleman and wife, and that no part of said balance had been paid. In the course of the bill Coleman alleges that "combining in himself the mortgagee's estate and the equity of redemption, he acquired a good and perfect title to the said land;" but there was no attempt to have the respective rights of his wife and himself adjudged and determined. One of the prayers of the bill is that the said mortgage on the said land allotted to the said Peter Redheimer may be declared to be a valid lien on said land in favor of your orator and oratrix, (Coleman and wife,) and that they may have all the benefits thereof in the same manner, and to the same extent that the said James Terry might have had, if he had retained the same and were now seeking a foreclosure, and that your orator and oratrix may be subrogated to the rights of the said James Terry, touching the said mortgage." I repeat, she is not concluded by the averments of his bill.

A deed of marriage articles should receive a more benign construction than might be authorized concerning an executed conveyance, yet it would be unreasonable and improper to make interpolations in the articles without the clearest proof of mistake and miscarriage, of which none exists here. This proposition contains the view upon which I exclude the claim for furniture, and recognize that a chose may be included in the term property.

The mortgage to Terry contains no operative words of grant of the mortgaged premises, unless they may be implied from the insertion of the clause "to have and to hold," and from the instrument calling itself a release. I suppose, however, that it might be treated in this court as a valid agreement to mortgage which could be specifically executed. An imperfect writing of this description would at least be evidence of the intention of the parties; that the statutory lien under the act of 1791 should still subsist. I uphold the lien.

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*The whole tract of land purchased by the plaintiff and Redheimer was originally subject to the lien of the mortgage; but as the moiety of plaintiff was first aliened, (Adams

v. Nelson and Dendy. M. S.) and as by express agreement in September, 1842, Redheimer's moiety was to sustain this burden, the plaintiff has an equity, that this latter moiety should primarily satisfy the lien.

It is adjudged, that the plaintiff is entitled to foreclosure of the lien for the balance due to her from Redheimer on their bond and mortgage by sale of the Redheimer portion of the land: but it is not safe now to order a sale. And it is ordered that it be referred to the Commissioner to ascertain the balance which may be due to her. If it appear on this accounting that the plaintiff, since the death of James B. Coleman, has received from the rents and profits of the Redheimer tract, all or any part of her debt, the proper deduction for payment from this source must be made. So also if it appear that James B. Coleman paid the note of February 24, 1849, to Wm. Coleman, Sr., for \$640, in which he was surety of his wife, from his own funds, and not hers, deduction may be made on this account. And considering the indulgence proposed to be granted to the plaintiff as to proof of the marriage articles, I further allow that the defendants may offer proof before the Commissioner on the reference, additional to the payment of the note or extinction of plaintiff's lien, by his payment of her debts. And finally, it is ordered that plaintiff may offer proof before the Commissioner on the reference of the execution of the marriage articles.

The plaintiff appealed from so much of the decree as decided that she was not entitled to the land under James B. Coleman's purchase of the equity of redemption at Sheriff's sale; and also from so much as restricted her rights under the marriage articles to such property only as is specified in the schedule on the grounds:

1. Because James B. Coleman, under the marriage articles, was the trustee in fact

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of the whole of his wife's property, *being possessed for their joint support with power to barter or sell for specified purpose; and the title to the land in question, which he acquired from the Sheriff for a nominal consideration, was obtained by him by means of the relation of trustee and agent of his wife, and was a speculation or good bargain based upon that relation and his wife's separate property, under circumstances in which she had no power to act except through her husband. The Sheriff's title, therefore, should enure to her separate benefit.

2. By the general terms, meaning, and spirit of the marriage articles, it was the intention of the parties that all the property of each should remain and continue separate and distinct; and that the marital rights of the husband should not attach upon any part of the wife's property; the instrument of writing being only marriage articles and not a deed, and no creditors or purchasers

being interested, it is submitted that the Court should restrain and debar the marital rights of the husband from attaching upon any part of the wife's property according to the understanding of the parties, and the spirit of the agreement.

The defendants also appealed from so much of the decree, as decided that the complainant was entitled to foreclosure of the lien, for the balance due, on the bond and mortgage upon the grounds:

1. Because the said bond and mortgage are not contained in the schedule annexed to the marriage settlement, although they existed at the time of the execution thereof.

2. Because the said bond and mortgage were delivered to James B. Coleman and wife, in payment of her distributive share of her former husband's real estate, which was due to her at the time of the execution of the marriage settlement.

Bauskett, for complainant.

Boozar, Jones, contra.

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*The opinion of the Court was delivered by

DUNKIN, Ch. By the ante-nuptial contract, 29th August, 1838, it was stipulated that the covenants should become "obligatory in the event of the contemplated marriage taking effect." No further settlement was covenanted for, or probably intended. Still, all such agreements should receive a liberal interpretation, in order to accomplish the obvious intention of the parties. The plaintiff complains that the furniture of the wife was not construed by the Chancellor to fall within the provisions of the articles, although not specified in the schedule. The preamble recites that the parties, respectively, are seized and possessed of considerable real and personal estate, "which they are desirous should be secured, ultimately, to their respective children." The first article covenants for securing the wife's property, "a schedule of which property is signed by the parties, bearing even date with these presents, and is to be taken and considered as a part of this deed." The furniture is not included in the schedule, and the obvious conclusion is that the parties did not regard some articles of household furniture, probably to be worn out in the use, as of sufficient importance to be "ultimately secured to the children," and were, therefore, not specified in the schedule. We are not called on, however, to speculate upon the probable views of the parties. The Court sees no cause to suppose that the omission of the furniture from the schedule was the result of accident or mistake, or that the same does not set forth a full statement of all the property which the parties who subscribed the schedule desired to have secured to their respective children.

The plaintiff, also, appeals because the decree did not declare the Redheimer tract to be vested in her under the purchase from

the Sheriff, instead of establishing a lien in her favor under the bond and mortgage; while, on the other hand, the defendants insist that the bond and mortgage were given for her interest in her former husband's estate, and were not included in the schedule,

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although they existed at the *time. These objections may be conveniently considered together. The difficulty arises from some confusion in facts and dates, rather than from any doubts as to the legal conclusions.

The real estate of John G. Blewer, the former husband of the plaintiff, was sold by James Terry, Esq., former Commissioner of Edgefield, in 1837, for partition among the heirs. These heirs consisted of his widow (the plaintiff) and four children. At the sale, the plaintiff and Peter Redheimer, her son-in-law, purchased land to the amount of \$10,000, for which they gave a bond, with sureties, and a mortgage of the premises to the Commissioner. Mr. Terry says, in his evidence, that the entire sales amounted to \$13,795, of which the widow's share was \$4,500, or thereabouts. Very soon after the sale, the land purchased by the plaintiff and Redheimer was equally divided between them by metes and bounds. The proportion of the bond payable by the plaintiff exceeded her share of the estate. On her subsequent intermarriage with Coleman, in August, 1838, her half of the land thus purchased from Commissioner Terry, in April, 1837, is specially described in the schedule, and also that "it had been since divided between Redheimer and herself." At that time, she was indebted to her son, John P. Blewer, as his guardian, and otherwise, and special provision is made in the articles that her debt to her son, as well as her other debts, should be paid out of the property included in the schedule. She subsequently sold to her son the land which she had purchased at the Commissioner's sales, and at the same price. After these transactions, to wit: on 26th September, 1842, a settlement took place in Mr. Commissioner Terry's office, between the heirs of John G. Blewer, deceased. This matter is explicitly set forth in Coleman's bill (under oath) against the Bank of Hamburg, in June, 1847. He says that, at this settlement, it was ascertained and agreed that the bond given by the plaintiff and Redheimer to the Commissioner, had been fully paid, except the sum of thirteen hundred and forty-

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four dollars and forty-two cents, which was due by Peter Redheimer on his half of the bond—that the plaintiff was the guardian of her son, John P. Blewer, and "it was thereupon agreed that, instead of exacting the cash from the said Peter for the balance due on said bond, which he was not then prepared to pay—that the said bond and mortgage should be delivered to your orator and oratrix towards the share of the said John P. Blewer, and should stand as a valid and ef-

fectual lien upon so much of the land in said mortgage specified as had been allotted to the said Peter Redheimer, for said balance of thirteen hundred and forty-four dollars and forty-two cents, with interest thereon," &c. This is fully confirmed by other testimony. Among others Robert Haukison, who had married a daughter and was present at the settlement, said: "Mrs. Coleman took Redheimer's bond and mortgage out of the Commissioner's hands. When he handed it to the old lady he said about \$2100 was due, but that they could arrange it among themselves; that, at this settlement, he (the witness) took a single handed note from Redheimer so that the bond might be given up to Mrs. Coleman." He subsequently testified that "John P. Blewer bought his mother's share of the land before the settlement with Terry, and before he was of age—he took the land at cost—the witness had first bargained for it—the price was upwards of \$4,000. Mrs. Coleman paid her son his share of the estate by selling him this place; this sale threw the estate (or rather J. B. Blewer) in debt to her about \$1,200, and for this the bond and mortgage were transferred to her. From this statement it is very clear that in August, 1838, the plaintiff's outstanding bond, as obligor with Peter Redheimer, to the Commissioner in Equity, was entitled to no place in a schedule of her property. Her share of the land, which was the consideration of her bond, was properly included, and constituted more than her share of the entire estate. But in consequence of the subsequent sale of her share of the land to her son, and the adjustment in the Commissioners office in September, 1842, she acquired an equitable

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*Title to the balance of \$1,344.42, due by Peter Redheimer on the bond, and as an incident to the mortgage of his moiety of the premises. This fell directly within the second article of the marriage contract, by which the future acquisitions of the wife were declared subject to the operation of the instrument in the same manner as the property then owned by her. If, in 1837, Peter Redheimer had given to the Commissioner his separate bond for his moiety, on which, in September, 1842, a balance of \$1,344.42 was still due, and the other arrangements above detailed took place, in order to give them legal form, Mr. Terry, the Commissioner, would have assigned to J. P. Blewer, as trustee, under the marriage articles, the bond and mortgage of Redheimer for the balance due. Such is now the light in which the rights of the parties are regarded by this Court. When, in August, 1843, Coleman purchased Redheimer's equity of redemption at Sheriff's sale, there was no merger of right between debtor and creditor, and, consequently, no extinguishment of the debt. As standing in the place of Redheimer, Coleman may have become liable to pay the bond, but he had no

right, either equitable or legal, to receive the money. The strict legal title was in the obligee and mortgagee, James Terry; but the equitable right was in the trustee of the settlement, or the beneficiaries interested, according to the provisions of the articles. The husband, Coleman, purchased the equity of redemption for himself and took the Sheriff's conveyance to himself in October of same year, and the Court agrees with the Chancellor that there is nothing to fix him with a fiduciary character in this transaction. We concur generally in the decree and the decretal orders made at the Circuit. But in taking an account of the amount due on the bond of Redheimer, the calculation of interest must be suspended from the time of the transfer, in September, 1842, until the death of Coleman, in August, 1852. According to the terms of the settlement, James B. Coleman was entitled to hold the property for the joint use and benefit of himself and

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wife, during their joint lives. The *interest, therefore, which accrued on the bond after it became part of the trust estate, he was entitled to demand and receive during the coverture. From the position which he assumed on becoming the purchaser of the equity of redemption in August, 1843, it must be presumed that the interest, which had accrued since the transfer and which subsequently accrued until the period of his death, was extinguished and paid. With this explanation (which is not at variance with anything announced in the Circuit decree) the Circuit decree is affirmed, and the appeal dismissed.

DARGAN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *202

*ROBERT MCCLELLEN and Wife, and Others, v. JOSEPH HETHERINGTON and Others.

(Columbia, May Term, 1858.)

[*Executors and Administrators* ⌚111; *Wills* ⌚736.]

An executor, who was a devisee and legatee, allowed his counsel fee in establishing the will before the Ordinary in solemn form; the devise to himself and the legacies being charged rateably in proportion to value.

[Ed. Note.—Cited in *De Leon v. Barrett*, 22 S. C. 424; *Ex parte Landrum*, 69 S. C. 142, 48 S. E. 47.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 448-462; *Dec. Dig.* ⌚111; *Wills*, Cent. Dig. §§ 1875-1887; *Dec. Dig.* ⌚736.]

[This case is also cited in *Ex parte Landrum*, 69 S. C. 136, 48 S. E. 47, and distinguished therefrom.]

Before Johnston, Ch., at York, June, 1856. This case came before the Court on exceptions to the Commissioner's report; the first

exception being "Because the Commissioner erred in not allowing the defendant, as executor, a credit of five hundred dollars, being the amount paid by him as counsel fees for establishing the will of the testator." On this exception, his Honor, the Circuit Chancellor, decreed as follows:

Johnston, Ch. This exception is of a class which is becoming quite perplexing. In *Wham v. Love*, (Rice, Eq. 51,) there was no contest as to whether the deceased died testate or intestate. All parties before the Court claimed under him as intestate. Love was his administrator. But the contest was as to who were his distributees. Love, with his associates, claimed that they were the true distributees, in opposition to other parties, whose claim they contested. It was held that the costs of this contest were not to be charged on the estate, to the loss of the other parties, who prevailed. This was clearly according to principle. But in *Atcheson v. Robertson*, (4 Rich. Eq. 39) it was held that when an executor, in the faithful execution of his general duties as executor, was put to expenses, these were properly chargeable on

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the estate. *And in a late case, (a) and whose title has escaped my memory, (the case came up from Edgefield), an executor who had, in pursuance of his duty, expended considerable sums in attempting to prove the will, but had failed, was allowed these expenses when accounting for the estate.

It seems to me that upon the principle of this case, the exception under consideration is well taken. It is admitted that the sum claimed is reasonable and proper. This exception is, therefore, sustained.

The complainant appealed.

Smith, for appellant.

Clawson, McAliley, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The brief in this case is long, but while it contains much superfluous matter, it omits some of the materials of a satisfactory judgment; particularly the Commissioner's report of June, 1856, which was the basis of Chancellor Johnston's decree, now appealed from. The first ground of appeal objects that the Chancellor allowed the defendant, as executor, a credit of \$500, as a counsel fee paid to establish the will of testator, when it appears, by the provisions of said will, that he was, in fact, litigating in his own right and for his own interest. It seems that the testator devised to the executor all his land, worth about \$6,000, and at least an equal portion of his small personalty, and that the executor had notice before probate in common form, that the validity of the will would be contested. The case is distinguishable from those previously decided on this "perplexing doctrine."

(a) *Butler v. Jennings*, 8 Rich. Eq. 87.

In *Wham v. Love*, Rice Eq. 51, the ordinary duties of the administrator had been dis-

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charged, and he was *refused credit for his expenses in resisting, unsuccessfully, the title of the plaintiffs to the fund for distribution in his hands, in behalf of himself and other defendants in the same interest; his expenditure was not for the maintenance of his fiduciary relation, but for his own gain. In *Atcheson v. Robertson*, 4 Rich. Eq. 39, allowance was made to an executor for a fee paid to counsel, partly for resisting just claims of the legatees; but this was because the legatees received the benefit of a mortgage taken by the executor for his own security, and it would have been plainly unjust to deprive him of his title for the benefit of the legatees generally, without reimbursing him for his expenses honestly incurred. In *Butler v. Jennings*, 8 Rich. Eq. 87, which is most analogous of the cases to the present, an executor was allowed his expenses in attempting to establish a will in due form of law, after it had been admitted to probate in common form, but it did not distinctly appear there that the executor took any interest under the will. The principle to be deduced from all the cases is that the representative should be reimbursed from the estate for the expenses he has incurred in litigation fairly falling upon him in his character of trustee; especially where he has been successful, although he may have some interest in the subject of suit. He should have credit for all expenditures for the preservation and benefit of the estate, as for fees to counsel, for general advice in the administration of the estate, for resisting doubtful claims, for clearing out incumbrances, for obtaining the instruction of the Court in a proper case, for settlement of the estate, and like services. In *Butler v. Jennings*, some reliance in the judgment was put on the fact that the litigation concerning the will was stirred after the title of executor had been conferred on the defendant by the Ordinary; but one nominated executor may perform many acts in that character before probate, and is under obligation to set up what he really believes to be the will of his deceased friend and testator; and if the result proves that his belief was just, he ought not to sustain the cost of establishing

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the will from his *own pocket. We are content then in this case that the counsel fee should be paid out of the estate; but, as we understand the matter, the Commissioner, in his last report, throws the whole burden of this expenditure on the other legatees, in exoneration of the executor, at least to the extent of his devise. That is considered an unjust result. In payment of the debts of a testator or intestate and the ordinary expenses of administration, resort is properly had primarily to the personal estate, but this

case is exceptional. The executor was litigating with the other legatees mainly for his own benefit, and partly before he assumed the office; and it is not just that they, in addition to payment of their own counsel, should sustain the whole burden of reimbursing him for payment to his counsel. It is adjudged that the executor here is not entitled to exoneration for payment to his counsel of that part of the fee which is proportionate to the value of the estate devised and bequeathed to him; and it is ordered that the Commissioner reform his report so as to make it a burden on all the legatees rateably to the value of their shares.

The second ground of appeal relates to the hire of the slave Daniel for the years 1852, 1853 and 1854, and suggests that the Chancellor was mistaken in supposing that the slave for these years was in possession of James Hetherington, and not hired out by the executor. The Commissioner originally allowed this hire, and the Chancellor disallowed it; but recommitted the report, with very proper instructions to the Commissioner, to charge the executor where he had hired the slave to another person than James H., and had received, or ought to have received, the hire, and had not accounted with James H. before notice of the latter's assignment. There was evidence at the former reference that this slave had been hired for two of these years, although it did not appear by whom, or to whom, or at what price, he was hired. At the latter reference, Crosby, assignee of James, offered additional evidence on the subject, and the Commissioner refused to receive it, because, as he supposed, the Chan-

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cellor had concluded the point. We do *not so interpret the decree and think the Commissioner should have received the evidence. It is ordered that the report be recommitted to the Commissioner as to this matter.

On the questions of fact brought under review by the third ground of appeal, we do not perceive in the dim light afforded by the brief any error in the Chancellor.

It is ordered that the decree be modified as hereinbefore directed, and in other respects be affirmed.

DUNKIN and DARGAN, CC., concurred.
Decree modified.

10 Rich. Eq. *207

*BENJAMIN ETHEREDGE v. NELLY
PARTAIN and Others.

(Columbia. May Term. 1858.)

[Witnesses ⇨101.]

A defendant is a competent witness for his co-defendants upon all issues in which he has no interest, though upon other matters a decree might be rendered against him—the contingent

liability for costs not being sufficient to exclude him.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 396; Dec. Dig. ⇨101.]

[Witnesses ⇨112.]

The depositary of certain choses, upon bill filed against her and others who claimed title through her, deposited the choses with the Commissioner to abide the event of the suit, and then filed her answer disclaiming all interest, held, that she was a competent witness for her co-defendants upon the issue whether the plaintiff or the co-defendants were the owners of the choses.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 425-475; Dec. Dig. ⇨112.]

The answer of a defendant who is the depositary of a chattel claimed by the bill, is, it seems, evidence for co-defendants, who claim title through the depositary.

Before Dargan, Ch., at Edgefield, June, 1857.

Dargan, Ch. Burdett Etheredge, the plaintiff's intestate, (who died on the 22d July, 1855,) had never contracted matrimony. He had formed an illicit connection with Nelly Partain, and by her he had two illegitimate sons, known as Jacob B. Partain and Noah Partain, who are still under the age of twenty-one years, and who are also defendants in this case—properly represented by guardian ad litem. The intestate had other near and legitimate relations; namely, his brother, his administrator and the plaintiff in this bill, his sister Jemima, the wife of Hancock Southard, and the children of his predeceased sister, Sarah Corley, who was the wife of Nathaniel Corley, all of whom are parties to these proceedings.

The intestate, a short time before his death, was possessed of an estate worth some twelve thousand dollars, consisting of about nine thousand dollars, four slaves, and an inconsiderable amount of live stock and

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household furniture. The estate, *with the exception of the choses in action, was taken possession of by the administrator. The choses in action, with the exception of an open account of no great value, consist of notes and securities, amounting without interest to \$9,000, or near that sum, and are in the possession of the defendant, Nelly Partain, who claims the right to retain them in her possession, alleging that the intestate had in his life given them to her two sons, the said Jacob B. and Noah Partain. The bill was filed to compel her to deliver said notes and securities to the administrator, who is the plaintiff, and for discovery and account of the same.

The gift set up in the defence, is alleged to have been by parol. The consummation and validity of the alleged gift is the only question in the case. It is purely a question of fact, and must be determined by the evidence.

The evidence is plenary, that the intestate always acknowledged his illegitimate children from their birth; that he exhibited to

wards them marks of paternal affection; that they, with their mother, lived with him, in his house, for many years previous to his death in family relations; that he sent them to school; that he supplied all their wants; that he treated them as fathers commonly do their lawful children; and that he spoke of them uniformly from their birth to the end of his days, as the destined inheritors of his estate, and of his intention at his death to bestow upon them his entire property. These facts do not admit of any controversy or doubt. The only question is, whether he has carried out, in a manner sufficiently formal to make it valid and operative, his unquestionable intention.

I will say, by way of preliminary remark, that though for reasons of policy, bastards are put by the law under many disabilities, and are under the ban of public opinion, (and this is all right, and as it should be,) yet neither the rigorous edicts of the law, nor the maledictions of religion can silence the voice of nature in the father's bosom, nor prevent him from loving his innocent off-

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spring, who for his own sin, are ushered *into the world with a stigma attached to their name. I think that the father of illegitimate children is under a high moral obligation, if able to provide for them, and to give them religious, moral and intellectual education, that they may be enabled to soar above the low estate in which the accident of their birth has cast them. This, of course, is not to be done at the expense and in disregard of higher and more sacred obligations. This is the best reparation he can make for being instrumental in inflicting upon them the disgrace and the disabilities which must more or less attend them through life. Where there is a lawful wife, and lawful children, the law does not permit the father and the husband to bestow his property except to a certain extent, upon the object and fruit of his unlawful affections. But these objects of a higher and more sacred obligation out of the way, it is not a monstrous or unnatural thing for a father to desire to provide for his illegitimate children, and to give them the preference over his collateral relations. It is an act which morality does not condemn nor the law inhibit. If, therefore, the intestate, in this instance, has disposed of the greater portion of his estate in favor of his illegitimate children, as is alleged, he has done an act not condemned by morality, religion or the laws of the country.

Again, I say by way of preliminary remark, that if a man makes a disposition of his property in conformity with his previously declared intentions, and his fixed purposes, the allegation that he has made such a disposition is no great or startling demand upon our belief. And when it is alleged, that an act which is proper in itself, which the dictates of morality and the instincts of na-

ture alike prompt him to do, and which act is also in conformity with his uniform, repeated, and emphatically declared intentions, surely it does not require such a high degree of evidence to convince the judicial mind, that such act has been done. It is half proved at the commencement of the enquiry. These views received strong support; indeed are avowed in some of our decided

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cases. *Fowler v. Stuart*, 1 McC. 504; *Blake v. Jones*, Bail. Eq. 141 [21 Am. Dec. 530]; *McCluney v. Lockhart*, 1 Bail. 117; *Brashears v. Blassingame*, 1 N. & McC. 223, note.

On looking into the evidence in this case, it will be seen that there is some, nay, much contradiction as it bears upon the question of the gift. But in my judgment the great preponderance of the evidence is in favor of the gift. Besides Nelly Partain herself, to whom the delivery of these securities is alleged to have been made, there was no witness of the gift. She fully (so far as her testimony may be considered to be entitled to belief) sustained the gift according to the allegations of her answer, and in all its details. The plaintiff adduced witnesses for the purpose of proving the infamy of her character. But with the exception of her long cohabitation with the intestate and of her having borne two illegitimate children, there was nothing proved against her character. On the contrary, a number of the witnesses testified that as to veracity, her character was good. In general, when women lose the cardinal virtue of their sex, their whole moral being becomes utterly degraded and weak. But there are exceptions and the loss of chastity is not always followed by the loss of every virtue. On the contrary, there are memorable instances of women who have led the life of courtesans, who have been found to possess high and lofty virtues, and who have been distinguished for truth and integrity, and who have performed trusts under circumstances of temptation with the most scrupulous fidelity and punctilious honor. However, I have no reason for believing Nelly, though certainly under no bad repute as to veracity, a *Ninon de l'Enclos*; and I should not have been willing in an issue like this, (when her own children were the parties,) to have reposed upon her evidence with such confidence as to have based my decree upon it. But I am unable from anything I have seen, to withhold all credit from it, and to deny it any weight.

There were several witnesses who proved declarations of the testator, wherein he ac-

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knowledgeed that he had done exactly *what Nelly testified that he did, and what he himself undoubtedly did previously declare it was his purpose to do; that is to say, that he had given the notes to Nelly Partain for his two children. I must qualify this last observation. There was no proof of a declara-

tion of an intention to give the notes to Nelly Partain for the children. I mean that the gift to the children was in conformity with his previous declarations.

The declarations of intestate going to establish the gift, was proved by Col. Denny, who was the principal witness on this point. If his testimony is to be believed, it leaves no doubt upon the subject. There was an attempt to weaken the force of his evidence by showing the inconsistency of his statements as a witness, with what he had stated on a former occasion, or occasions. There was also an attempt to assail his character, for the purpose of putting down his evidence. The inconsistency, if any, was not gross, and the attack upon his character failed. The imputations upon him, grew out of one single transaction. What it was I did not learn. There were but few who thought his character sullied by this transaction; many thought him a man of first rate character, and none said they would not believe him on oath. After all, similar declarations of Burdett Etheredge were proved by other witnesses not assailed or deemed objectionable; and he only proved what the intestate was morally bound to do, and what he frequently said he would do. When it is proved clearly and conclusively by parol that the alleged donor has said, that he has given a chattel, it is sufficient, if the witnesses are to be believed; and in such case it is presumed that all the forms necessary to the validity of such parol gift have been observed.

It is urged, that this story of the parol gift by the intestate to his two illegitimate sons, by which he endowed them at once with three-fourths of his estate, is highly absurd and incredible. If he had survived, he would have been deprived of nearly all his estate, and dependent upon his children. It was certainly not prudent. It would have been wiser for him to have made the disposition

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by a revocable instrument, or to *have retained a life estate. The only effect of this view of the case would be to require a somewhat more stringent proof. And giving this argument its proper weight, the case is sufficiently made out. Besides, instances of this kind of improvidence on the part of parents, are of daily occurrence. Many have fallen under my personal observation. I but yesterday tried a case in which litigation grew out of a transaction very similar, and in which a person had committed herself with too much confidence to the tender mercies of an adopted child. A similar instance of misplaced parental confidence in the fidelity and loyal affection of favored children has been seized upon by the great tragic poet, as the basis of the most powerful drama, that has ever been written in the English language, or in any language. I am, therefore, not to be told that all this array in support of this parol gift, is to be rejected and dis-

believed, because Burdett Etheredge, the donor, did an unwise act in making the gift.

I need not cumber this opinion further with the details. The evidence is herewith filed, and may be referred to by any one whose duty or interest it is, or may be to investigate it. In my opinion the parol gift of the choses and securities alleged to have been made to Nelly Partain for her two children, Jacob B. and Noel Partain, and a description of which is contained in the schedule filed as exhibit A., of the said Nelly Partain's answer, is sufficiently established by the evidence. And such is the judgment and decree of this Court.

It is further ordered and decreed that the bill be dismissed.

The plaintiff appealed on the grounds:

1. Nelly Partain, being a party defendant, having put in her answer to the bill, and having, by process of subpoena, procured the attendance of a large number of witnesses at two of the sittings of the Court, had incurred such liability for the costs and expenses of the suit, as rendered her utterly incompetent to testify on the behalf of the defence. She had, moreover, a direct interest in sustaining the gift set up by her answer, as it entitled her to have and hold the notes and single bills

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*the subject of that gift, to collect the moneys thereby secured, and to retain the same until her natural sons, Jacob and Noah, should attain, respectively, to the age of twenty-one years. Her testimony ought, therefore, not to have been admitted, and without it there was no sufficient proof of the alleged gift.

2. Even if competent, the defendant, Nelly Partain, ought not to have been admitted as a witness for the defence, because no notice that she would be proposed as such witness had been given to the plaintiff or his solicitors, and the effect of her being admitted to testify in the cause, operated as a surprise upon the plaintiff, and necessarily subjected him to grievous disadvantage.

3. The witness, Nelly Partain, was contradicted in such and so many important particulars, labored under a bias so strong in favor of the defence, and the mode, extent, subject and circumstances of the alleged gift were so extraordinary, that her testimony should have been wholly rejected, except as to the particulars in which she was corroborated by other witnesses; and if the evidence thus regarded be duly weighed, it is respectfully submitted that the alleged gift amounted, at the uttermost, to no more than a "donatio mortis causa," which became wholly inoperative upon the recovery of Burdett Etheredge from the sickness by which he was then visited.

4. The alleged gift as to the notes dated subsequently to February, 1855, is proved solely by the unsupported testimony of Nelly

Partain, and such proof, it is respectfully submitted, is wholly insufficient.

5. As there was much conflicting testimony touching the alleged gift, and as such conflict involved the credibility of the witnesses examined, it is respectfully submitted that an issue at law upon the question of the alleged gift should have been directed by the Chancellor on the Circuit, and ought yet to be ordered by the Appellate Court.

Carroll and Bacon, for appellant.
Jones and Blake, contra.

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*The opinion of the Court was delivered by

DUNKIN, Ch. Upon a question purely of fact, this Court would be indisposed to disturb the conclusions of the Chancellor, unless some error has been committed in the admission or rejection of testimony. It is urged that Nelly Partain was incompetent as a party defendant on the record, and as having a direct interest in the issue.

The general rule upon this subject is stated by Mr. Maddock, 2 Madd. 416; that, unlike the practice of the courts of law, a defendant may, in equity, examine a co-defendant, if he is not concerned in interest, as if he be merely a trustee or disclaims; and, for the last illustration, he cites a note to 2 Ch. Cases, 214, said to be by Sergeant Maynard. The rule that a defendant may be a witness for his co-defendant, where his interest is not to be affected by his testimony, is recognized by our own courts in *Wright v. Wright*, 2 McCord, Eq. 185, and *Glenn v. Wallace*, 4 Strob. Eq. 149 [53 Am. Dec. 657]. Mere contingent liability for costs, as a party to the record, (costs being always within the discretion of the Chancellor), has never been held sufficient to exclude a witness not otherwise interested. A cause in equity frequently involves several distinct issues. The inquiry always is as to the interest of the witness in the matter to which he is proposed to be examined; "and a defendant (says Mr. Maddock, *ut supra*,) having been examined as a witness, may have a decree against him upon other matters to which he was not examined." In the well considered case of *Nevill v. Demeritt*, 1 Green Ch. R. 321, cited also in a note to 2 Dan'l Ch. P. 1044, it is held that "an order allowing a defendant to examine his co-defendant as a witness will always be granted upon a suggestion that the party to be examined has no interest in the cause, leaving the question of interest to be settled at the hearing upon the proofs."

The plaintiff is the administrator of Burdett Etheredge, deceased. The declared purpose of the proceedings is to obtain possession of certain notes and single bills to the amount of some nine thousand dollars, be-

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longing, it is alleged, to the *estate of the intestate. A general description of the papers claimed is filed with the bill, and it is charg-

ed that the plaintiff has no adequate remedy at law by reason of Nelly Partain's insolvency; plaintiff prays a more perfect description of the papers and security for the forthcoming, &c., but makes no charge or suggestion that Nelly Partain had collected, or attempted to collect, any part of the choses in action. The bill was filed 6th November, 1855, and on the next day an order was made that Nelly Partain should give security for the forthcoming of the papers. Immediately after the order, instead of giving security, she forthwith deposited with the Commissioner in Equity the several choses in action claimed by the plaintiff; and afterwards filed her answer, containing a copy of the several choses in action, and formally disclaiming any interest therein. After this statement, all of which is verified, not by any testimony of Nelly Partain, but by the record and the papers accompanying the record, it is not perceived in what way the witness had any personal interest at the time of her examination in the only decree which the plaintiff sought, to wit: the specific delivery of the choses in action. Doubtless, she entertained a strong bias in favor of her children; but this effects only her credit, and was duly considered by the Chancellor who heard the cause.

In any view of the subject, however, it is entirely too late for the plaintiff to object to the statements of Nelly Partain in relation to this transaction. If Nelly Partain had possession of choses in action to which he was entitled, and her insolvency authorized his appeal to this Court, he had only to say so in a bill filed against herself. But the scope of the plaintiff's bill is far more extensive. He makes other persons party defendant, sets forth the alleged gift on the part of the intestate for the benefit of his children, which he charges to be groundless and unfounded, and prays that the defendants may be required, upon their corporal oaths, to answer all and singular the premises, &c. The answer of Nelly Partain, thus interrogated, sets forth, substantially, all the matters in rela-

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*tion to the gift to which she subsequently testified. *Mills v. Gore*, 20 Pickering's Rep. 28, was a bill in equity to compel the redelivery of a deed deposited in the hands of the defendant by the plaintiff and another person, who also claimed the deed. It was held, generally, that where the plaintiffs call upon a defendant for a discovery, requiring him to answer, under oath, fully to all matters charged in the bill, they cannot be allowed to say that his answer is not testimony. It was also ruled that the answer of a defendant in a bill in equity, which is responsive to the bill, is admissible in evidence in favor of a co-defendant, more especially where such co-defendant, being the depository of a chattel claimed by the plaintiff, defends himself under the title of the other de-

fendant. See also the opinion of the Supreme Court, delivered by Chief Justice Marshall, in *Field v. Holland*, 6 Cranch, 8 [3 L. Ed. 136].

Without inquiring, therefore, whether the other evidence in the cause, independent of the statements of Nelly Partain, was sufficient to establish the gift, we are of the opinion that the decree of the Chancellor was well sustained by competent proof, and that the appeal should be dismissed. It is so ordered and decreed.

DARGAN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *217

*WM. M. WILLIAMS and Others v. JOHN SULLIVAN and Others.

(Columbia. May Term, 1858.)

[*Deeds* 56.]

Where the grantee takes possession of the deed in the presence of the grantor and without objection on his part, that is a sufficient delivery.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 121; Dec. Dig. 56.]

[*Deeds* 194.]

Where the grantee is found in possession of the deed, delivery will be presumed until the contrary is shown.

[Ed. Note.—Cited in *McGee v. Wells*, 52 S. C. 474, 30 S. E. 602.

For other cases, see *Deeds*, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. 194.]

[*Wills* 88.]

An instrument, in form a deed, whereby the grantor gave and granted 'at her death' certain negroes, *held*, to be a deed and not a will.

[Ed. Note.—Cited in *Merck v. Merck*, 83 S. C. 333, 65 S. E. 347.

For other cases, see *Wills*, Cent. Dig. § 208; Dec. Dig. 88.]

Before Dargan, Ch., at Edgetfield, June, 1857.

Dargan, Ch. 'Mrs. Elizabeth Sullivan, an aged lady, (87 or 90 years old at her death,) departed this life on the 20th January, 1857, intestate, leaving some real and personal estate, and leaving as her heirs and distributees the persons described in the bill as such; and all of whom are parties before the Court in this proceeding, either as complainants or defendants. The bill prays a partition. A portion of the negroes of which the intestate died possessed are claimed by one of her heirs, namely the defendant, John Sullivan, by virtue of a deed of gift to him executed by the intestate in her life time. This deed the plaintiffs claim to have set aside on various grounds, and ask to have partition awarded of the negroes covered by the said deed. At the trial there was no controversy save that which related to this deed.

The grounds upon which the plaintiffs

claim to have the deed set aside, are first, that the grantor, Elizabeth Sullivan, was aged and infirm of mind, and that the gift was procured from her by undue influence and control; second, that it was not delivered. And third, that it was not a deed, but a testamentary paper, void for the want of due attestation; there being only two witnesses.

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*That Mrs. Sullivan's life was protracted to an extraordinary length, far beyond that usually allotted to man, is most true. But so far from its having been shown that she was imbecile in any sense, that could make her deeds or contracts void, the very reverse of this state of things was clearly established. It appears that considering her extreme age, her understanding was uncommonly vigorous, and this strength of mind she retained to her last day. Nor was there any proof that the deed was procured from her from any persuasion or influence. There can scarcely be a doubt, that if a strong minded person thinks proper to yield to persuasion and solicitation in the disposition of his property in favor of the person using such means of influence, the instrument by which the disposition of the property was made can not be set aside for that reason. There must concur in the case, such imbecility of mind on the part of the donor, as shows him to be capable of being influenced and controlled, and there must be satisfactory proof that such influence and control were actually exercised. If this were not the rule, weak minded persons would be denied the *jus disponendi*, and would be incapable of making a will or a deed at all. In this case there was no competent proof that the old lady had been solicited to make the deed. The only pretence of a showing on this point, was proof of some parol declaration of Samson Sullivan that the old lady had been persuaded out of the deed by John Sullivan. I need not dilate on this part of the case. The counsel for the plaintiff did not seem to press it seriously.

The next question is as to the delivery of the paper. The plaintiffs deny that there was delivery, which would be regarded in law as such. The manner of the delivery was this, as sworn to by Sam. P. Getzen, one of the subscribing witnesses. He says, 'I knew Elizabeth Sullivan intimately, lived about the fourth of a mile from her ever since 1840. Didn't know Mrs. S.'s age, she was very old: I was present when the deed in question was executed. Don't know when it was. Suppose Mrs. S. could not read writing. Don't

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know *that she could not. I saw her make her mark. The deed in question was read to Mrs. S. before she signed it. I can't say who read it—either Samson Sullivan or David Glover. I remember her saying something about wanting the word 'increase' put in

that deed as regards Lucy. (Lucy was one of the negroes conveyed.) This rendered her uneasy. I have heard her talk about Jack as having worked hard for her, which was the reason she wanted to make a deed. This was before the deed was signed. The day after it was signed, Jack Sullivan came up to the village to see if it was properly done and every thing right about it. I can't say whether the deed was, or was not delivered to Jack Sullivan. It was there among them. I don't know who took the deed." In his cross examination, he says, "the parties present thought the usual formalities were observed."

David Glover, the other subscribing witness, on the matter of the delivery, testified as follows: He said he was present when a deed was signed by her, (Mrs. Sullivan;) S. Sullivan read it to her; she said it was written right; the way she wanted her property to go. After signing, Mrs. S. did nothing with the deed. Samson Sullivan said to Jack, (John Sullivan, the donee,) "you'd better put it away." Jack took the paper. This witness made probate of the deed before the Clerk of the Court. It was recorded in the office of the Register of Mesne Conveyances, 7th June, 1841. The date of its execution is 5th of June, 1841.

This is the whole of the evidence bearing upon the question of delivery. In my judgment it is amply sufficient. If after the due execution of a deed, or other instrument requiring delivery for its consummation, the party entitled to its keeping takes possession of it, by the direction or tacit acquiescence of the grantor, or party to be bound, or in his presence, without protestation on his part, that is a due delivery to all intents and purposes. I go farther, and say, that if, after the due execution of any instrument requiring for its validity the formality of delivery, it is found in the possession of the

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party *in whose favor it is made, and who is entitled to its possession, a delivery is presumed; and this presumption must stand until the contrary is shown—the onus resting upon the party disputing the delivery. The proof in this case, brings it clearly within the requirements of these rules. The judgment of the Court is that the deed in question was duly delivered.

The remaining question to be considered is, whether the instrument executed by Mrs. Sullivan on the 5th June, 1841, is in its form and dispositions a deed, and can have the operation of a deed, or is it a testamentary paper void for the want of a legal attestation. The testamentary character may be made to appear in three ways; by the declaration of the testator in the will itself, by his parol declarations and explanations accompanying its execution, and by the character of the disposition of the property which he makes—showing that the instrument is in-

tended to take no effect and to create no right until the event of his death. Though such a paper may be in the form of deed, it can only have the effect of a testament. It is in the latter category, the plaintiffs seek to place the instrument in question. That class of cases, of which *Jaggers v. Estes* [2 Strob. Eq. 343, 49 Am. Dec. 674], may be considered as the exponent, does not conflict with the rule as above defined. The circumstance that by the terms of the deed, the enjoyment of the property given is postponed till the death of the donor, does not of itself, stamp it with the testamentary character, if it appear that he intended to do an irrevocable act, and to create now a right to the future enjoyment of the chattel given. If this intent does not appear upon the face of the instrument, it is void as a deed, and might, if sufficiently attested, be admitted to probate as a testament.

This paper is in the form of an absolute deed, except where she qualifies it by the word "at my death." Mrs. Sullivan by this instrument gives to John Sullivan, his heirs, &c., "the following negro property at my death, namely, Lucy and her six children, together with her increase," here follows a

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*description of the negroes. Immediately following the description are the words "to have and to hold the said negroes unto him the said John Sullivan, his heirs, executors, administrators forever, under the following proviso," namely: This proviso creates a limitation in favor of her son Sampson Sullivan, in case John "should die without lawful issue," a void limitation in fact. The deed concludes with a general clause of warranty.

The counsel for the plaintiffs contended that the qualifying words "at my death" were misplaced, and that they should have been put after the habendum. Such a rule of construction would be entirely too technical and narrow. In my opinion it is not material in what part of the instrument the qualifying words are placed, provided the intent in some part of the deed, or the whole taken together be clearly expressed. I am utterly unable to distinguish this case from that of *Jaggers v. Estes*. In the latter case the instrument is in the form of an absolute deed, except as to the qualifying words. He grants "to the said Elizabeth Jaggers and her heirs, &c., in as full and ample a measure as I am capable of bestowing, to have and to hold the said negroes Polly and Joe, unto the said Elizabeth, her heirs and assigns from henceforth and forever, as her lawful property at my death," without a clause of warranty as in the case.

Now what is the difference? In the case last mentioned, the words, at my death, which qualify what would otherwise be an absolute deed, to take effect instantan, both as to the right and the present enjoyment of the property, occur at the conclusion of the

deed, after the description and the habendum, and in this case these same words precede the description of the property and the habendum. Can that make any possible difference? If I understand *Jaggers v. Estes*, it amounts to this: A future estate in a chattel to take effect at the death of the grantor may be created by a deed; provided that upon a proper construction of the whole instrument taken together, it clearly appears that it was the intention of the grantor to do

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*an irrevocable act, and to create a present right to the future enjoyment of the chattel conveyed. Under this rule it is immaterial in what part of the deed the intent appears. The principle settled in this case, is sufficiently plain to govern every case, except as to the question whether the intent required does sufficiently appear. In *Alexander v. Burnet*, 5 Rich. 189, the instrument was in the form of a deed, and absolute throughout till the conclusion, where there was appended a proviso as follows: "It is clearly and unequivocally understood that the aforesaid deed of gift is to be of no effect whatsoever, until I, the aforesaid Benjamin Johnson, depart this life." It is impossible to define a rule which would remove all doubts of this character. For there are some instruments of so mongrel a character, that it is impossible, with any thing like a satisfactory conviction, to assign them a place among wills or among deeds; as, for example, the instrument that was the subject of controversy in *Conner v. Livingston*. In determining whether an instrument be a will, or a deed, I apprehend that each case must be judged by its own circumstances. In this investigation there are always some indicia to which the Court may look in determining the character of the instrument—the form may be appealed to for this purpose, though, as we have seen, that is not conclusive. The nature of the dispositions, and whether they appear to have been intended as testamentary and revocable, is a pregnant enquiry. If it is declared on its face to be a will that is conclusive whatever may be the dispositions of property which it makes; and so I apprehend, if in terms, it is declared to be a deed, that is equally conclusive. The employment of terms appropriate to a deed or will, often leaves the matter in doubt, for sometimes both forms of expression are used in the same instrument; still these forms of expression throw some light upon the construction.

The case of *Bookter v. Raglan*, cited in the argument, is not in point. There was no delivery in that case, and the instrument for this reason could not have been set up as a

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*deed. Though in the form of a deed for the most part, nevertheless there were expressions and dispositions in it which gave it the appearance of a will. There was in it a clause which revoked all former testa-

ments. In *Alexander v. Burnet*, already cited, the Court in deciding the instrument to be a deed, laid much stress on its containing a clause of warranty of title. And this is a feature in the deed in this instance. When did a testator ever think of warranting the title of property which he devises or bequeaths? In the disposing clause of this deed, the words are "give and grant." The word give is proper and common to both forms of conveyance. The word grant is peculiar to deeds, and in this instrument there is no word peculiarly appropriate to a will. These circumstances, would not, taken singly, be conclusive, but taken in connection with others of a like nature, are entitled to some weight.

I am unhesitatingly of the opinion that the instrument is a deed, and that it is valid to vest in John Sullivan at the death of his mother, the negroes and their increase therein conveyed. It is so ordered and decreed. (a)

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*It is further ordered and decreed, that a writ of partition do issue to divide the other personal estate of Elizabeth Sullivan among her distributees according to their respective rights; in which partition it is ordered and decreed that the said John Sullivan do account for the negroes given to him by the said deed as an advancement. And that it be referred to the Commissioner of the Court to enquire the value of such advancement. It is further ordered and decreed that the accounts of the administrator be referred to the Commissioner.

(a) Copy of the deed from Elizabeth Sullivan to John Sullivan:

State of South Carolina,
Edwards District.

Know all men by these presents, that I, Elizabeth Sullivan, of the District of Edwards, and State of South Carolina, for and in consideration of the natural love and affection which I bear to my son, John Sullivan, of the District and State aforesaid, have given and granted, and by these presents do give and grant unto the said John Sullivan, his executors, administrators and assigns, the following negro property at my death, to wit: Lucy and her six children, together with their increase, should there be any, Caroline, Matt, Chandler, Allen, Wiatt, and Zack, to have and to hold, the said negroes unto him the said John Sullivan, his executors, administrators and assigns forever, under the following proviso, namely: that if the said John Sullivan should die without lawful issue, then the above named negroes to go to my son Sampson Sullivan and his heirs, and I, the said Elizabeth Sullivan, for myself, my heirs, executors and administrators, the said negroes to the said John Sullivan his executors, administrators and assigns, against the claim of me, the said Elizabeth Sullivan, my executors, administrators and of every other person whomsoever shall and will warrant and forever defend.

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*In testimony whereof, I have hereunto set my hand and seal, this the 5th of June, 1841.

Elizabeth ^{her}X Sullivan, [L. S.]
mark

Witness, D. M. Glover, /
S. P. Getzen. }

The tract of land on which Mrs. Sullivan lived and died, was a part of the real estate of her deceased husband, Pressly Sullivan. By an arrangement and agreement with her children, who were the heirs of the said Pressly Sullivan, she was entitled to occupy this land during her life. At her death it was to revert to them and be divided among them, as the property of the said Pressly Sullivan.

It is ordered and decreed that a writ of partition do issue to divide the said tract of land as the property of the said Pressly Sullivan among his heirs at law according to their respective rights.

It is further ordered and decreed that the costs of this suit be paid out of the funds of the estate of the said Elizabeth Sullivan.

The plaintiffs appealed upon the grounds:

1. The instrument of writing which is upheld by the circuit decree as an effectual disposition of the slaves therein mentioned, it is respectfully submitted, is in legal contemplation invalid as a deed, is in its nature essentially testamentary, and is inoperative and void for want of due attestation.

2. If the instrument referred to were capa-

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ble of taking effect *as a deed, yet it is utterly ineffectual for lack of sufficient delivery.

Carroll, for appellant, cited *Broom Leg. Max.* 77; *Rabb v. Harrison*, 9 Rich. Eq. 111; *Folk v. Carn*, 9 Rich. Eq. 303.

Moragne, contra.

PER CURIAM. This Court concur in the circuit decree, which is hereby affirmed and the appeal dismissed.

DUNKIN, DARGAN, and WARDELOW, CC., concurring.

Appeal dismissed.

10 Rich. Eq. *226

*STEPHEN JONES v. MARGARET GODWIN.

(Columbia. May Term, 1858.)

[*Sales* ⇐244.]

Actual notice of an unrecorded marriage settlement inferred from circumstances, the principal fact being that the purchaser took a bill of sale from the trustee and the husband.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 700-702; Dec. Dig. ⇐244.]

[*Limitation of Actions* ⇐102.]

Where the husband and trustee sold a negro held in trust for the wife for life, with remainder to the children, and the purchaser remained in possession eight years, when the husband died: *Held*, that the purchaser's possession did not give him title under the statute of limita-

tions—the wife having had no notice of the sale until the husband's death.

[Ed. Note.—Cited in *Neal v. Bleckley*, 51 S. C. 533, 29 S. E. 249.

For other cases, see *Limitation of Actions*, Cent. Dig. § 504; Dec. Dig. ⇐102.]

Before Dunkin, Ch., at Williamsburgh, February, 1858.

Dunkin, Ch. The pleadings and the evidence present the following state of facts: In March, 1833, Hardy B. Godwin was about to be married to the defendant, then Margaret McCutchen—Godwin had no other property than his horse. The defendant was possessed of negroes and other property. In contemplation of the marriage, an instrument was executed on 26th March, 1833, a copy of which is filed with the pleadings. The language of the paper is neither exact nor technically accurate. But all instruments of this character receive a liberal construction in order to effect the manifest object of the parties, especially when the purpose is to secure only the property of the intended wife. The effect of the transaction was to vest the legal estate of the slaves in the trustee, Willis J. Godwin, to be held for the separate use of the wife, during her natural life, and on her decease, for her lawful issue absolutely. It is also to be inferred from the provisions of the instrument, that the husband was entitled to the possession of the property, but that he "was to manage and employ the

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*same for the use and benefit of the wife and her lawful issue."

The marriage accordingly took place. The deed was duly proved, and was recorded in the Secretary of State's office, 25th May, 1833, and on the 4th July, 1833, in the office of the Register of Mesne Conveyance for Williamsburg District. In process of time, Hardy B. Godwin became embarrassed in his affairs; and, in March, 1848, he and the plaintiff entered into a bargain for the sale and purchase of the slave John, the son of a woman included in the settlement. The plaintiff lived in the neighborhood, and the evidence of his cousin, John Frierson, as well as that of Willis J. Godwin, apart from the public notoriety of the record, leave no reasonable doubt that the plaintiff was fully aware of the infirmity of the title for which he was treating. Else why apply to the trustee "to sign the bill of sale?" He took a bill of sale from Hardy B. Godwin and Willis J. Godwin, as joint owners, with the usual warranty, dated 7th March, 1848, but which has never yet been placed upon record.

The plaintiff remained in possession of John from this time until the death of Hardy B. Godwin. He died the latter part of 1855, or beginning of 1856, leaving the defendant, his widow, and seven children. Soon afterward, John was taken by the defendant, claiming the possession of him under the pro-

visions of the settlement of March, 1833. The plaintiff filed his bill for specific delivery, &c., on 30th September, 1856.

The character of the plaintiff's title under his arrangement with the husband of the defendant and her trustee, Willis J. Godwin, is discussed by Mr. Justice Story, in the § 395 of his *Equity Jurisprudence*: "A person who purchases with full notice of the legal or equitable title of other persons, will not be permitted to protect himself against such claims." "It would be gross injustice, to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes by such conduct participes criminis with the fraudulent grantor." "And in all such cases of purchases with notice, courts of equity will hold the purchaser a trustee for the ben-

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efit of the *persons whose rights he has thus sought to defraud or defeat."

The principle is illustrated in the text, by reference to the case of *Saunders v. Dehaw*, 2 Vern. 271, in which a mortgagee with notice of a trust, in order to protect his mortgage, procured a conveyance from the trustee. He was held not to be entitled to any benefit from it: but he was declared to be subject to the original trust in the same manner as the trustee. Although a purchaser may buy an incumbrance, or, as it is said, lay hold on any plank to protect himself, he must not protect himself by taking a conveyance from a trustee with notice of a trust, for he thereby becomes a trustee; and, to get a plank to save himself, he must not be guilty of a breach of trust. But the plaintiff had not the plea of necessity. It was not the case of *tabula in naufragio*. He dealt with his eyes open, and with his free will. His knowledge of the trust was far more clearly established than that of the purchaser in the case of *Gibbes v. Cobb*, 7 Rich. Eq. 60. Yet with all this information, the plaintiff proceeds to bargain with the husband for the purchase of the slave, but cautiously refrained from completing the contract until he had procured the assent of the trustee to violate his trust by joining in the bill of sale. His reply to his kinsman, John Frierson, who, after defendant was in possession of the slave, rather reproached the plaintiff for not running the negro as soon as Godwin was dead, shews that he always understood his position.

But it is said that the original infirmity of the plaintiff's title was cured by the laches of the defendant in prosecuting her rights; that the fraud of the plaintiff in his arrangement to defeat the trusts of the settlement was only constructive, and that he is entitled to the protection of the statute of limitations. This is the only part of the case in which the Court has experienced any embarrassment. As has been already intimated, it is not only a fair construction of the terms

of this instrument, but the natural and common interpretation and understanding of all such contracts, that the husband was to be entitled "to manage and employ the slaves."

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he might *keep them in his own possession, if necessary, for the comfort and support of his family, or he might hire them out to other persons for the same purpose, if that should be a more advantageous mode of employment. As he had the charge of his own family, it would be very difficult to prescribe at what time the trustee or cestui que trust was bound, or had the right to interfere with his management. He might hire one of the slaves to his neighbor for a month or a year, or a term of years, even without consulting the trustee, much more with his privity and approbation. The answer of the defendant is upon oath; she avers that until after the decease of her husband, she never knew that the plaintiff had purchased the slave; that, on the contrary, she was informed, and always believed, "that by some arrangement between the plaintiff and her deceased husband, the plaintiff was to hold the slave during the lifetime of her husband; and that she did not know until after the slave was again in her possession, that the plaintiff had any title to him. She had been informed and believed, that the plaintiff had a right to the use of the slave during the life of her husband, and that he would be restored to her upon his death." There is nothing in the evidence to contradict or impeach this averment. On the contrary the instrument, under which the plaintiff claimed the absolute estate, although very formal was never placed on record, and had all the appearance, when produced, of never having left the plaintiff's *escritoire*. It was not the bargaining for the use of the slave of which the husband had the right of management, which necessarily constituted any fraud; but it was the sale of the absolute property in the slave. The defendant is in no worse situation than if she had filed a bill against the plaintiff and the trustee, charging the fraud, which she has proved, and averring that this fraud had only come to her knowledge since the decease of her husband. The distinction between a court of law and a court of equity, in this respect, is stated in *Prescott v. Hubbell*, 1 Hill Ch. 213, and is familiarly recog-

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nized. *In equity the relief against a fraud done to the rights of a party, is barred in four years, (not from the commission of the act as at law,) but from the discovery of the fraud—and it is *prima facie* sufficient if the party aver that the discovery was within four years. The plaintiff, selecting the jurisdiction of a court of equity, submits to the rules of administering justice which prevail in that tribunal. The court is of opinion that the equitable rights of the defendant are satisfactorily established, and that the

plaintiff is not entitled to the aid of this court, in disturbing her possession.

It is ordered that the bill be dismissed.

The complainant appealed, and moved this court to reverse the decree on the grounds:

1. Because the purchase, by complainant, for a full price, vested in him a valid, legal and equitable title to the slave John, and the pretended settlement set up by defendant cannot defeat said title.

2. Because the paper set up as a marriage settlement was not recorded within the time required by law in the office of the Register of Mesne Conveyances for Williamsburg District; and if held a valid settlement is void as to complainant as purchaser.

3. Because the possession of complainant, for eight years, gave him a good title against the trustee and cestui que trusts under said deed; and defendant's answer as to what she considered the character of such possession was not evidence to rebut the presumption that the said possession was an adverse one.

Harlee and Pressley, for appellant.

Dargan, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Two questions are raised by this appeal; first of fact whether the plaintiff at the time of his purchase had notice of defendant's equitable title, and sec-

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ondly whether *the statute of limitations is a bar to that title under the circumstances of the case. It is difficult to add to the Chancellor's reasoning on either question.

On the first we should adopt here the Chancellor's conclusion, unless error was clearly demonstrated. But we have considered the evidence, and we fully concur in that conclusion. The recording of the marriage settlement, although it was effected a few days after the prescribed time, and for that reason not raising the implication of notice to all persons, goes far to shew actual notice to a near neighbor of a fact so notorious as the settlement. The conviction of Willis Godwin that plaintiff well understood the condition of the property—the omission of the plaintiff, while alleging in his bill that plaintiff set up a claim on the slave, and while conversing with his cousin concerning the slave, to deny notice of the character of defendant's claim—are slight circumstances but tending to show notice. Then there is the fact inexplicable on any other hypothesis of his procuring the trustee to join in the bill of sale. In his conversation with his cousin, he founded his trust of exemption from loss exclusively on the warranty of the trustee, and we are glad to be informed that such is the condition of the trustee's affairs, that the plaintiff is not without redress in the proper forum.

As to the statute of limitations we concur in the view presented in the circuit decree, so sufficiently as to need no amplification. Where a decree is adequately vindicated by a single course of reasoning, it is superfluous and frequently indiscreet to add other lines of argument. It is at least doubtful whether the rights of the defendant were at all invaded, so as to impose necessity of suit, before the death of her husband, Walker v. Frazier, 2 Rich. Eq. 99. But we forbear further discussion.

It is ordered and decreed that the decree be affirmed and the appeal be dismissed.

DUNKIN and DARGAN, CC., concurred.

10 Rich. Eq. *232

*JOHN O. SANDERS v. ALEX. J. ANDERSON.

(Columbia. May Term, 1858.)

The question, whether the Court has jurisdiction to decree the specific delivery of slaves to any one but the absolute owner, reserved,

[*Trover and Conversion* §60.]

In decreeing compensation for the loss or injury arising from a trespass, as the unlawful taking and detention of slaves, the Court confines itself to giving compensation for the actual loss or injury; it cannot give vindictive, speculative or possible damages.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 281, 282; Dec. Dig. §60; Damages, Cent. Dig. § 204.]

Before Wardlaw, Ch., at Colleton, February, 1857.

Wardlaw, C. On November 26, 1855, plaintiff and defendant entered into articles of agreement, whereby the defendant, Anderson, covenanted to sell and convey to the plaintiff, Sanders, a plantation on Ashepoo, named Auckland, and some stock thereon, in consideration of \$6,000, payable in a special mode on January 1, 1856; and if the purchase of the plantation were completed, to hire to the plaintiff, for the term of five years, beginning January 1, 1856, and in consideration of \$1,000 a year, payable annually, the slaves, Andrew, Elcy, John, Tom, Quash, Daphny, Molly, Daphny and infant, Cato, Handy, Clarista, David, William, Israel, Sally, Louiza, Letty, Eliza, Billy, January, Monday, and Toby; and the plaintiff, Sanders, covenanted to pay the purchase money, and hire aforesaid, to the defendant, and "that he will feed, clothe, and otherwise treat the said negro slaves in a kind, humane, and proper manner; and should the said John O. Sanders, at any time during the said five years, depart this life, or treat or manage the said slaves, or any of them, cruelly, or neglect to furnish them, or any of them, with proper clothing, food, houses, bedding, or medical aid in sickness, then and in such case, at the end of the year the

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said A. J. Anderson, his executors or administrators, shall have the right to end this agreement, so far as the hiring of the slaves forms a part of it, and take possession of the same." It was further agreed, that the agreement to hire should end on the failure of the plaintiff to pay the hire annually.

In pursuance of the agreement, the plaintiff paid the \$6,000, and defendant conveyed to plaintiff the plantation, and delivered to him the slaves so hired. On January 1, 1857, plaintiff paid to the defendant \$1,000 for the previous year's hire; and afterwards, on the same day, the defendant retook the slaves from the plaintiff's plantation, and he still retains the possession of them.

The plaintiff, by his bill, filed January 6, 1857, claims specific restitution of the hired slaves, and compensation for the loss sustained by him from defendant's detention of them.

The defendant, in his answer, insists that the plaintiff broke, and consequently ended the covenants concerning the hiring of the slaves, by denying defendant's right to go upon the plantation to ascertain the good or ill-treatment of the slaves, and by ill-treatment of the slaves, especially in the matter of clothing.

A preliminary question arises concerning the jurisdiction of this Court in the premises, not suggested by the pleadings, nor urged by defendant's counsel, (for he expressed desire that the Court should entertain jurisdiction,) but necessarily involved in the allegations and proofs. Will the Court decree specific delivery of slaves to one who is not the absolute owner, and claims merely an interest for years in the slaves? The case is novel, if not in principle, in the application of the remedy by this Court. Since the case of *Young v. Burton*, McMul. Eq. 255, the doctrine has been firmly established, and approved by the profession and the people, that a bill may be maintained in this Court for the specific delivery of slaves withheld from the possession of the rightful owner. The hirer of slaves for five years, or any other term, is as much the owner of the

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slaves for the term as the absolute owner is for an unlimited time; and he may have as strong reasons for claiming restitution from a wrong doer, as an absolute proprietor can present. The absence of precedent on the particular point is sufficiently explained by the notorious fact, that hiring of slaves is generally for a single year; and that from the infrequent sittings of the Court, and its course of procedure, it is commonly impracticable to obtain the remedy of specific delivery within a year. In the present case, the hired slaves had been trained by long employment to the cultivation of the particular plantation of plaintiff; the plantation could not be cultivated to the same ex-

tent, nor with proportionate profit, by fewer or other slaves; and the plaintiff was not able to supply the requisite number of workers, by hiring elsewhere, without great loss and inconvenience. I adjudge that the plaintiff may prosecute his remedy in this tribunal, and I proceed to consider the defences.

When the parties met on January 1, 1857, defendant asserted the absolute right to visit the plaintiff's plantation, to ascertain by personal inspection whether the slaves were well treated as to clothing, houses, &c., and avowed his resolution, if the negroes stayed, to visit them on the plantation once a month, or once a week, if he thought proper; the plaintiff denied the right of defendant at his pleasure to break the plaintiff's close, and and threatened an action of trespass if it were attempted, but expressed his willingness to give the defendant license to visit the plantation. There was a difference of opinion between them then, still manifested by their respective counsel, on the question whether the agreement contained an implied license to defendant to visit when he saw fit the plantation of plaintiff, for the purpose of ascertaining if the terms of the agreement as to the treatment of the slaves were carried out. If I supposed the plaintiff was wrong in his law, I should still be disinclined to hold this error as amounting to an infraction of his covenant, involving a dissolution of the agreement, especially while he said he was willing to permit the defendant to visit the plantation; in fact, however,

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I think the plaintiff's legal views were sound, and that by the stipulations of the agreement, the defendant had no right, independently of the plaintiff's permission, in particular instances, to invade the homestead or inclosure of the plaintiff. The peace of society, and the protection of proprietary rights in reality, require that the dominion of the owner should be paramount and exclusive. In mortgages of personalty, it is considered necessary to incorporate a covenant of the mortgagor, that the mortgagee may enter on the close of the mortgagor, to seize the chattels, when the conditions are broken. If, in a case like the present, the owner of the soil, who had hired slaves, and covenanted for their humane treatment, should perversely refuse a particular application of their owner to visit them at the place of their employment, this would justify Courts in drawing conclusions, unfavorably to the hirer, concerning the treatment of the slaves; but it would be a great heresy, leading to communism, to hold generally that the owner could break at discretion the close of the hirer. There is nothing in the stipulations of this agreement which extends the rights at common law of the defendant on the soil of the plaintiff; and I do not regard the plaintiff's challenge of the defend-

ant's claim in this respect as any infraction of his agreement.

Concerning the treatment of the slaves hired by the plaintiff, the proof generally is, that he is a kind, even indulgent master; that he furnished sufficient food for these slaves; that he improved their habitations by building new houses, and repairing the old; and that the slaves continued in good health. The only point upon which his humane treatment has been assailed, is in respect to the clothing of the slaves. Some of the witnesses said, that the Georgia kerseys in which he clad the slaves, were too thin for workers on a rice plantation, and perhaps on a cotton plantation. It seems that Auckland is high up on the Ashepoo, and is a mixed plantation of rice and cotton, where it is practicable in severe weather to remove the hands from the rice ditches to oth-

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er *employment. Most of the witnesses testified that the plaintiff clothed these slaves snugly—that he did as much in this respect as his neighbors did to theirs, and fully as much as the defendant had been in the habit of doing towards these same slaves on the same place. This portion of the defence is further discredited by proof, that in July or August, 1856, defendant avowed his purpose to press his pecuniary demands on plaintiff, with the view of procuring possession of the slaves, and without reference to their treatment. I am of opinion that the weight of the evidence as to treatment of these slaves, even as to their clothing, is in the scale of the plaintiff. Something was brought out in the evidence which hardly deserves serious consideration, about the refusal of the plaintiff to receive the negroes back. The negroes were never tendered back to plaintiff, although on some offer to resume possession of them made on January 2nd, he seemed to decline, saying that defendant had interfered with his business, and would do so again; but in a few hours afterwards, he offered to defendant, through the son of the latter, to receive the negroes again, upon certain conditions not very unreasonable; and on January 6th, he filed this bill. I conclude that the plaintiff is entitled to relief.

It is ordered and decreed that the defendant forthwith restore and deliver to the plaintiff, the slaves enumerated in the agreement; and that the Commissioner inquire and report as to the extent of loss sustained by the plaintiff, on account of the capture and detention of said slaves by the defendant.

The Commissioner submitted the following report:

The order of this case requires the Commissioner to ascertain "the extent of loss sustained by plaintiff, on account of the capture and detention of said slaves by the defendant." On the investigation of this subject, the opinion seemed to be entertained by

the defendant's solicitor, that the opinions of the witnesses as to the loss was not sufficient, and some other evidence less conjectural was required. This is true only so far as rests upon the supposition, that such oth-

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er evidence is *possible to be had. That evidence is the best in any case, which is all the evidence possible under the circumstances; and if from it a rational conclusion can be drawn of the subject investigated, it is germane. Any other view in this particular case would result to cutting off all redress for a manifest injury. For if the damages now under inquiry must be shown by proof positive, and not by what competent witnesses might suppose would be the natural and proximate result of the act complained of, then the plaintiff suffers without redress. Positive evidence of the actual loss in this instance is out of the question, since there are too many accidental circumstances intervening that preclude all conclusions, other than those drawn from probabilities. And if such conclusions, though reasonable, are worthless, the plaintiff, who has already been adjudged, wronged and injured, is without substantive relief, and thus it was idle to have referred the matter. The Chancellor who heard the cause, understood the nature of it, knowing what evidence only was likely to be had, and referred it to be investigated with just testimony, necessarily. Under this apprehension, the Commissioner has gone on to a conclusion, and submits the following as the result:

That to remove one-half the force from a plantation in the month of January, and return them three months and a half after, must eventuate in a very serious loss. The time they are absent is the season set apart for the preparation of the soil, and planting, and is beyond question the most laborious, and the most important portion of the year. Much depends on the order the land is in, and more in getting the seed in at a proper time; and this lost, can rarely be recovered. Every planter is aware, that skill in the culture must fail to compensate for imperfect, or no preparation of the glebe, and being behind time in planting. One man may do better under such circumstances than another, still no man can lose better than one-fourth the year's work, and hope good results. The Commissioner, therefore, is inclined to follow the conclusions of most the witnesses, that a

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half crop, and no more, should be *fairly calculated upon. The proof is, that the plaintiff could not, nor did not, attempt to plant full to the hand, having cultivated not more than 28 acres of cotton in addition to the rice crop, while he could as easily have attended 70 or 80 acres more. This being so, and it further appearing that the rice portion of the crop was an average one, both as to the number of acres planted, and the

yield, plaintiff's loss results *prima facie* from the loss of the cotton crop. For though there is some evidence that the plaintiff was engaged in rebuilding his dam to the rice lands, and his work was interrupted by the removal of the hands, still no evil result is the consequence of it. The rice alone could have suffered from the incompleteness of the dam, but it did not, if we may judge from the yield. Admitting, however, that this was so, the unfinished dam was not the result of the removal of the force, because it is satisfactorily established, the dam in any event could not have been finished under two years. So, too, as regards the proof, that plaintiff was delayed in sending his crop to market; no loss has been attempted to be shown, and none flows necessarily from it. The delay, indeed, seems to have benefited the rice at least since the market for rice steadily improved as the season advanced. As to the cotton, the evidence is, that it was housed, but in preparing for market, untouched at the date of the removal of the hands. It certainly could not have been got ready under the most favorable circumstances till some time after, had all the force been present, and at what probable time is not shown. Neither is there any proof, that had it been shipped when the price was ruling high, what was the usual rule observed by the plaintiff in the sale of his crop, whether he advised a sale so soon as it reached a mart, or held on for still higher rates. All we know, is, that the crop of 1856 is still unsold, and the season was the most extraordinary in the history of the long cotton market. Whether the plaintiff attempted a sale, and was unable to do so, or whether, had he sold, the loss on sales of his cotton would have been greater than the advanced

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price realized on sales of rice, is *without any evidence whatsoever. This being so, the Commissioner submits, 'tis in vain to push the inquiry as to loss any further in this direction. What then is the extent of plaintiff's loss as to the cotton crop of the past year? Mr. Burrell Sanders, a long cotton planter, and the most successful planter in the district, estimates the loss in this wise: that the price he would ask for the force removed at the time, and for the time, away, would be just the half he expected to make by the whole force for the year, estimating this sum by the amount realized from previous year's crops. In other words, as the Commissioner understood, he would require half the amount of an average crop as the equivalent of what he conceives would be his loss under the circumstances. Mr. Joel Larisey, another long cotton planter, the plaintiff's immediate neighbor, and well acquainted with his place, says that the rice lands on the same were heretofore cultivated with half the number of plaintiff's force, and therefore plaintiff could have at-

tended some eighty acres of cotton, in addition to the rice; which eighty acres could have made the past season sixteen bags of long cotton. The Rev. P. G. Bowman, a long cotton planter, of some five or six years experience, also acquainted with the lands, is of the opinion the lands could not have been prepared after the return of the hands in the middle of April, consequently as for cropping purposes, they were valueless for the remainder of the season. Mr. H. Ferguson, a rice planter of some experience, says, that the rice lands of the plaintiff were in fine condition in the Spring of 1857, the cotton lands on the contrary in awful bad order; and that sixteen hands, (or half plaintiff's forces,) are unequal to the task of attending both. This is the evidence, on which the extent of loss is to be predicated. In scrutinizing the opinion of these gentlemen, it appears to the Commissioner, that their estimates of the loss are the same, differing only in the manner of arriving at their several conclusions. They each are under the conviction, that plaintiff can only be compensated by giving him such a sum as, added to the crop of the past season, will foot

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*it up to an average one. That an average crop could have been made, had there been no molestation on the part of defendant, and all less than an average one is the extent of plaintiff's loss. Nothing in this is very extravagant; nor such conclusions counter-evidenced by the predicate of the fact that a full rice crop has been made. Because half plaintiff's force was adequate to the culture of the rice, as shown by the evidence, and as certain that their labor had been directed to this end, since the rice land was in fine condition, and the cotton land shamefully neglected in the Spring of the past year. While Mr. Burrell Sanders estimates the loss by the expression, that he would ask just the half of an average crop for the time the hands were away, Mr. Larisey expresses in saying, that the force removed was capable of preparing and attending 80 acres, or half the crop; and Mr. Bowman, that the hands, after their return, were valueless as for planting purposes. All tending to the very same conclusion, that a crop from their labor was out of the question. Compare their conclusions thus variously expressed with actual results, and it appears they are greatly at fault. For instance, the plaintiff did make the attempt to plant with these hands, and late as it was, succeeded in getting in twenty-eight acres of cotton, a fraction over a third of what he could have attended, and from which he made three scant bags, against eleven bags the year previous, and nineteen in 1855. The consequence is, that the crop of 1857 is twelve bales short, when their opinions are that it should be set down at fifteen, the average, taking the crops of 1855 and 1856 as a guide. No injustice

will result to defendant in taking these years from which to average, since though it be true that in 1855 plaintiff's force was larger by two hands than in 1856, still it is equally true that only fifty acres were in cotton that year. So, too, as to the year 1856, when but eleven bales were made, the evidence is, that that season was a most disastrous one for cotton in plaintiff's vicinity, which the small yield confirms. Twelve bales of three hundred pounds, which is the

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amount *of a long cotton bale, is what is the extent of plaintiff's loss in this particular, so far as the Commissioner can judge. What this is presently worth, presents a new difficulty. The proof is, that such cotton as plaintiff plants was worth the past season fifty cents per pound, and early this season twenty-seven to thirty if properly prepared. Taking it for granted that as the plaintiff had the necessary fixtures, as was proved, for preparing the cotton, and as a prudent man that he did so, he is entitled to receive the highest stated price for it. The Commissioner, therefore, sets down the loss at twelve bales of cotton, at thirty cents per pound, equal to \$1,080, and to which should be added any reasonable amount paid to his solicitors, which is a loss very necessarily incurred in redressing himself. Some evidence was introduced, going to show that, from first of May, and some three months thereafter, the plaintiff had employed some four or five men splitting staves, as also that the provision crop was as large as usual. If this be intended as a set-off to the present damages, the Commissioner does not see the force of it. For though it be true the hands were so employed, it does not appear whether there had been a sale of the staves, and if there had, whether the profits of sale exceeded the value of the timber destroyed. So, too, as to the provision crop, the defendant can have no interest in it, other than to show it did not fall below an average one.

The Commissioner afterwards amended his report by stating that three hundred dollars would be a reasonable counsel fee for complainant's solicitor.

The defendant also excepted to the report of the commissioner, on the grounds:

1. Because the extent of loss ascertained by the commissioner as sustained by plaintiff, is speculative merely, and as such should not be sanctioned by the Court.

2. Because, if the loss of \$1,080 by plaintiff, as the value of the twelve bales of cotton, is a legitimate conclusion from legal evidence, the expenses attendant on the

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preparation, forward*ing to market, and sale of twelve bales of such cotton, should be deducted therefrom, to arrive at plaintiff's actual loss.

3. Because, the commissioner should have taken into his calculation of loss, (if such

calculation was legitimate,) the fact in evidence, that for three months and longer, all the male slaves hired from defendant, were employed in getting out staves; and if defendant was charged with the entire loss of twelve bales, he should have been credited with the profits made by these slaves in this time, or with the general value of their services for this period.

4. Because commissioner recommends that the plaintiff be allowed the reasonable amount paid his solicitor.

Wardlaw, Ch. On hearing the Commissioner's report in this case, and the argument of counsel on the exceptions filed by plaintiff and defendant: It is ordered, that the exceptions taken by plaintiff be overruled, and those taken by defendant be sustained; and that it be referred to the commissioner to report the actual loss sustained by plaintiff, from the capture and detention of the slaves mentioned in the pleadings.

The complainant appealed on the grounds:

1. Because, it is respectfully submitted, that the loss of complainant, as assessed by the commissioner, is compensatory and remunerative, within the rule laid down by this Court in such cases, and well warranted by the evidence submitted to the commissioner; and not vindictive, as held by the Chancellor.

2. Because the matters referred by the decree to the commissioner, are questions of fact; and he having ascertained the same, his report is in the nature and place of a verdict of a jury, and if warranted by the testimony submitted to him, should be confirmed by this Court.

3. Because the order of the Chancellor is, in other respects, contrary to law and evidence.

Carn, for appellant.

Tracy, contra.

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*The opinion of the Court was delivered by

WARDLAW, Ch. In this case, the defendant's counsel so far from contesting the authority of the Court to decree specific restitution of slaves to the owner of them for a term of years only, expressed desire that the Court should entertain jurisdiction of the cause. The consent of the parties to a litigation simply will not confer jurisdiction on any tribunal, where the matters in controversy are foreign to its general course of adjudication; but if, as in this case, the general subject be within the authority of the Court, as commonly exercised, and the question be merely whether or not a particular case be exceptional, the Court may well proceed to judgment on the concurring desire of the parties, without being astute to find reasons for evading the labor of trial and decision. The circuit decree exhibits the opinion of the Chancellor uninstructed by argument

on the jurisdiction of the Court in the special case, but this Court, anxious to avoid even the appearance of usurpation, reserves its opinion whether any but the absolute proprietor of slaves be entitled to the peculiar remedy of equity of specific delivery or execution, refused generally as to personalty, and not hitherto applied as to slaves except in behalf of the complete owner, nor as to him where damages assessed by a jury would afford ample redress. Certainly there is difficulty in distinguishing the case of the owner of slaves for life or for years from that of the absolute owner, as affording grounds for refusing our peculiar remedy to partial proprietors and extending it to absolute proprietors. But a portion of us here would have preferred that the bill had been dismissed by the Chancellor for lack of jurisdiction, although we do not feel obliged to dismiss it in this appellate tribunal when no party proposes such course. We decide to decide nothing, or in other words, to exclude conclusion as to the jurisdiction of equity in this case.

The only matters presented to us by the appeal affect the extent of compensation to which the plaintiff is entitled for the tortious taking from his possession by defendant, and

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the *unlawful detention for three months and a half, of certain slaves hired by plaintiff at the rate of one thousand dollars a year. The primary decree ordered the commissioner "to inquire and report as to the extent of loss sustained by the plaintiff on account of the capture and detention of said slaves by the defendant." The commissioner, on speculative considerations as to the diminution in the extent of crop which plaintiff might have made, allowed to the plaintiff \$1,080, besides recommending that the plaintiff should have \$300 more for fees paid to his counsel. Defendant's exceptions as to this mode of ascertaining speculative or vindictive damages, presented in various forms, were sustained by the Chancellor, and the report was recommitted to the commissioner, with instructions to ascertain "the actual loss sustained by plaintiff from the capture and detention of the slaves mentioned in the pleadings;" and from this judgment defendant appeals on several grounds, not necessary to be specified, asserting in substance that compensation to plaintiff consists in remuneration for his possible losses. The substantial question is whether equity in such case should confine itself to compensation for loss, or pursue vagaries in the wilderness of damages through which juries wander. Damages are not commensurable by rule, and cannot be adjusted satisfactorily in a tribunal proceeding for compensation and not for revenge or punishment. As to such matters, juries have a discretion undefinable by strict rules, but it is contrary to the great principles of right and liberty that discretion

should be unnecessarily extended. The Chancellor acted on the judgment in *Bird v. Rail Road Company*, 8 Rich. Eq. 57 [64 Am. Dec. 739], so obvious in principle to common sense and to freedom as to require no further illustration. There the Court perceiving that the defendant had derived no actual profit, and that plaintiff had suffered no loss except from the trespass and tort of the defendant, and that a jury is the fit means of ascertaining damages strictly, said: "the object is to ascertain the amount of loss which the plaintiff has sustained by the wrongful

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acts of the defendant. The plaintiff, by *applying to this Court, waives all claim for vindictive damages, and the actual injury and loss may probably be as well ascertained before the commissioner as by subjecting the parties to the delay and expense of a trial at law." All the objections which overrule the allowance in this Court of vindictive damages apply with equal force to the allowance of damages which are speculative, and not proceeding proximately as consequences from the acts of a wrong doer. The organization of this Court is adequate for the ascertainment of actual loss, not for the assessment conjecturally of possible profits and damages. I suppose on the authority of *Harrison v. Berkley*, 1 Strob. L. 525 [47 Am. Dec. 578], which is a careful review of the cases on the subject, that the Court of law would not sustain a jury in finding damages remote and speculative, and not proceeding as proximate consequences from the acts of the wrong doer. I am more assured that if in this Court we allow under the name of compensation possible damages for an unplanted crop, we might as safely proceed to give damages for a gold mine which might have been found by a laborer, or for any other thing suggested in the visions of Eastern romance.

It is probable that the defendant, in this case, acquiesced in the jurisdiction of the Court, as to the specific delivery of the slaves, on the notion that if he were decreed to restitution of the slaves, he would be compelled only to compensation for his improper detention of them. He never meant to waive a doubtful question of jurisdiction here, and at the same time to subject himself to the highest damages for his wrong that could be awarded elsewhere. He says, practically, I submit to your authority to determine the question as to the rightful possession of the slaves, provided you pursue your procedure in compelling me to compensate for my wrong, and not to punish me in unfettered discretion for conjectural and unforeseen damage to my adversary.

We find reasons for supporting the Chancellor's judgment. He did not mean, and in his oral judgment expressed the contrary, nor do we mean that plaintiff should be re-

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stricted *to an aliquot portion of the hire he agreed to pay for the year. Possibly, in connection with the purchase of the plantation, plaintiff obtained the negroes on hire at undervalue. His actual loss is the value of the hired slaves for the time they were out of his possession. It is suggested that "positive evidence of the actual loss in this instance is out of the question." Why? It is the daily practice of the Court to obtain the value of hire of slaves in the possession of trustees, or of persons not entitled to possession, on estimates of witnesses of what the slaves would bring on the block at auction, or of their annual worth under all the circumstances of the case. There is no special difficulty in this case.

It is ordered and decreed that the appeal be dismissed, and the decree be affirmed.

DUNKIN and DARGAN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *247

*M. W. MILLER and Others v. J. H. SLIGH and Others.†

(Columbia. May Term, 1858.)

[Assignments for Benefit of Creditors *§* 366.]

Where there are joint trustees, the general rule is, that each is liable for his own acts alone, and not for the acts of his co-trustees, except where he has contributed to them; and this rule applies to assignees and agents under the Act of 1828, in relation to assignments for the benefit of creditors, there being nothing in the Act which makes them jointly liable.

[Ed. Note.—Cited in *McIntyre v. McClenaghan*, 12 S. C. 197.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. *§* 1113; Dec. Dig. *§* 366.]

Before Johnston, Ch., at Newberry, September, 1857.

George Neel made an assignment for the benefit of his creditors; J. H. Sligh and J. M. Crosson, defendants, being the assignees, and J. M. Baxter and J. H. Williams, also defendants, the agents duly appointed by creditors under the Act of 1828. The assigned estate was sold on credit, and Crosson, having wasted a portion of the assets which had come to his hands, became insolvent and unable to pay. The bill, filed by Miller and others, creditors of Neel, was for an account, and under an order of reference, the Commissioner, without regard to the evidence, held, that the defendants were jointly liable, by force of the Act of 1828, for Crosson's devastavit. One of the defendants filed exceptions to the report, and his Honor, the presiding Chancellor having overruled them, Williams and Baxter, the agents, appealed.

† NOTE.—This case was heard at November and December Term, 1857, but the opinion was not delivered until May Term, 1858.

Williams, for appellants.

—, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. I am to announce the opinion of the Court, in which I concur.

It is that the appeal should be sustained; and as the circuit decree must be set aside,

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and as in any further proceedings *which may be had in the case, it will be almost impossible to separate the defendant, Sligh, from the appellants, that it is but just he should have the benefit of their appeal, although not a party to it.

Crosson, one of the assignees, is made out to have received and made way with a portion of the proceeds of assigned estate which was sold; and the question raised and decided on the circuit was whether Sligh, his co-assignee, and Williams and Baxter, the two agents of the creditors, were—by mere force of the statute relating to assignments, (a) and without proof of any special circumstances implicating them in his misconduct—chargeable, jointly with him, for the sum he had embezzled.

I am of opinion the construction of the statute adopted on the circuit was hasty and ill-advised. In fact, the argument addressed to the Court there was quite foreign to the point involved; and served, in some degree, to withdraw its attention from the true questions in the case.

It is not to be disguised that the general tenor of the statute is to create a joint authority of agents and assignees over the subjects of their trusts; but it is by no means a necessary legal consequence of this that all of them are responsible for the acts of each.

It is a general principle of equity, in this State, that the liability or non-liability of a trustee depends on his bona fides and the exercise of that degree of diligence which a prudent man of ordinary intelligence would employ in his own affairs. This is the rule in the case of a sole trustee; and it must unquestionably apply, with more force, in the case of joint trustees, when a portion of them, guilty of no dereliction of duty themselves, are sought to be made liable for the misconduct of their colleagues.

If we look to cases somewhat analogous to the one before us, of joint executors or ad-

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ministrators, the doctrine in this *State is that, in general, each trustee is liable for his own acts alone, except so far as he may have contributed to the acts of his fellows. (b) In

(a) A. A., 1828, 6 Stat. L., 365.

(b) Vide *Clark v. Jenkins*, 3 Rich. Eq. 319; *Lemoir v. Winn*, 4 Des. R. 65 [6 Am. Dec. 597]; *Knox v. Pickett*, 4 Desaus. 93; *Wilks v. Davis*, Rich. Eq. Cas. 390; *Johnson v. Johnson*, 2 Hill Eq. 277 [29 Am. Dec. 721]; *O'Neill v. Herbert*, Dudd. Eq. 30; *Gayden v. Gayden*, McMull. Eq. 444; *Atcheson v. Robertson*, 3 Rich. Eq. 132 [55 Am. Dec. 634].

the case of administrators, considered merely in the light of trustees, this is no less true than in the case of executors. It is only through the administration bond, to which all the administrators are parties, that one of them is made responsible, by virtue of his legal obligation, for the mal-administration of the others. He has engaged, by the bond, to become surety for the administration, and must be charged as such; though as mere trustee he would be exonerated.

The case of *Atcheson v. Robertson*, [3 Rich. Eq. 132, 55 Am. Dec. 634,] a case of joint executors, may have carried the doctrine of which I speak, as far as it can well go; but it is, on that account, only a more distinct recognition of that doctrine; in which light I make particular mention of it.

Is there anything in the statute under consideration that, properly regarded, should put the case of assignees and agents of an insolvent upon a different footing? I am persuaded there is not.

It may be said that the other parties assisted Crosson, the defaulting assignee, to obtain the fund he wasted. If by this is meant that by joining him in the acceptance of the trust, they helped him to acquire the power which he abused, it is obvious that the remark would be equally true of all joint trustees; and in the case of executors, we have seen that the taking out joint letters has not the effect of making one executor the guarantor of the other.

Again, it may be said that Sligh, Williams and Baxter, having joined Crosson in the sale of the property, and having taken the securities for the sale in the name of all the trustees, (I am stating facts which do not appear, in order to put the case more strongly,) and

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then having left the securities in his *hands, enabled him, individually, to receive the money, and should, therefore, answer for his use of it. But it is matter of necessity that securities or funds belonging to a trust estate must be in individual hands. It is a physical impossibility that they should be in the constant custody of all the trustees. In *Atcheson v. Robertson*, the executors had made a joint sale, and taken the securities in their joint names, and then divided the securities between them, making a joint return of the sale; yet it was held that one was not liable for the devastavit committed by the other, of the securities he had received.

It is not clear that the legal title of the property sold in the present case was not exclusively in the assignees, and if so, there is the less pretence to hold the agents responsible. Certainly, at common law, and independently of statute regulation, a conveyance, such as the assignment of a failing debtor, vests the title in the person to whom the conveyance is made, that is, in the assignee. And though the conveyance be subject to a controlling influence, lodged in a

third person, (I refer here to the control which the statute gives to the agents,) this control amounts only to a power, and not to a title in such third person.

This is clearly the law, independently of the statute regulating assignments. The title must be in the assignees, unless the statute takes a portion of it from them, and lodges it in the agents. The statute is full of provisions directing the agents to act jointly with the assignees in selling the property and distributing its proceeds—which, as I have observed, confers a power upon them—but I find nothing detracting from the title of the assignees, or translating any portion of it to the agents, except in the single instance mentioned in the second section of the statute, where the assignees shall have neglected to assemble the creditors within a specified time; in which case the creditors are authorized to convene, of their own accord, and appoint agents, who, under order of a judge or chancellor, may take possession of the assigned estate.

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*It follows, from what I have said, that in the present case, Crosson and Sligh, the assignees, had the title of the property sold, and each of them an equal right to the securities taken for it; and, as between themselves, being joint trustees of the subject matter, each had a right to receive, as Crosson did, without subjecting the other to liability for the sum thus received.

It may be asked what, then, is the function of the agents under an assignment? They are the agents of the creditors; and their function is to supervise what is done, and see that their principals suffer no detriment. No doubt they are liable for loss arising from their gross neglect of duty, as well as for any positive act of wrong done by them. If they see any wrong, either of omission or commission, going on, they should interpose, and if necessary, bring suit to arrest it. Though the title be in the assignees, it is subject to an equity in creditors, and, of course, in their agents; and in case of collusion between purchasers and the assignees, or in case of any other fraud which the agents may arrest or correct, it is their duty (for the gross neglect of which they are liable) to interfere and prevent or remedy the consequences. Thus, though a joint liability does not arise by simple construction of the statute, and though the trustees are not liable by construction for the acts of each other, yet they may make themselves liable by express acts against duty, or by willful neglect of duty. The circuit decree took up the subject upon the simple construction of the statute, and, of course, shut out all enquiry as to the particular conduct of the defendants, Sligh, Williams and Baxter. That conduct may now be inquired into, if the plaintiff supposes he can make out improper conduct on their part.

There is one clause of the statute which declares that the proceeds of sales, which are directed to be deposited in the Bank of the State, or its branches, shall be subject to the joint draft of assignees and agents. Had Crosson received the fund he wasted upon such a draft, it might have become a ques-

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*tion whether all the trustees so drawing might not have been charged. I form no conclusion, but I suppose they would not, unless circumstances showed a fraudulent and collusive intent in the others to connive at an intended speculation on his part. But this point cannot arise in this case.

It is ordered that the circuit decree and the report of the Commissioner be set aside—except as to the defendant Crosson, as to whom they shall stand—and that the matters referred be taken up on reference de novo, according to this opinion.

DUNKIN, DARGAN and WARDLAW, CC., concurred.

Appeal sustained.

10 Rich. Eq. *253

*JAMES S. GUIGNARD and Others v. ALFRED P. ALDRICH, and Others.

(Columbia. May Term, 1858.)

[Witnesses ⇨98.]

Upon the trial of a creditor's bill, filed to set aside a judgment confessed by the debtor, and certain purchases made by the plaintiff in that judgment of the debtor's property, at Sheriff's sale, and for an account from the plaintiff in the judgment, of all moneys received by him on the judgment, and from sales he had made of the property purchased by him, all creditors of the debtor, whether by judgment or simple contract, are incompetent witnesses for the complainants.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 334; Dec. Dig. ⇨98.]

[Witnesses ⇨98.]

Where the object of a bill, filed by judgment creditors, is to subject equitable assets to their demands, simple contract creditors are incompetent witnesses for complainants—equitable assets being always distributed pro rata among all creditors.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 334; Dec. Dig. ⇨98.]

[Fraudulent Conveyances ⇨140.]

Permitting the debtor to remain in possession of property purchased at Sheriff's sale, is, of itself, an insufficient badge of fraud, the sale being otherwise fair and unimpeached.

[Ed. Note.—Cited in *Pringle v. Sizer*, 2 S. C. 65; *Beattie v. Pool*, 13 S. C. 384; *Richardson v. Mience*, 19 S. C. 483; *Pregnall & Bro. v. Miller & Kelly*, 21 S. C. 390, 53 Am. Rep. 684; *Sloan v. Hunter*, 56 S. C. 389, 391, 34 S. E. 658, 879, 76 Am. St. Rep. 551.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 446, 447; Dec. Dig. ⇨140.]

[Fraudulent Conveyances ⇨43.]

A debtor having an equitable right to become the owner of property on paying for it, may without the consent of his judgment cred-

itors, waive his equity and consent to a sale of the property to a third person.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 41, 95–100, 301; Dec. Dig. ⇨43.]

Before Wardlaw, Ch., at Barnwell, February, 1857.

Wardlaw, Ch. The plaintiffs are, James S. Guignard, Charles Neuffer, Joseph J. Harley and John A. Hayes, judgment creditors of William J. Harley, who sue for themselves and all others who may come in and contribute to the expenses of the suit and by this bill, filed January 14, 1856, they pursue William J. Harley, Alfred P. Aldrich, John J. Ryan, William H. Peyton, and Joseph J. Harley, as defendants, with the purpose that a judgment confessed by the said William J. Harley to said Alfred P. Aldrich, March 23, 1849, for \$15,102.19 may be vacated as a fraud on the creditors of said William J.; and that a judgment confessed by said William to said A. P. Aldrich, J. J. Ryan, W. H. Peyton, and J. T. Harley, March 24, 1849,

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for \$15,000, may be vacated for the *same reason, so far as said Aldrich and Ryan are concerned, and upheld as a security for the said Peyton and J. T. Harley and the plaintiffs, J. J. Harley and Hayes as sureties in the bond given by W. J. Harley for the faithful performance of his duties as Sheriff; and that purchases of certain lands and negroes of said William J. made by said Aldrich, at sales of the property of said William J., by the Sheriff under executions and mortgages, and other purchases by said Aldrich from one Alex. Smets, of Savannah, of land and slaves once belonging to said William J. should likewise be set aside as fraudulent.

The pleadings and testimony, all in writing, are of immense extent, requiring from a diligent man a day or two's time even to read them; and I cannot attempt a synopsis of them, for this would involve a sacrifice of my time and labor more legitimately demanded by other duties.

The bill has been dismissed by consent as to J. J. Ryan, who was used as a witness; and this dismissal necessarily involves plaintiff's abandonment of his prayer to vacate as to Aldrich the judgment in favor of all the defendants, for Aldrich had no interest in that judgment, except in common with Ryan, for the amount secured by a mortgage given to them both for their joint indemnity, as W. J. Harley's sureties, or endorssors upon two promissory notes. The plaintiffs seek no remedy against the defendants, Peyton and J. T. Harley, and have offered them as witnesses. I shall hereafter speak of W. J. Harley and A. P. Aldrich, as the defendants.

1. As to the confession of judgment to A. P. Aldrich. This judgment was founded on a bond taken for convenience to consolidate the numerous demands of Aldrich, but a

schedule was filed with it detailing the particulars of claim. It was confessed and entered up after the return-day of a term, and while suits to a large amount were pending against Harley. It appears that Aldrich, becoming alarmed as to his own security and Harley's solvency by the magnitude of these claims, prepared a statement of his demands

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and submitted it to Harley, with a representation that the earnings of his life would be wasted if he were not secured as to payments; and that Harley, after retaining and examining the statement, for several days consented to prefer him as a creditor by confessing judgment. The judgment includes two claims, for which Aldrich had previously some security by mortgages of slaves. In their answers the defendants respectively and explicitly aver that every cent included in the judgment was justly due to Aldrich, and as to most of the items, they make clear proof of the fact. The plaintiffs object that there is no precise proof as to the justness of some of the items, particularly as to judgments and other debts of third persons, said to be paid by Aldrich and assumed by Harley, and that some of the items were out of date at the time of the confessions. These objections have little weight. There is no disproof of Aldrich's title as to these judgments and debts, and no claim of them by third persons. Defendants swear that Aldrich paid, and Harley agreed to reimburse him for these items, and they were the persons most cognizant of the facts, and primarily and principally interested in adjusting their mutual demands; and their adjustment must bind creditors and all claiming through them, who do not show fraudulent collusions of the parties, which has not been done here. If Aldrich paid these items, he is entitled to be reimbursed; and if he did not pay them, he might still be treated as trustee for the real owners of the moneys, and in their behalf the judgment might be supported. Whether the items were due or not, the parties supposed them to be due, and were not guilty of any design to magnify and surcharge the sum of the judgment, which, if proved, might have avoided the whole judgment. *Bowie v. Free*, 3 Rich. Eq. 403. The fact that a schedule accompanied the judgment, and that it contained such items difficult of proof extrinsically, is strong evidence of the fairness of the transaction, for if the parties had intended fraud, they would, in a natural course, have fabricated bonds, notes, or other evidences of debt susceptible of easy proof. The

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same remark is applicable, to some extent, to the notes out of date. Harley might have protected himself from the payment of the items, by pleading the statute of limitations, but no principle of equity or ethics required him to defend himself in this mode from his unfulfilled promises; and his creditors cannot impute it to him as a fault that he ac-

knowledgeed and revived his unpaid debts. It is further objected, that when some of these debts were contracted Harley was reputed to be embarrassed; but it is of no consequence that Aldrich, in prudence, should not have trusted him, if he did, in fact, extend the credit.

Again, it is objected that the confession was made without any strict settlement between the parties, and that certain demands on both sides were not brought in to adjustment. The bill contains no mention of particulars, as to mutual demands, but the answers mention that a note of \$300, given by Aldrich to Harley, was considered at the time of the confession, and agreed to be greatly over balanced by unsettled claims of Aldrich upon Harley for professional services. Some proof is offered by plaintiffs of another demand of \$475, of Harley upon Aldrich, for the sale of a slave named Sam, as to which defendants give no satisfactory explanation by evidence. But it may be that this sum had been previously settled between them, or that it too was covered by the adverse claim for professional services. At all events there is no intimation in the evidence that this claim, or the note for \$300, was dropped with the view of fraudulently swelling the judgment; and it is quite clear that the parties to a confession of judgment are under no obligation to have an exact and complete settlement of all outstanding claims on both sides, but may settle and secure in part, and leave other matters to be adjusted in future.

Again, it is urged that the confession was made while suits against Harley for a large amount were pending. Undoubtedly a debtor may prefer one creditor to another, and if simple preference be intended, without pur-

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pose to hinder or defeat other creditors beyond postponing them to the preferred creditor, the transaction is unimpeachable. Where the concurring circumstances indicate a fraudulent purpose, the pendency of other suits may corroborate the conclusion of fraud, but in itself it is of little weight. Here there is no reason to infer more than the single design to prefer.

It is supposed to be a suspicious circumstance, that, after the confession, Aldrich kept in his possession and now produces the vouchers of Harley's indebtedness; but really this seems no more than reasonable precaution on his part. He may have released Harley from these demands when the judgment was taken, although this is not very probable. It is certain that he could not again have recovered these demands from Harley, for not only were they specified in the schedule, but they were merged and extinguished in the bond and judgment. It was natural and conformable to the usual course, that Aldrich should keep these vouchers.

The whole argument of the plaintiffs against the judgment proceeds on the as-

sumption that it must be regarded as fraudulent, unless defendants completely demonstrate its fairness. Whereas, the rule in every enlightened tribunal is that fraud is not to be presumed except from controlling circumstances, and that the burden of proof is on the party impeaching. The judgment of a competent tribunal must stand until overthrown by proof.

It is argued that such controlling circumstances raising the prima facie presumption of fraud, is to be found here in the relation of client and attorney which had subsisted between Harley and Aldrich. No such ground is taken in the bill, and no proof is given of such relation beyond the naked fact that Aldrich had some unsettled claim on Harley for past professional services. There is nothing in the fact that one has acted as attorney for another in ordinary litigation, not specially affecting a particular estate concerning which they afterwards deal, which disables the attorney from contracting with the client or imposes on him the neces-

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sity of proving *uberrima fides in any particular transaction not otherwise assailed than by proof of the relation. The emoluments of the bar would be in a most precarious condition if lawyers were disabled from securing their just compensation by ordinary remedies. All this doctrine, concerning client and attorney, is founded on the principle that the subordinate in the relation should be protected from oppression and injury on account of any advantage taken by the superior from his skill or influence; but where the inferior, as in this case, after full information of his rights, confirms and ratifies the dealing, the interference of his creditors or others in his right is altogether officious and impertinent. This point was more particularly pressed in respect to the purchases of Aldrich, but the reasoning applicable both to judgment and purchases, is now stated once for all.

Finally, it is strongly urged that the judgment is fatally impaired by certain admissions of Harley before and after the judgment, that he owed Aldrich nothing. These admissions are proved by Peyton and Ashley, who are judgment creditors of William J. Harley, and consequently substantially plaintiffs in this suit, and directly interested in the object and event of the suit to increase the fund from which creditors may be paid. The defendants object to the competency of these witnesses and of others in like condition, as Joseph T. Harley, James T. Harley, James Cochran and Jones Williams, and in my judgment on sound principles. In general, a creditor is a competent witness for his debtor; but where he occupies substantially the position of a distributee, and from the insolvency of his debtor must look to a specific fund for payment, he is not competent to testify, when called by a party in like interest, for the establishment or increase of

this fund. He is not allowed to swear himself into the means of satisfying his demand. This distinction is clearly taken in the case of Haseltine & Walton v. Madden, 7 Rich. L. 16, and is supported by all the cases. McCall v. Smith, 2 McC. L. 375; Brown v. O'Brien, 1 Rich. L. 268, [44 Am. Dec. 254]. Nothing

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to the contrary is *implied in the cases, [Ogier v. Holmes], 1 Bail. 473; [Ex parte Hinton] 3 Rich. 97. This decision affects this case to a large extent, for striking out the testimony of these incompetent witnesses, there is scarcely an adminicle of evidence impeaching the judgment and purchases.

Harley's representations, if proved by competent witnesses, could not affect Aldrich's rights until a fraudulent collusion or conspiracy between them had been established. It is most illogical to reason in a circle that Harley's admissions prove the conspiracy, and then that the conspiracy being thus proved, his admissions are competent, perhaps conclusive, against his co-defendant. The interest of Harley is with the plaintiffs and against his co-defendant, to diminish his liabilities and augment the fund for their satisfaction; and he cannot be received to effect this before his co-defendant and himself have been shown alunde to be participes criminis. This principal includes his letters and written statements as well as his oral declarations. There is no pretence of extrinsic proof of conspiracy.

Reliance is placed on the fact that Aldrich being called from his seat at the bar during term time, and informed that Harley said he owed him nothing, merely uttered the exclamation pish! and without further exclamation returned to his employment. In the first place and conclusively, the fact is not proved by a competent witness; but if it were, the course of Aldrich is just such as a busy man of character would be likely to pursue.

After all, the fairness or fraud of Mr. Aldrich's judgment does not materially affect the main issue of this case, which is as to the validity of Aldrich's purchases. If Harley did not owe the whole amount of the judgment, he certainly owed the greater part of it; and of the sum of Aldrich's purchases, fully paid by him, not more than about \$560 (exclusive of the mortgages included, which are hardly assailed even in pretence) were justly applied to this judgment; and, at the utmost, as the Sheriff had full authority to

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sell from other *unimpeached executions and mortgages, equity would not require more than that Aldrich should pay on his purchases the additional sum of \$560. Gist v. McJunkin, 1 McMul. 342; Mouchat v. Brown, 3 Rich. L. 117.

I am of opinion, however, that Aldrich's judgment is intact by the impeaching evidence.

2. As to Aldrich's purchases at Sheriff's

sale. This sale was made under various executions and mortgages, by Sheriff Walker, on September 3, 1849, and included all of the visible property of Harley. Aldrich became the purchaser of lands, negroes, horses and mules, for the aggregate price of \$24,824.75, all of which he was compelled to pay to the Sheriff, as applicable to liens superior to his judgment, except about the sum of \$500. The sale under the executions, and one mortgage, was extensively advertised in Charleston, Augusta and Barnwell district, and was attended by a large number of persons, including creditors and their counsel, and some from a distance, engaged in the traffic of slaves. The biddings were animated, and the competition earnest, and the property brought as full prices as are usual at such sales. It is not proved that the sales, although partly made under mortgages of slaves to Aldrich, had been advertised to take place under these mortgages; but, before the sale, Harley consented in writing (drawn by Aldrich) that these mortgages should be foreclosed by the Sheriff's selling the mortgaged slaves, and this was necessary to the completion of the title of purchasers of these slaves. Aldrich had urged the postponement of the sales, particularly when advertised for August; representing that the season was unfavorable as money was scarce, and the planters had not sold their crops; but J. M. Harley and Dewit pushed the Sheriff forward. The bill alleges that Aldrich's purchases were made in whole, or part with Harley's funds; but this is explicitly denied in the answers, and there is no affirmative proof, and much proof to the contrary.

The sale is directly assailed only on the ground that certain acts and declarations of

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Harley and Ryan were adapted to *chill competition. This ground is not taken in the bill. The testimony as to these acts and declarations comes, mostly, from incompetent witnesses; yet Spears swears that he heard Harley bid at the sale, and that he looked angrily at some other bidder; and C. Sanders swears that he heard Harley bid and say to the auctioneer, "knock it down," "enter it to the same."

The Sheriff and other witnesses swear that Harley did not bid, and the fact is not clearly established, but if it be, it is a trivial circumstance—his bids augmented the price, and I do not see what impaired his right to bid in common with other competitors for the property. Thompson and Ryan were the agents of Aldrich in buying. The exclamations "knock it down," "to the same," are just such as frequently come from indifferent spectators in the crowd surrounding the auctioneer on such occasions.

Besides we have the general fact that competition was not chilled.

The great stress of the plaintiffs is on the fact, that after the sale Harley resumed

possession and control of the lands and chattels bought by Aldrich. It is insisted that the sale was essentially voluntary, and equivalent to the private, voluntary sale of Harley to Aldrich, and having the consequence that the debtor's remaining in possession implied a fraudulent agreement between him and his creditor before the sale. To denominate this sale voluntary, sounds like mere cavilling. It was made by the officer of the Court under mandatory precepts, at the pressing instance of some of the plaintiffs in execution. In point of fact the property was not levied upon, nor advertised, nor sold under Aldrich's execution, but the character of the sale would not have been varied if he had not only assented to the sale but urged it to be made. He was as much entitled to the execution of his judgment as any other like creditor. The prominent reason given for calling the sale voluntary and distinguishing it from other Sheriff's sales, is that Aldrich had obtained control of most of the liens superior to his execution, and might have had paid

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the \$2,000 *necessary to satisfy the clamorous creditors, J. R. Harley and Dewit, as in fact he was compelled to do after the sale. But Aldrich was under no obligation to advance his money to satisfy these creditors, and possibly did not have the present means to pay their claims. The sale must be treated as an ordinary Sheriff's sale; and the doctrine concerning such sales is well stated by Chancellor Dunkin in *Coleman v. Bank of Hamburg*, in which the defendant in execution was permitted to remain in possession of land sold by the Sheriff. (2 Strob. Eq. 286 [49 Am. Dec. 671].) "Since *Kidd v. Rawlenson*, 2 Bos. and Pul. 59, it has not been doubted that even chattels, bid off at Sheriff's sales, may be permitted to remain in the possession of the defendant in execution. The distinction is recognized in *Smith v. Henry*, 1 Hill 16, as well as in *Martin and Walter v. Evans*, 2 Rich., Eq. 374. It is not the voluntary sale of his property by a debtor to one of several creditors, who permits him to remain in possession, thereby implying some secret agreement; but it is a public and forced sale in which all had the opportunity of competition. The purchaser at such sales is protected because, says Chancellor Kent, 2 Com. 519; 'though the goods were suffered to continue in the possession of the defendants, yet the transaction was necessarily notorious to the whole neighborhood, and the execution notice to the world, and the cases, being free from fraud in fact, were under these circumstances, free from the inference of fraud in law.'"

Even in a private sale by a debtor to his creditor, the fact of the debtor's remaining in possession after the sale, is not conclusive of fraud, although that with concurring suspicious circumstances may justify that portion of the Court which determines the facts in inferring fraud. This inference may

be repelled by proof of bona fide hiring to the debtor, or something equivalent. *Jones and Briggs v. Blake*, 2 Hill, Eq. 636; *Pringle v. Rhame*, 10 Rich. L. 72 [67 Am. Dec. 699].

In the present case, Aldrich and Harley entered into an agreement, October 8, 1849,

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which was recorded in the Registrar's Office, November 17, 1849, whereby Harley was constituted the overseer and agent of Aldrich for the management of the lands and chattels bought from the Sheriff, for an indefinite time at the compensation of ten per cent. of the net products of the lumber and timber cut, of the crops made and the stock raised. It is said for the plaintiffs that this agreement contains unusual and suspicious stipulations, such as that Harley should deliver up the property when called for, should send this lumber as directed by Aldrich, and should not contract about the property without Aldrich's permission. This is really straining for a point. The conveyancer who drew the instrument, testifies that he mainly followed a precedent in Oliver's conveyancing. The stipulations attacked are merely formal expressions of what may have been implied from the relation of the parties, and do not impress me as being very peculiar.

It is more strongly urged that Harley did not comply with his covenant to account to Aldrich for the net products of the mills and plantations, and on the contrary appropriated much of the products to his own use in the support of his family, and the payment of his debts, and the purchase of a carriage and mules, and some other chattels. Such appropriation by Harley is to some extent proved, but whether with the knowledge and permission of Aldrich or not does not appear. It may be that Harley, as agent, dealt unjustly with his principal, as Aldrich sometimes complained, or that the parties subsequently modified their agreement of October, 1849. It must be borne in mind, that Harley's remaining in possession of the property and dealing with it are unimportant, except as tending to raise the presumption of a compact between the parties before the sale by which Aldrich secured an advantage to himself at the expense of other creditors, effecting his purchases, by permitting his debtor to remain in possession. If we start our investigation of the case with the foregoing conclusion, that there was such fraudulent preconcert, we may find in trivial cir-

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cumstances "confirmation as strong as proof from holy writ." On the other hand, if Aldrich purchased fairly without such preconcert, he could deal with the property as any other proprietor, and contract about it at his caprice, and even give away the income or the corpus to his debtor or any other person. The inference of corrupt agreement from the debtor's remaining in possession is deduced for the reason that this course is obviously against the creditor's interest.

Here, however, from the great rise in price of property since the sale, Aldrich has ample security in the corpus for reimbursement of the price paid by him, and for the balance of Harley's indebtedness to him; and he has frequently avowed since the sale that he would be content with such reimbursement. With this view he may have been supine and inexact of late years in requiring strict settlement and full payment from his agent as to the net income. It appears that for some months Harley permitted two young female slaves of this property to be in the employment of his son-in-law, Langley, and upon some contract as to the lumber cut, permitted three or four other of the slaves to cut timber on Langley's land; that when Aldrich heard of these transactions, he disapproved of them, and resumed possession of the girls and made a new contract with Langley as to cutting timber. It may be that the irregularities of Harley in the management of the property, where not expressly permitted, were without the knowledge of his principal. Aldrich is unskilled in agriculture and milling, and engaged in professional pursuits, requiring steady attention; and it is proved that his visits are unfrequent even to his Edisto plantation, and his superintendence of it slight and casual, although his attention to Harley's Mills is even less. The defendants, in their answers, swear that they have made repeated and satisfactory settlements as to the income, of which they have not always preserved the evidence; still it is proved that Aldrich has received large sums of money from the income; and to several of the witnesses of plaintiffs he stated that he had received what was

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equal to the interest due to him. I conclude that Harley's remaining in possession is sufficiently explained, and is quite inadequate to raise the presumption of any corrupt agreement with Aldrich.

It is not improbable that Harley may have preferred Aldrich, who had done him many kindnesses, to be the purchaser of his property, and may have entertained at the time of the sale, some vague and secret expectation of further kindness from him; and that Aldrich may have wished and purposed at the time of the sale, in consideration of past favors bestowed by Harley upon him, when he was starting in life, further to befriend Harley, so far as consistent with the security of his own interests. But that any engagement or promise was made and accepted by which advantage was given to Aldrich in effecting the purchase, is not supported by the evidence. Harley and Aldrich sometimes conferred during the sale, at an open window of the Ordinary's office, near the auctioneer; but it can hardly be questioned that such conference was concerning the condition and value of the property. There really was no motive for any corrupt agreement of these parties, respecting the sale, for no agreement between them would assure any advantage to Aldrich

at a public sale, open to the competition of all, and when in fact, the competition was active and produced full prices.

Reliance is placed by the plaintiffs on Aldrich's admissions since the sale, of his purpose, after the purchase money, and Harley's debt to him were paid by the produce of the property, to convey the property for the use of Mrs. Harley and her children. He offered to sell the land to James Patterson, and stipulated that one-half of the profits of re-sale should be settled on Mrs. Harley. Such intention to favor Harley's family, formed after sale, is totally distinct from an antecedent agreement to pursue such course, and is altogether consistent with law, morals, and honor. It may afford evidence of Aldrich's generosity, but not of his fraud. One witness, Bowman, thinks Aldrich stated to him that he would allow Harley to redeem

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the property, but if the witness has not erred in detailing the conversation, which is not unlikely, it only shows that the parties had modified the overseer's agreement. Another witness, whom I have adjudged to be incompetent, testifies that Aldrich remarked to him "our best friends will be first satisfied," from which the witness inferred the meaning, that the creditors of Harley, favored by Harley and Aldrich, should be first paid; but the remark is too equivocal to require this interpretation, and it is quite as probable that it referred to loans of Mr. Ayer's money, managed by Aldrich, about which the parties had been conversing, or meant merely, that Aldrich's friends would be soonest satisfied of his innocence.

I am of opinion that Aldrich's purchases from the Sheriff must stand.

As to the land and negroes purchased by Aldrich from A. A. Smets—

It appears that Harley, several years ago, bargained with Norman Wallace for what is called the Isaac's land at a certain price and applied to Smets, who was his factor, in Savannah, to advance for him the purchase money. This Smets at first altogether declined, but ultimately agreed to pay the price to Wallace, which he did, and take the conveyance to himself and hold the land as security, not only for the price, but for existing and future indebtedness of Harley to him. In the course of their dealings Harley paid to Smets more money than the price of the land, but was never out of debt to him; and ultimately, on January 27, 1848, Smets obtained a judgment against him, older than Aldrich's, for about \$4,760.75.

At the Sheriff's sale of Harley's property, Smets purchased certain negroes for \$4,375, and to obtain possession of them, paid \$1,800 towards the James' judgment, which was older than his own. He permitted these negroes to return to the land purchased by Aldrich, and entered into an agreement with Harley, October 18, 1849, for their management, similar to that of Aldrich with Harley of Octo-

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ber 8, 1849. On December 1, 1849, Aldrich and Smets entered into articles of agreement, stipulating that the net proceeds of the lumber business conducted on the land, and by the negroes purchased by Aldrich, should be first appropriated to the extinguishment of the balance due on the James' judgment, and next to repayment of the \$1,800 advanced by Smets, and then that the proceeds should be divided between them proportionately to the respective amounts of their purchases; and further, that if Aldrich paid to Smets within two years, including Smets' share of the proceeds of lumber, \$4,303.91, with interest on \$4,200, from the date of the agreement, Smets would convey to Aldrich the Isaac's land and the slaves purchased by him at the Sheriff's sale. From the proceeds of rafts of lumber consigned to Smets, Aldrich paid to him the \$1,800, and the \$4,303.91 and interest, and on 15th and 28th January, 1852, by separate deeds, Smets conveyed to Aldrich the Isaac's land and the negroes so purchased. It does not appear what price Aldrich paid for the land, as the land and negroes were jointly bargained for. No plausible objection is made to the purchase of the negroes. Smets, who is examined as a witness by plaintiffs, testifies that he conveyed the land with the approbation of Harley, but neither he nor Harley, communicated this fact to Aldrich, and the last avers in his answer, that he had no notice of Harley's equitable title until after Smets' conveyance to him.

It is contended for plaintiffs that there is a resulting trust for the land in Harley, which attached to it, first in the hands of Smets and then of Aldrich, who are to be considered successively as his trustees. It cannot safely be affirmed that there was any resulting trust, at least until Smets' judgment was satisfied, for there was no investment of H.'s money in the land. I incline to the opinion that Harley might waive this equity, as he did according to Smets' testimony, and that after this waiver, and perhaps without it, his creditors have no standing in Court to compel the execution of the trust. It is a bald attempt to pursue the

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debtor of a debtor when the latter claims no demand. Then one cannot be converted into a trustee without notice of the trust, and no notice is fixed on Aldrich until his legal title was consummated, previously to which he had paid the purchase money. I am less firm in my conclusions as to this branch of the case than any other.

This case was ably and most elaborately argued before me, and many minute points were discussed which it would be excessively tedious to consider separately. I have mentioned those which occur to me which are supposed to bear most strongly on the issues between the parties.

The defendant, Aldrich, formally declines to avail himself of the statute of limitations, preferring, for the sake of his character, that the charges against him should be investigated. Still it is a fact proper for consideration in his behalf, that the plaintiffs sought no relief for more than six years after his purchases. It is affirmed by the plaintiffs, Guignard and Neuffer, that they did not discover the frauds of which they complain until a time within four years before the filing of their bill; but they can mean no more than that they discovered the supposed evidence of the alleged frauds within four years.

It is ordered and decreed that the bill be dismissed.

The complainants appealed on the grounds:

1. Because the decree should have set aside and vacated the judgment confessed by W. J. Harley to A. P. Aldrich, for \$15,102.19, as a fraud upon said Harley's creditors.

2. Because the decree should, upon the pleadings and proofs of the case, have set aside the purchases of W. J. Harley's property, made by A. P. Aldrich at Sheriff's sale, as a fraud upon said Harley's creditors.

3. Because the decree upon the pleadings and proofs of the case, should have vacated the purchases of the property made by A. P. Aldrich from A. A. Smets, on the ground of fraud on said Harley's creditors.

4. Because, at all events, the Isaac's land, part of the last named purchase by Aldrich, should have been decreed a trust in Aldrich's hands for said Harley's creditors, and should

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have *been ordered to be sold by the Commissioner, and the proceeds applied to the judgment debts of said Harley.

5. Because his Honor, Chancellor Wardlaw, in and by his decree, held that the witnesses who were creditors of W. J. Harley were incompetent to testify in this cause, and therefore excluded from his consideration the whole of their testimony, whereas it is respectfully submitted that all of said creditors, who were not parties to this cause, were in law and equity competent to testify for complainants.

[For subsequent opinion, see 11 Rich. Eq. 1.]

Graham, for appellants.

J. T. Aldrich, Hutson, contra.

The opinion of the Court was delivered by

DARGAN, Ch. The first question which would naturally arise in the discussion of this case is that which is made in the fifth and last ground of appeal, and relates to the competency of several witnesses, which the Chancellor, on the circuit trial, held to be incompetent; the correctness of which decision is called in question by this appeal.

This is a creditor's bill. The plaintiffs, Guignard, Neuffer, Jos. J. Harley, and Hays, in behalf of themselves and all others, the creditors of William J. Harley, who shall

come in and contribute to the expenses of this suit, complain that a judgment against the said William J. Harley in favor of A. P. Aldrich, for the sum of \$15,102.19, bearing date the 9th day of March, 1848, was fraudulent and void against the creditors of the said William J. Harley. They also complain, that on the 3d day of September, 1848, one N. G. W. Walker, Sheriff of Barnwell District, under and by virtue of sundry writs of fieri facias, and in foreclosure of sundry mortgages, offered and exposed for sale, and did sell, at public auction, all of the visible property of the said W. J. Harley, except an inconsiderable portion thereof; that at said sale, A. P. Aldrich became the purchaser of several tracts of land, which

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are particularly described in the bill, and of thirty-three slaves that are described by their names, and of horses, mules, &c. The allegation further is, that the purchase by Aldrich of said real and personal property was fraudulent, null and void, by reason of an illegal and corrupt bargain between the said Aldrich and the said Harley, that the said Aldrich should purchase and hold the said property for the benefit of the said Harley, in fraud of and to the injury of the latter's creditors. This is substantially the complaint of the bill, though there are many and minute specifications of these charges. Inter alia, the plaintiffs pray that the judgment confessed by W. J. Harley to Alfred P. Aldrich for \$15,102.19, entered 23d March, 1848, be vacated and set aside, and that the said Alfred P. Aldrich be required to account for and pay over to the execution creditors of the said William J. Harley all moneys heretofore received by him on said judgment, with interest; and that a judgment confessed by W. J. Harley to Alfred P. Aldrich, John J. Ryan, William H. Peyton, and Jos. T. Harley, for \$15,000, entered 24th March, 1849, be set aside as to the rights of A. P. Aldrich and John J. Ryan therein, &c. And that the said Alfred P. Aldrich be required to account for and pay over to the execution creditors of the said W. J. Harley all such sums of money, and the interest thereon, as have heretofore been received by him from sales of any portion of the property aforesaid. They also pray for general relief.

On the trial, for the purpose of substantiating the charges of fraud against Aldrich and Harley, the plaintiffs called a number of witnesses; some of whom were execution creditors, and some simple contract creditors of the said Harley. Their evidence was taken very fully by the Commissioner, under protest, and subject to the objection of their being incompetent. The question as to their competency was raised on the circuit trial, and the Chancellor held them to be incompetent. It is again raised on this appeal, and this Court concurs with the Chancellor.

It seems to me that a bare statement of

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the case shows the *judgment creditors to be incompetent. It is a creditor's bill, to which any creditor of Harley may make himself a party by application to the Court at any time during the progress of the cause. The prayer of the bill is that the judgment in favor of Aldrich be set aside, and that all the moneys, with interest thereon, which he has received on said judgment, be paid over to the execution creditors of the said Harley; that is to say, to the very parties who are now brought forward as witnesses to prove the fraud by which the judgment in favor of Aldrich is to be set aside, and the money he recovered thereon be paid over to themselves. It is impossible to conceive a more direct interest in the event of the suit. The case is different from the common one of a creditor testifying in favor of his debtor, by which the debtor's estate may be enlarged, and the probability increased of his being able to pay the debt due to the witness. In that case, the witness is interested more or less, according to the pecuniary resources of the debtor. Such an interest does not exclude his testimony, but goes to his credibility. He has no immediate and direct interest in the event of the suit.

In the same way and upon the same principles, the simple contract creditors of Harley are incompetent as a witness. If the fraud is established, and the prayer of the bill is granted; if the judgment in favor of Aldrich be vacated, and his purchases declared fraudulent and void, then, as a necessary legal consequence, he would be decreed to account for the mesne rents and profits, and these rents and profits would be equitable assets. And in like manner, if the prayer of the bill in reference to the purchase of the Isaac's land from Smets be granted, and that land be decreed to be sold for the benefit of Harley's creditors, the proceeds of such sale would be equitable assets. Equitable assets are always distributed, in this Court, pro rata among all the creditors. The simple contract creditors are allowed to come in on equality with judgment creditors. It is obvious, therefore, that the testimony of any simple contract creditor, called as a wit-

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ness to prove the frauds *charged in this bill, tends directly to create a fund out of which his own debt would or might be paid. Any witness, therefore, who was a simple contract creditor of Harley was incompetent to testify against the defendants in this case. All the evidence given by the creditors of Harley must be ruled out. And when, in addition to this, all that part of the testimony which relates to the declarations of Harley, which is confessedly incompetent, is also excluded, there is very little left to support the allegations of the bill.

But we are of opinion that if all the evidence hereby excluded, were held to be com-

petent and admissible, it would still be insufficient to entitle the plaintiffs to the relief which they ask of the Court. Upon the whole evidence, and considering the time, and all the circumstances attending the sale, the Court cannot see otherwise than that the prices were as full and fair as could have been reasonably expected. There is no proof of any interference with the sales on the part of Aldrich. In fact, he endeavored to procure their postponement. It is not shewn that he or any one else endeavored to suppress or check competition. The bidding was full and animated, and the property was knocked down to him, because his bids were the highest. The Court has looked with a scrutinizing eye into the circumstances attending these sales, and has perceived no feature that can, in justice, be considered as casting a reasonable suspicion upon it. Undue weight, in the view of the plaintiffs, has been attached to the fact that Harley remained in possession of the property after the sale. In the first place, the principle that the vendors remaining in possession of the property is a badge of fraud, does not apply to Sheriff's sales, as has been shewn in the Circuit decree. Conceding the sale to have been fair, and the prices full, and at that conclusion we have arrived, what mischief or injustice is there to any one, if the defendant in execution is permitted by the purchaser to resume the possession of the property which has been sold? Suppose it to have been proved that Aldrich, before the

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sale, had said to *Harley, that if he purchased his property he would let him have it back, and give him an opportunity of redeeming it; and that after his purchase he had fulfilled this promise and agreement; and Harley had, accordingly, resumed the possession of his property—the sales being otherwise fair, and the prices adequate, where is the fraud or vice of such an arrangement? My impression is, that such arrangements at the calls of friendship, are not at all infrequent, nor condemned by any legal or moral obligation. In this case the bids of Aldrich were all accounted for and paid in to the Sheriff, and by him have been distributed and applied to the executions, according to their priority. None of the execution creditors whose executions have been satisfied, can or do complain; nor have those whose executions have not been reached, a right to complain, provided the sale was fairly conducted and the prices full. These propositions are not controverted, but it is contended that the fact that Harley after the sale went immediately into the possession of the whole property purchased by Aldrich, being nearly the whole that was sold, raises an irresistible presumption that Aldrich's purchases were paid for by Harley's funds. There might be considerable force in this assumption, if it had been shewn that Harley

had the possession or control of funds sufficient to have carried out such a fraudulent arrangement, and that Aldrich had not. In the first place, Aldrich and Harley answering to the pointed interrogatories of the plaintiff's bill, positively deny that the purchases of Aldrich were effected by any pecuniary aid from Harley. It is not shewn that Harley, had the necessary funds for such a scheme. The presumption is the contrary. He would not willingly have suffered this total wreck of his fortunes to have taken place, and himself and family reduced to a state of dependence and beggary. It further appears that Aldrich obtained the legitimate control of some of the executions, on which the proceeds of the sale would apply, and by the assistance of friends, raised funds to a sufficient extent at least, to repel any nec-

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essary or probable *inference that his purchases were paid for by Harley's money.

A vehement effort has been made to shew that the confession of judgment by Harley to Aldrich for \$15,102.18, is fraudulent. This Court perceives no reasons for believing that this judgment was based upon fictitious considerations. The plaintiffs have purged the defendants consciences by an answer, on oath, to their charge of fraud in this respect. Both Aldrich and Harley, on oath, have denied the allegation of fraud. So far from the answers having been impeached by two witnesses, or by one and corroborating circumstances, they have been strengthened by the investigation. The particulars of the schedule filed with the confession, as being the consideration of the note on which the confession was given, have been verified to a considerable extent. Nor have the plaintiffs been able to disprove that schedule in a single particular. It is shewn by an unimpeachable witness that Harley was reluctant to give the confession. When first appealed to by Aldrich, he hesitated. He expressed surprise at the magnitude of Aldrich's aggregate demand. Without consenting or refusing, he took time to consider, and several days afterwards gave the confession. This is totally unlike the conduct of two confederate par-

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ties, concocting a fraudulent confession of judgment to defeat just creditors.

In regard to the question made in this appeal concerning the transaction of Aldrich with Smets about the Isaac's land, I deem it necessary to add very little to what has been said on this subject in the circuit decree. I do not perceive that there was any resulting trust, as the plaintiffs contend; for the land was not bought with Harley's, but with Smets' funds. But I do not think that this view about the resulting trust is very material. Harley certainly had an equity to demand a title from Smets on discharging the equitable claims of Smets. Before he could have a right to demand a title from Smets, he must not only have paid up the purchase money in full, but all claims of Smets against

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him on account. This was *Harley's equity; call it a resulting trust, or by any other name. It was a mere right of action, like any other chose. It was not bound by the executions, nor subject to any other liens. Unfettered by liens of any kind, it was entirely subject to Harley's control. He had a right to waive, and did waive his equity as against Smets, and consented that the latter should convey the land to Aldrich. This is fully established by the testimony of Smets. The price paid by Aldrich for the land was about \$1,800; how much less than its value does not appear. I cannot perceive any fraud in this transaction.

It is not my purpose to follow the learned and ingenious counsel of the plaintiffs through all the minutiae of his zealous and protracted argument. It is not necessary that I should do so, nor would it be profitable. Suffice it to say that this Court concurs fully with the Chancellor who heard the cause on circuit in the views which he has taken.

It is ordered and decreed, that the circuit decree be affirmed, and the appeal be dismissed.

DUNKIN and WARDLAW, CC., concurred.
Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, SOUTH CAROLINA—NOV. AND DEC. TERM, 1858

CHANCELLORS PRESENT.^(a)

HON. JOB JOHNSTON,

HON. FRANCIS H. WARDLAW,

HON. BENJ. F. DUNKIN.

10 Rich. Eq. *276

*H. S. NEAL and Others v. THOMAS J. SULLIVAN and Others.

(Columbia, Nov. and Dec. Term, 1858.)

[Assignments \hookrightarrow 100; Judgment \hookrightarrow 883.]

The assignee of a judgment takes it subject to the equity of the defendant to set off against the judgment any sums he may be compelled to pay in consequence of his subsisting liability as guarantor of a note of the plaintiff in the judgment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 177; Dec. Dig. \hookrightarrow 100; Judgment, Cent. Dig. § 1688; Dec. Dig. \hookrightarrow 883.]

[This case is also cited in Moore v. Scott, 66 S. C. 296, 44 S. E. 737, as to facts.]

Before Wardlaw, Ch., at Laurens, June, 1858.

Wardlaw, Ch. The decree of Chancellor Dargan, who heard this case in June, 1857, adjudged that the estate settled on Thomas J. Sullivan, as trustee for the use of Hewlet S. Moore for life, by the deed of Samuel Moore, bearing date June 1st, 1853, was liable to the extent of said Hewlet's interest to the satisfaction of his creditors, and this judgment was affirmed by the Court of Appeals.

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*The decretal order of the Chancellor directed, that the real estate settled, should be sold absolutely by the Commissioner of the Court, and that the slaves settled, should be hired out annually, at public outcry, by the trustee; and the Court of Appeals, expressing the opinion that, if a sale were necessary, it should be made by the trustee, and saying they had not information of the circumstances on which the propriety of the

sale depended, set aside the decretal order, and referred it to the Commissioner "to take testimony, and report whether it would be most for the interest of the parties, that a sale should be made of all, or any part of the trust estate, or that the same should continue in the same shape under the management of the trustee."

It is said, in the course of the opinion, that "the rights of those ultimately entitled must be considered, as well as the rights of the creditors;" and in a conflict between these two classes, the attempt should be to reconcile the interests of both, and not to defeat entirely, or greatly impair the interest of either; the claims of the former being express, but contingent, and of the latter incidental, but accruing through the immediate object of bounty. In executing the order of the Appeal Court, the Commissioner has ascertained the following facts: Hewlet S. Moore is a married man, about thirty years old, and has a child born since the execution of the trust deed. His debts, as reported, amount to \$7,235.15. The trust estate consists of three parcels of land and ten negroes. One tract contains three hundred and seventeen acres, of which forty only are cleared and arable, and is worth in fee \$2,536, and for annual rent, \$57. Another tract contains two hundred acres, all in forest, worth in fee \$1,000, and nothing for rent. The third tract is an improved lot in the village of Laurensville, one mile from the Court House, containing eighteen and three-quarters acres, and worth in fee \$2,000, and in annual rent, \$150. The negroes are likely: Sylvia is about forty years old, and with her two children, a boy of six years,

(a) Hon. George W. Dargan absent, by illness.

and a girl of one year, is worth \$1,000 to
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\$1,400 absolutely, or \$60 *for annual hire. Louisa, about eighteen years old, worth \$1,400, and \$75 for hire. Hagar, about thirteen years old, worth \$900, or \$75 for hire. Emma, about eleven years old, worth \$800, and \$60 for hire. Dave, about twenty-eight years old, worth \$1,100, and \$150 for hire. Avarilla, about twenty, and her child, worth \$1,200, and \$60 for hire; and Elijah, about twenty-nine years old, a plantation blacksmith, worth from \$1,200 to \$1,400, and for hire \$150. On this state of facts the twelve witnesses examined by the Commissioner differ much in opinion as to the propriety of a sale of one or both descriptions of property, in fee or for life. Nearly all concur in the opinion that the interest of the creditors would be promoted by an absolute sale, as interest on the proceeds of sale would amount to a larger sum than the aggregate of rent or hire. Five witnesses express belief that if the life interest alone were sold, it would not bring more than 25 per cent. of the whole value; one, that it would bring 40 per cent.; one, that it would bring 40-50 per cent., and others that it would bring 50 per cent. McDavid and Smith think it better that the property should remain as it is; Mitchell, that the land should be sold, and not the negroes; McCarley, that it is better for remaindermen that land should be rented; Blakely, that it would not be detrimental to remaindermen to sell both; Berry and Chandler and Eppes, that it would be injudicious to sell a life interest separately, particularly in the negroes; Richardson and Gunnels, that it is better for remaindermen not to sell the negroes; Dial and Davenport express no opinion, except that the former says that the value of the increase of the slaves is likely to be greater than interest on their value.

The Commissioner, "deeming it proper to draw his own conclusions from the testimony of the witnesses," "reported his opinion that it would be to the interest of all the parties that the fee simple of the whole real estate should be sold, and that the life interest of the defendant, Hewlet S. Moore, in the negroes, should be sold." To this report the trustee excepted, 1. "Because the

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testimony was conclusive that it *was not most for the interest of the parties to sell either the life estate in the slaves, or the fee in the land;" and 2. "Because the Commissioner disregarded the testimony, and adopted his own arbitrary opinion, in recommending a sale of the property." Some misconception is exhibited in the frame of these exceptions. A question as to the propriety of a sale is not within the province of science or peculiar skill, as to which the maxim *cui libet in sua arte credendum est*, but is an ordinary inquiry into facts, in which the

opinion of witnesses is not strictly testimony. The Commissioner being required to report on the question, necessarily expresses his opinion in recommending any course to the Court, but his opinion should be based on the circumstances proved, and not on the unsupported theories of other persons. It is the business of witnesses to state facts, and of the Court to form opinions on their statements. The judgments of all of us, however, as so much influenced by the views of intelligent associates, that we may well listen, in matters of discretion to the mere advice of others; but it seems plain that a Commissioner or Chancellor may disregard the advice or opinions of all the witnesses in a case, if not approved by his own understanding. My own judgment is entirely satisfied of the propriety of selling the lands in fee. They are now yielding a rent of \$207 only, which is \$180 less than the annual interest on their value. If they were sold for Moore's life only, a purchaser could afford to give nothing for one of the tracts, and little for another, as, according to my apprehension, he would have no right to open the wild lands for cultivation. Even the house and lot, although the improvements are new, is not yielding any thing near that rate of profit, say 10 per cent. of the value, which is the ordinary standard of rents; and common experience teaches that such property is liable to great dilapidation, especially in the tenure of those holding for a year only, or for an uncertain term. The remaindermen sustain no direct loss by a sale, and at most complain of possible loss of the contingent

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appreciation of the *estate, whereas there is much risk of depreciation. My conclusion is nearly as confident that the slaves should not be sold for the life of Moore. If sold at all, an absolute sale would be preferable. They are likely, and for the most part reproductive, so that, as Dial says, the value of their increase will probably exceed the interest on their present value. They are now capable of yielding a hire of \$630, which is \$105 more than the interest on their whole estimated value, and the probability is, that their annual value will increase, so that creditors cannot complain of hiring. The utter uncertainty of the duration of Moore's life, makes the price of his interest as uncertain, according to the hopefulness or caution of bidders. Slaves sold for an uncertain time are exposed to the risk of being overworked from the greediness of purchasers to reimburse themselves and make profit, and thus their lives may be shortened, and their fruitfulness impaired. So, too, notwithstanding every precaution of forthcoming bonds, and the like, they may be eluded and lost. There are objections even to hiring, in its bearing on the interests of remaindermen; but it is the least objectionable form of securing the interests of the parties. The

trustee must be invested with as much discretion as is consistent with the interest of creditors, and they should have the opportunity of bringing forward their complaints of any breach of trust or waste on his part. It is ordered and decreed that Thomas J. Sullivan, trustee, do sell the several tracts of land described in the trust deed, at public auction, on a credit of one and two years, with interest from the day of sale, payable annually, the two tracts lying in Greenville, at some suitable place, on, or near the premises; and the house and lot at Laurens C. H., at such times as may be fixed by the trustee, public notice, for at least twenty-one days, of the sales being given before the sales. Purchasers to give bonds to said trustee, with at least two good sureties, and possession not to be taken until the present leases expire.

It is further ordered and decreed that the

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said trustee proceed to hire such of the slaves passing by the trust deed as are not hired, until the first of January next; and it is further ordered that said trustee on the first Monday in January next, and on the same day in every year afterwards during the life of Hewlet S. Moore, while the debts established against him remain unpaid, hire out the said slaves at public outcry, at Laurens C. H.; allowing discretion to said trustee to reject the bid of any unfit hirer, and to take all proper measures to secure the humane treatment of said slaves.

It is further ordered that said trustee pay ratably to the creditors of said Moore who have established, or may establish their demands, the amount of the hire of the slaves and the interest of the proceeds of sale of the land, as the same may be collected. It is further ordered that said trustee make annual returns to this Court for Laurens of his transactions under the foregoing orders; and that any of said creditors have leave to except to such returns, and bring to the notice of the Court any breach of trust, waste, or other act impairing or endangering the trust, on the part of the trustee.

There is another branch of this case. The Court of Appeals further ordered the Commissioner to call in the creditors of Moore to present and prove their demands, and that he report thereon. The Commissioner has reported demands established to the amount of \$7,225, and to this report the trustee also excepts because certain claims are included, on insufficient proof. The objection to the proof of the claim of Cheshire & Smith is made in mistake. The note was in evidence before the Commissioner and was produced by him on the trial. The claim of Wm. M. Badgett of \$250 is for building a kitchen on the lot in Laurensville, on a fair contract with Moore. The building added to the value of the lot at least to the extent of this claim. I think the demand may be fairly considered

as originating in the creation of the trust estate, and that it was properly allowed. The claims of J. H. Henry and E. B. Benson, which are objected to, are not clearly proved.

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but, under *the circumstances, I shall grant the application for leave of further time to make supplementary proof.

The fourth exception of the trustee is, "because the Commissioner has reported that H. S. Moore is liable on a guaranty of a single bill for \$845.84, and interest, claimed by Edward Hix, when the makers of the single bill. (Daniel L. and Spencer H. Neal,) are parties before the Court, through their assignee, H. S. Neal, claiming a judgment of \$950.62, and interest, against said Moore, and the Commissioner has allowed both; whereas he should have reported that if Moore is liable on the guaranty, the judgment against him in favor of D. L. & S. H. Neal should have been credited with the amount of his liability on said guaranty."

It appears that the single bill from D. L. & S. H. Neal, is dated February 23, 1853, payable on January 1, 1854; that it was assigned by Moore to J. W. Arnold, with guaranty of payment, April 23, 1853, and that by subsequent assignments it passed to Edward Hix, who obtained judgment thereon against D. L. & S. H. Neal. They were afterwards discharged under the insolvent debtor's Act. The note of Moore to D. L. & S. H. Neal was given March 4, 1854, payable one day afterwards; and sometime afterwards Moore confessed judgment to them on said note; and they, on November 15, 1853, assigned this judgment to H. S. Neal as indemnity or collateral security for certain liabilities he had incurred in their behalf. The Commissioner sustained this exception without making any explanation, and I am not able to perceive the reasons on which he acted. There is no such connection between the two claims as to render the doctrine of set-off applicable. It would be manifestly unjust to compel Hix to release his claim because his debtor, after Hix's right was acquired, became debtor of a firm of which he was originally creditor. The Commissioner was right at first, and wrong in reversing his judgment. It is ordered and decreed that this report of the Commissioner

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on the debts of Moore *be re-committed for the purpose of further inquiry and evidence, and report as to the claims of J. H. Henry and E. B. Benson, and that in all other particulars said report be confirmed.

The defendant Thomas J. Sullivan, appealed from so much of the decree as relates to the judgment in favor of the Neals, and the guaranty on which E. Hix sets up a claim, and now moved this Court to reverse that portion of the same which allows said judgment, on the grounds:

1. Because the fourth exception filed by the defendant to the Commissioner's report, and

sustained by him, was well taken, and ought not to have been overruled by the Court.

2. Because the Chancellor's decree was founded in a misconception of the facts of the case, and the defendant has an equity to have so much as his estate pays on the debt to Hix, for which he was only security, credited on the judgment of the Neals against him, who were his principals.

3. Because if the judgment was assigned to H. S. Neal, as indemnity or collateral security, he was bound to prove that he was damaged before he could avail himself of the judgment.

Sullivan, for appellant.

Simpson, Henderson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. When this case was formerly heard, the principles of the Circuit decree were affirmed, but the decretal order directing a sale, &c., was opened for the purpose of further inquiry. That inquiry has been made, and the judgment of the preceding Chancellor has been confirmed by that of his successor, and no appeal has been taken from that part of the decree. The trustee should, therefore, account for the hire of the slaves as well as the rent of the land from the time fixed in the former decree, and apply the same as provided in the last circuit decree.

Upon the subject of the fourth exception, it

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appears that *the judgment of D. L. and S. H. Neal against Hewlet S. Moore was assigned 15th November, 1855, to H. S. Neal as indemnity for certain liabilities, sometime after the transfer and guarantee by Moore of the note of D. L. and S. H. Neal which was payable to himself. In the opinion of the Court the assignee of the judgment, H. S. Neal took it subject to the Equity, which Moore had to set off against the same, any sums which he should be compelled to pay in consequence of this subsisting guarantee. The decree of the Circuit Court is modified accordingly. In all other respects the decree is affirmed.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

10 Rich. Eq. *285

*ANN M. HENAGAN v. J. J. HARLLEE and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Dower \hookrightarrow 15, 24; Executors and Administrators \hookrightarrow 272.]

A widow is entitled to dower in land mortgaged by her husband to secure the purchase money. In such a case, it is the duty of the executors to pay the mortgage debt out of the personal estate; and if, upon their failure to do so, the creditor should enforce his lien by sale of the land, the widow will be entitled to have

her claim of dower therein satisfied out of the personal estate.

[Ed. Note.—Cited in *Agnew v. Renwick*, 27 S. C. 574, 4 S. E. 223; *Ebaugh v. Mullinax*, 34 S. C. 376, 13 S. E. 613; *Grube v. Lillienthal*, 51 S. C. 452, 29 S. E. 230.

For other cases, see *Dower*, Cent. Dig. §§ 57, 74; *Dec. Dig.* \hookrightarrow 15, 24; *Executors and Administrators*, Cent. Dig. § 1068; *Dec. Dig.* \hookrightarrow 272.]

[Dower \hookrightarrow 93.]

Under a bill for dower, the claim for an account of rents and profits limited, under the circumstances, to the time of filing the bill.

[Ed. Note.—Cited in *Phinney v. Johnson*, 15 S. C. 163.

For other cases, see *Dower*, Cent. Dig. §§ 351, 352; *Dec. Dig.* \hookrightarrow 93.]

Before Dunkin, Ch., at Marion, February, 1858.

This bill was filed by the widow of Dr. Barnabas K. Henagan, late of Marion district, against his executors and children, for delivery to complainant of the legacies bequeathed to her by the testator, and also for recovery of dower, with account of rents and profits, in several tracts of land of which the testator died seized.

Dunkin, Ch. This cause came on for a hearing on the bill and answer, and counsel having been heard, it is the opinion of the Court that the complainant is entitled to dower in all the lands whereof the testator, Barnabas K. Henagan, was seized at his death, including the lands ordered to be sold for the payment of debts, which can only be sold subject to her said right of dower, and also the tract, called the Cannon land, respecting which it is stated in the answer, that it was mortgaged to secure the purchase money by deed of even date with the conveyance to the testator; and that a large part of the purchase money remains unpaid—and that it is the duty of the executors to pay and satisfy the said mortgage debt out of the personal estate, and in the event that the mortgage creditor shall proceed to enforce his lien on default of payment by them, that the complainant is entitled to have her

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*claim of dower therein satisfied out of the personal estate. (a) It is further the opinion of the Court, that the complainant is entitled certainly, under the circumstances of this estate, as disclosed in the answer, to have delivered to her the specific legacy for life, of slaves, stock, household and kitchen furniture, farming utensils, &c., given to her in the first and second clauses of the testator's will.

It is therefore ordered and decreed, that a writ of admeasurement of dower do issue, directed to suitable persons, to be named according to the practice of the Court, author-

(a) *Gordon v. Stevens*, 2 Hill Eq. 46 [27 Am. Dec. 445]; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Brown v. Caldwell*, Sp. Eq. 322; *Whilden v. Whilden*, Riley, Eq. Ca. 205; *Francis v. Lehre*, 1 Rich. Eq. 271; *Wilson v. McConnell*, 9 Rich. Eq. 500.

izing and requiring them, or a majority of them, to admeasure and set out to the complainant, her dower or thirds, in the several tracts of land described in the pleadings, and make return of their proceedings therein to this Court.

It is further ordered, that the Commission-er hear evidence, and state an account of rents and profits of the said several tracts of land since the time of filing the bill, and ascertain and report the complainants one-third part thereof.

It is further ordered, that the defendants, James J. Harlee and James H. Henagan, executors of the will of B. K. Henagan, do surrender and deliver to the complainant, without conditions, the several slaves and their increase, the horses, cattle, hogs, wagon and harness, cart, household and kitchen furniture, plantation tools, and farming imple-ments, which, in the first and second clauses of testator's will, are bequeathed to her, to be by her held and enjoyed for life, according to the terms of the said bequest.

The defendants appealed on the grounds:

1. Because, with respect to the lands known as the Cannon lands, the same were under a mortgage for the purchase money, and complainant can only take her dower subject to said mortgage, and only in such

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portions of said lands as testator had a valid legal title, and testator's personal estate is not liable to be subjected to pay said mortgage to enable complainant to get her dower.

2. Because, it having been conceded on the trial that complainant purchased certain articles of personal property, for which she had not accounted, and had also entered into an agreement with the defendants, as alleged in their answer, with respect to the hire of the slaves specifically bequeathed to her, his Honor should have decreed that these amounts should have been set off against her dower in said lands.

3. Because, with respect to the property bequeathed, complainant in the first and second clauses of said will, she is not entitled to have a delivery of the same or an account therefor, until the testator's debts are paid and satisfied.

The complainant also appealed on the ground:

That the complainant being entitled to her dower in all the lands whereof the testator died seized, and having been guilty of no laches in asserting her right, was entitled also to an account of, and to her one-third part in the rents and profits of all the said lands, from the accrual of her said right, at the death of the testator, and not merely from the time of filing the bill, and his Honor ought so to have decreed.

Harlee, for appellant.

Inglis, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. In reference to the plain-tiff's right to dower, and the extent of that right in premises mortgaged by the testator, the Court concur in the decree, and do not deem it necessary to add to the authorities cited.

The defendants' second ground of appeal, and the plaintiff's appeal may be considered together. In this Court the widow, whose right of dower is established, is also entitled

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to *an account of the rents and profits. But the extent of that right may be modified and restricted by the circumstances of the case. In *Bullock v. Griffin*, 1 Strob. Eq. 60, the account was limited to the time of filing the bill.

Dr. Henagan died in 1855. The executors were not obliged, in the opinion of the Court, to deliver to the widow the property specifically bequeathed until the expiration of a year and day. The negroes, however, were delivered to her forthwith, upon the understanding that they should not be precluded from demanding a fair hire under certain circumstances. The plaintiff forbore to set up her claim until more than a year after the testator's death. The decree limited the account of rents to the time of filing the bill, and did not allow any set-off to the claim of dower for the year's hire of the negroes. Both parties appeal. But the Court is satisfied with the judgment of the Chancellor, and the decree is affirmed and the appeal dismissed.

JOHNSTON and WARDLAW, CC., con-curred.

Appeal dismissed.

10 Rich. Eq. *289

*RENNEKER & GLOVER v. N. J. DAVIS
and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Attachment ⇨164.]

In a suit by attachment, service of the writ by delivering a copy to the garnishee, gives the creditor a lien on all assets of the absent debtor in the hands of such garnishee, although such assets be not taken into custody by the attach-ing officer.

[Ed. Note. For other cases, see Attachment, Cent. Dig. § 468; Dec. Dig. ⇨164.]

[Creditors' Suit ⇨19.]

A creditor who sues by attachment, and thus gains a lien on the assets attached, has no right, for any balance due, after exhausting his lien, to come in, with other creditors, and participate with them, in the distribution of un-attached assets of the absent debtor.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 88, 89; Dec. Dig. ⇨19.]

Before Wardlaw, Ch., at Abbeville, June, 1858.

Bill for marshalling assets, injunction, &c. Some of the creditors of Mathis & Sale had commenced suits by attachment for recov-

ery of their debts, and their writs had been served by delivering copies to the garnishees, N. J. Davis and Thomas R. Cochran, both of whom had some assets of the firm in their possession when the writs were served. His Honor, the presiding Chancellor, held, that as those assets had not been taken into custody by the attaching officer, the attaching creditors had acquired no lien upon them; and he ordered them to be distributed pro rata among all the creditors.

The attaching creditors appealed.

Noble, for appellants, cited Attachment Act, 3 Stat. 617, § 1; Callahan v. Hallowell, 2 Bay. 8; 2 Bail. 209; 1 McM. 92; 1 Rich. 96; Act 1844, 11 Stat. 290; Serg. on Attachments, 14; Parker v. Parker, 2 Hill ch. 35.

McGowan, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The Attachment Act of

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1744 (3 Stat. 617, § 1) provides for *the issuing of a writ, commanding the proper officer "to attach the monies, goods, chattels, debts and books of account belonging to the absent debtor, in the hands of any person or persons whatsoever;" and declares "that the attaching of any part thereof, in the name of the whole that is in such person's hands, power or possession, shall secure and make the whole liable in law, to answer any judgment that shall thereafter be recovered and awarded upon that process."

The officer shall, when he executes the writ of attachment, "summon the person in whose hands the said monies, goods, chattels or books of account shall be, * * * requiring him, &c., to appear, &c., to show cause why the said monies, &c., should not be adjudged to belong to such absent debtor;" but if no person is present "at the time of attaching any the things aforesaid" * * the officer "shall fix up at the prison door a copy of the said writ, with an account of the things attached, and give notice thereof in the gazette, &c., for any person or persons, claiming the same, to appear as aforesaid and show cause as aforesaid. And the person or persons, so summoned, as aforesaid, shall be obliged to appear at the return of said writ, and to discover upon oath what sum or sums of money, &c., &c., he or she have, in his, her or their hands, possession or power, to which the said absent debtor hath any right, claim or property whatsoever." "And if any goods or chattels shall be actually seized and taken into the custody" of the officer "by virtue of said writ of attachment, and the person summoned shall not appear at the return of said writ, then upon his, her or their default, and no person appearing and laying claim to the goods and chattels so attached, the same shall be adjudged and taken to be the property of the absent debtor," &c.

The subjects of attachment are extended by various attributes not necessary to be noticed here.

By statute of 1844, (11 Stat. 290,) it is provided, that persons "in whose *hands, possession, custody, power or control" property of an absent debtor shall be attached by service of a writ of foreign attachment, and who shall not, on oath, claim the same as creditor in possession, shall surrender it to the Sheriff or enter into bond with good surety, for the use of the suing creditor, not to waste or eloin the property so attached, and render a schedule of it, on oath, to the Sheriff, and to make due return to said writ, and surrender the property attached when duly required by law, &c.

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In the present case, it has been adjudged by the Chancellor that, unless the subjects of attachment be actually taken into custody by the attaching officer, no lien arises in favor of the attaching creditor; and that in the distribution in this Court of the debtor's assets, such creditor can come in only *pari passu* with other creditors.

Our opinion is that an actual seizure is not essential to create the attachment lien, but that the service of the writ on one in whose custody or control the assets of the absent debtor may be, is sufficient, to make the whole assets in his hands "secure and liable in law, to answer any judgment that shall thereafter be secured and awarded upon that process."

It is familiar law that no action of debt can be grounded on such part of the debt sued for in attachment, as the attached property may fail to satisfy; (a) but the creditor when he proceeds to sue by attachment must rest contented with such remedy as the property, or choses, attached may furnish him.

When this is considered, it is but fair to give him as ample a remedy as this by fair construction can afford, and thus make compensation to him, by way of lien, for the disadvantages under which he labors as general creditor.

It is true, the precise point involved in the appeal does not appear to have been specifically decided in the cases quoted by the appellants solicitor; but the general practice

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in attach*ment cases has been as he contends, and the cases show what that practice has been without exception.

In Callahan v. Hallowell & Lenox v. Hallowell, 2 Bay, 8, Callahan's attachment was first lodged, but Lenox's was first served. The service was by serving a copy on the person in whose hands the goods of the absent debtor were. The Court, without the least hesitation as to the mode of attaching, awarded the priority of lien to the writ first lodged.

In McBride v. Floyd, 2 Bailey, 209, it was

(a) Floyd v. White, Sp. Eq. 351.

held, that the writ of attachment creates a lien on all choses in action of the absent debtor, in the hands, power or possession of the garnishee, (the debtor's attorney, who retained possession of his client's note, and recovered judgment on it,) which lien is not discharged by any intervening incumbrance or alienation, (such as a judgment recovered by another creditor, &c.)

In *Day v. Becher*, 1 McM. 92, although the Court held, that merely lodging a writ of attachment in the office of a Sheriff, who had goods of the absent debtor in hands, by levy, was insufficient service, yet it permitted him to accept service as garnishee, nunc pro tunc, the Court observing that by this proceeding "the prior lien of the attaching creditor is preserved."

In *Moore v. Byne*, 1 Rich. 96, the Court in discussing the question whether a third person in possession of goods alleged to belong to the absent debtor, but which he in possession lays claim to, observes: "The plain words of the Act of 1744, show that there is a material difference in the mode of executing the writ, when there is a possession in a third person, and when no one is in possession. What is meant by the terms "attach" "in the hands of?" Do they mean to seize and take into possession, or do they mean to seize so as to make liable in law for the plaintiff's debt? The latter, I have no doubt, is the true meaning. The act sufficiently indicates this. It declares that the attaching

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of a part in the name of *the whole, shall make the whole liable, in law, for the debt of the plaintiff. This is a constructive seizure, and shows that the service of the attachment was the creation of a lien merely."

In the case from which I have extracted these passages, there is a review of cases and authorities not only upon our Acts of attachment, but under the custom of London, for which I refer to that case.

And see *Sergeant on Attachments*, 14, 15, et passim.

It seems to follow from these cases, that the service on the garnishee has always been regarded, in practice, under our Attachment Acts, as creating a lien on the assets in his hands to be ascertained by the subsequent developments in the case.

If so, the decree should be modified so far as it denies the benefits of a lien to the attaching creditors of the partnership; but it should also be modified so as to take from them all claim to be satisfied out of unattached assets, if any. These are open to other creditors, but not to them; their right being limited to what remedies they may have under their attachment.

It is ordered that the decree be modified, according to the foregoing opinion; in all other respects it is affirmed.

DUNKIN and WARDLAW, CC., concurred.

10 Rich. Eq. *294

*R. S. WYLIE and Others v. R. J. WHITE and Others.

(Columbia. Nov. and Dec. Term. 1858.)

[*Execution* ⇨41; *Wills* ⇨673.]

Testator bequeathed to his son, "during his natural life, the use and benefit of" certain negroes; "but the said negroes not to be removed from the State, or be disposed of by him, or any other person whatsoever, but to remain exclusively for the annual support of my said son and family." Held, that the will created a trust for the benefit of the son, his wife and children—that the negroes were not liable to be levied on and sold under executions at law against the son; and that his creditors could only subject his interest to their demands, by proper proceedings in equity, instituted by them for that purpose.

[Ed. Note.—Cited in *Markley v. Singletary*, 11 Rich. Eq. 399, 400; *Hunter v. Hunter*, 58 S. C. 388, 389, 36 S. E. 734, 79 Am. St. Rep. 845; *Pelzer Mfg. Co. v. Pitts & Hartzog*, 76 S. C. 356, 57 S. E. 29.

For other cases, see *Execution*, Cent. Dig. § 90; *Dec. Dig.* ⇨41; *Wills*, Cent. Dig. § 1582; *Dec. Dig.* ⇨673.]

Before Dargan, Ch., at Chester, July, 1853.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

G. W. Williams, for complainants.

McAliley, Clawson, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. In the will of the testator, he says: "I will to my son, William, during his natural life, the use and benefit of the following negroes, and other personal property: my negro woman Patsy and her three children, Rachel, Betsy and Lucy, and also my negro man named Bob; but the said negroes not to be removed from the State, or be disposed of by him, or any other person, whatsoever, but to remain exclusively for the annual support of my said son and family."

Creditors of the son have levied executions on certain of these slaves; and his wife and children, claiming an interest in the slaves, have brought their bill to restrain the creditors.

The Chancellor, at the hearing, was of opinion, upon evidence of sufficient weight to

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support his judgment, that the *slaves disposed of by the testator were his property, at the time his will came into operation; and, of course, the will must control the rights of property afterwards.

The question is necessarily presented, whether the plaintiffs, as the family of the legatee, William Wylie, Junior, take any interest, under the will, and what is the nature of that interest?

These parties insist that the will intended a benefit to them, and that whatever interest was conferred by the instrument upon Wm.

Wylie, as the head of the family, was coupled with a trust in their favor; and in this position they are supported by authority.

To create a trust it is not necessary that the word should be employed in the instrument. It was said by Lord Eldon, in *King v. Denison*, 1 Ves. and B. 273, that the word "trust" not being made use of "is a circumstance to be attended to, but nothing more; and if the whole frame of the will creates a trust, for the particular purpose of satisfying which the estate is devised, the law is the same, though the word 'trust' is not used."

"Thus," says a good elementary writer, (a) "when a gift in a will is expressed to be for the benefit of others, or to be at the disposal of the donee 'for' herself and children; or towards her support and her family; or to enable the donee to provide for, or maintain, his children; * * * or where the gift is expressed to be made to the end, or to the intent that the donee should apply it to certain purposes; in all these cases the terms employed have been held sufficient to fasten a trust upon the conscience of the donee, * * * showing that in every case, the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question, whether a party does, or does not take in a fiduciary character.

It has been held that where property is given in terms sufficient to point out an ob-

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ject, or persons to be benefited, the *donee will be affected by a trust to accomplish the end designed, unless it appears by plain words or necessary implication that he is intended to have a discretion to defeat it. (b)

In this case the donee is restricted from defeating the design of the testator, by alienation or removal of the slaves, and the property is to be held "exclusively for the annual support of my said son and family." To this end, and this only, is it devoted; and it is no immaterial circumstance that the design is not the support, generally, but the annual support of the parties; showing that it is to be faithfully kept up from year to year without interruption.

The case resembles, but is stronger than the cases of *Raikes v. Ward and Crockett v. Crockett*, 23 Eng. Ch. Rep., 445, 451. In the first of these two cases, under a gift by testator to his wife of his residuary personal estate, "to the intent that she might dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous," it was held that the wife did not take an absolute interest, but one subject to the equities of the children.

In the course of his judgment, the Vice Chancellor reviews most of the cases on the

subject, and among them, mentions that of *Hamley v. Gilbert, Jacob*, 354, which case says he, shews, that "where maintenance of the objects of testator's favor is one of the purposes of the gift, that is a benefit capable of being measured."

In *Woods v. Woods*, 1 Mylne & Craig, 401, s. c. 13 Cond. E. Ch. R. 449, one of the cases referred to, testator devised certain estates by name, with the farming stock and furniture, &c., to his wife, "to sell, to discharge all his creditors;" and he constituted her and his brother T. W. his executors, "whom I do appoint to sell and dispose of all my estates and chattels, in such manner and form as they shall jointly agree upon; or not to sell, if it seems most advisable to keep them, or in any way that they shall think proper,

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so that every *creditor have his money; and, if sold, all overplus to my wife, towards her support and her family, if any there be, after paying my brother for his trouble, and all other debts whatsoever." It was held, upon demurrer, that testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits.

The Lord Chancellor, after disposing to his satisfaction of some preliminary matter, proceeds, "it is equally clear that if the contemplated event (a sale) took place, a trust as between the widow and the children, would be created."

In the present case, there is not only an absence of all discretion on the part of Wm. Wylie, Jr., the legatee to defeat the benefits intended by the testator to his family, but he is restrained from removing or alienating the property, and it is expressly confined to the end designed of supporting them. In such a case, it is impossible, to make anything but a trust out of the dispositions of the will. There can be no reasonable pretence that an absolute interest was intended to be conferred on the legatee named. Whatever he took, he took with a trust to himself and his family; and his creditors have no right to treat the property as his exclusive legal estate, irrespective of the interests of his wife and children.

By these latter observations I mean to intimate that the wife and children take an interest under the designation of "his family."

In England where the inheritance of real estate is regulated by primogeniture, under a devise to A. and her heirs, in the fullest confidence that after her decease, they will devise the property to my (the testator's) family, it has been intimated that, if the devise had been to A. for life, and not in fee, with remainder to testator's family, the remainder would have accrued to testator's

(a) Hill on Trustees, 65.

(b) *Malim v. Keighley*, 2 Ves. Jr. 333.

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heir at law. (c) But in this State, *even if this had been a will of land, the persons designated as the family, are the very persons who now lay their claim before the Court. The same succession obtains with us as to real and personal estate; and the principle, which, in England, carries real estate to the eldest son, carries both real and personal estate here, to wife and children generally.

In *Woods v. Woods*, 1 Mylne & Craig, 401, 13 Cond. E. Ch. 449, an English case mentioned some time ago, when the overplus arising from the sale of real and personal estate was directed by the will to the support of testator's wife and her family, the Lord Chancellor came to speak of the equities as between the wife and her family, and said: "One point raised upon the will itself was, that if there be a trust at all, it is a trust only for the eldest son. Now the word 'family' is capable of various significations, according to the context. It is obvious that in this passage the testator was dealing with the surplus of the purchase money after a sale; and the construction contended for, in support of the demurrer, would be, that, after a sale had taken place, although there was a trust for the family, the heir was the only person entitled to receive any benefit from it. The testator, however, was manifestly dealing with the property in contemplation of a certain event, the event, namely, of a sale. I think it is clear, therefore, that in the construction of this will, the expression 'family' cannot be confined to the heir, but that the other children must be considered as also objects of the testator's bounty."

Having come to an unhesitating conclusion that there is a trust in this case which extends to the wife and children of William Wylie, Junior, and which prevents the property from being dealt with by his creditors as his legal property; the question is, whether the decree should not have ordered a perpetual injunction, and stopped at that: leaving his creditors to make their claim in equity, as they may be advised, to segregate his portion or interest in the property and apply it to his debts.

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*I am decidedly of opinion, such would have been the proper course. Creditors are not to be encouraged to lay hands on trust property, and compel the cestuy que trusts, whom they are thus injuring, to flee into equity and incur the costs and trouble of a bill for their defence. If, when creditors by an aggressive proceeding have driven the cestuy que trusts into this Court, the practice be adopted to decree the creditors as full a remedy as if they had been guilty of no wrong, but had, in the first instance, come

here as they should with these equities, asking for an equitable remedy, this would be little less than to encourage them, in every case, to take their remedies into their own hands.

The proper practice was pointed out in *Rice v. Burnett* [Spear. Eq. 579, 42 Am. Dec. 336], and *Jorr v. Hodges*, Spear. Eq. 593, and is supported, by a course of reasoning which renders it only necessary to refer to the judgments delivered in those cases.

It is ordered, that the decree be modified so as to order a perpetual injunction against the creditors: leaving them to proceed in this Court on their own behalf, as they may be advised, if they desire to have a portion of the property involved in this suit, corresponding to their debtor's interests in it, applied to the payment of their demands.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

10 Rich. Eq. *300

*MARTILA TOMLINSON et al. v. THOMAS TOMLINSON, Sen., et al.

(Columbia. Nov. and Dec. Term, 1858.)

[*Appeal and Error* \S 819.]

Appeal from a circuit decree, and, also, a petition for rehearing the same, which could only be presented on circuit. As the hearing of the appeal would preclude the consideration of the petition, *held*, that the argument on the appeal should stand, until the petition could be presented on circuit.

[*Ed. Note.*—Cited in *Ex parte Knox*, 17 S. C. 212.

For other cases, see *Appeal and Error*, Cent. Dig. \S 3200; Dec. Dig. \S 819.]

Before Dunkin, Ch., at Chesterfield, February, 1858.

An appeal was taken by the complainants from the circuit decree in this case, and they also filed a petition for a rehearing of the same. They now moved this Court to stay the argument of the appeal, until they could have an opportunity to present their petition on circuit.

Inglis, for appellants.

Melver & Moore, contra.

The judgment of the circuit court was announced by

JOHNSTON, Ch. If the appeal be heard here, it will preclude the consideration of the petition upon circuit, where, according to the case of *Simpson v. Downs*, 5 Rich. Eq. 422, (a) petitions for the rehearing of a circuit decree should be presented, (and where they are to be determined without argument.)

The counsel of the appellants and petitioners have, therefore, moved that the argument of the appeal stand, to give them an

(a) See also, *Smith v. Hunt*, 3 Rich. Eq. 540; *Ex parte Vandersmissen*, 5 Rich. Eq. 519 [60 Am. Dec. 102]; *Simpson v. Watts*, 6 Rich. Eq. 364 [62 Am. Dec. 392].

(c) *Wright v. Atkyns*, 1 Turn. and R., 143, s. c. 11 Cond. Eng. Ch. 83.

opportunity for the presentation of their petition upon circuit.

The motion is hereby granted.

By order of the Court.

DUNKIN and WARDLAW, CC., concurred.

Motion granted.

10 Rich. Eq. *301

*J. J. PRATT v. J. J. McLURE, and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Judgment \hookrightarrow 876.]

Judgments presumed to be satisfied from lapse of time, and a levy indorsed; and the circumstances to rebut the presumption held insufficient.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1648; Dec. Dig. \hookrightarrow 876.]

Before Dunkin, Ch., at Union, June, 1857.

Dunkin, Ch. Daniel White, plaintiff's intestate, was surety to B. H. Bradley, administrator of Henry Long, deceased. The executors of McLure had instituted proceedings at law against the plaintiff, to subject White's estate for the default of his principal, B. H. Bradley. This was a bill of interpleader, filed 23d April, 1856. An order was taken requiring, among other things, the creditors of Henry Long, deceased, to establish their demands. The cause was heard upon the Commissioner's report, and exceptions thereto. It appears that Henry Long died in 1834, and B. H. Bradley administered March of that year. Two of the parties except to the Commissioner's report; First, William M. Thomson, a judgment creditor of Henry Long, deceased, excepts on the ground that the circumstances reported by the Commissioner were sufficient to rebut the presumption of satisfaction of his judgment arising from the lapse of time. The first judgment of William M. Thomson is a sum. pro. by confession, 25th February, 1823, \$62.48. Interest on \$49.50, from 1st January; costs \$10.00. Renewal fi. fa. 14th January, 1824, "credited 11th May, 1834; paid S. Harris, D. S., \$15.00, and 6th August, 1836, paid by B. H. Bradley to Sheriff Macbeth, \$75.97," "being the next oldest case lodged with me, and notified by A. W. Thomson to pay any funds coming into my hands from the administrator of Henry Long, deceased, to this case."—(Signed) R. Macbeth, S. U. D. The

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second judgment of Wm. *M. Thomson is against Elizabeth Long and Henry Long. Fi. fa. entered 24th March, 1830, for \$102.92; costs \$19.42.

Under the notice for creditors, these judgments were presented 2d June, 1857. The former of the judgments was then thirty-four years old, and the evidence proves actual payment of nearly the whole judgment, with interest, more than twenty-one years before the demand was presented in the Commis-

sioner's office. The second is a joint judgment against two parties, and was more than twenty-seven years old, when the demand was presented in the Commissioner's office. It may be that during a part of this interval, the estate of Henry Long, deceased, was represented by his administrator as insufficient to pay his debts, but he received large additional assets in 1848 and 1849. Besides, Henry Long survived until 1834, and this judgment of 1830 was against two defendants. There was no evidence whatever, of the insufficiency of the first named—and, apparently, principal debtor. The exceptions of William M. Thomson are overruled.

The next exception relates to two judgments by summary process, standing in the name of Reid and Davis v. Henry Long; the former is signed 13th October, 1827; decree \$68.25. Interest from 27th January, 1827; costs \$10.84. Fi. fa. 24th October, 1827; "levy on one horse, as the property of the defendant, November 13th, 1827." "Entered June 22d, 1831."—B. Johnson, S. U. D. "Entered August 4th, 1835."—R. Macbeth, S. U. D. "No property to be found returned to the clerk." Mem. "the money belongs to J. S. Cullum, of Charleston." The second judgment is signed 2d November, 1827. Decree \$41.43¾. Interest on \$16.62½ from 1st January, 1825, and on \$24.81¼ from 14th October, 1825. Attorney's costs. "Mem. the money belongs to J. S. Cullum, of Charleston." Tax costs, \$6.27, "levied on one horse, the property of the defendant, November 13th, 1827; entered June 22d, 1831."—B. Johnson, S. U. D. "Entered May 4th, 1835."—R. Macbeth. "No property to be found of defendant's returned to the clerk."

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*It is objected that the Commissioner has not reported in favor of these judgments, and for the reasons stated in the exceptions.

It is a very well established principle of the law, that when a defendant's goods are seized on a fi. fa., the defendant is discharged. Clark v. Withers, (2 Ld. Raym. 1072, 1 Salk, 322.) In Ladd v. Blunt, 4 Mar. R. 403, it was held, that when goods sufficient to satisfy an execution are levied on a fi. fa., the debt is discharged, even if the Sheriff waste the goods, or misapply the money. It was conceded, that a levy is prima facie evidence of satisfaction of an execution; but on the authority of Hancock v. Day, 1 Rice, Dig. 303, it was urged that proof, that the property did not belong to the defendant, and was not sold, was sufficient to rebut the presumption. It is difficult to affirm that the evidence in this case rebuts the legal presumption of satisfaction. The amount of both executions a little exceeded one hundred dollars. Immediately after the lodgment of the executions, a levy was made on the defendant's horse. It is incumbent on the plaintiff in the executions, to show what became of

the levy. Thirty years have elapsed. The presumption of satisfaction is positive. The evidence to rebut it after this great lapse of time, is merely negative. Many of the remarks of Judge Earle, in *Moore & Nesbit v. Kelly*, 2 McM. 359, are not inapplicable to this case.

But a circumstance which seems to have had much influence with the witness of the defendant, strongly corroborates the presumption from the lapse of time that the executions were satisfied. Samuel Harris says: He knew Henry Long from his childhood to his death, lived within a mile of him "is of opinion, from his knowledge of the man, that he could always have raised money enough to have prevented the sale of a horse by the Sheriff." The disposition of Cullum to press for his money is proved by his prompt proceedings. Henry Long lived for nearly seven years after this levy, and was always able to raise money enough to satisfy such demand.

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*No legal proceedings were instituted by Cullum, or any one else, to revive these judgments for 30 years. The Court is of the opinion that the inference of the Commissioner is well sustained, and that these exceptions must be overruled. See *Stone v. Dunn*, 3 Stark. R. 448.

The plaintiff is entitled to his costs out of the fund, up to the time of the payment of the money into Court. It is ordered and decreed that the statement of the Commissioner be so modified, and that the fund be distributed by him according to the principles of this decree.

Reid and Davis and William M. Thomson, appealed on the ground:

1. That his Honor the Chancellor erred, in holding that the executions were satisfied by the presumption of payment arising from the lapse of time, when the debts had been admitted and payment made by Henry Long, in his life time, and these debts were returned as debts due by the intestate and payments made by the administrator.

2. Because from the case made by the pleading, evidence, and the report of the Commissioner in the cases, the said appellants' executions were not, and could not legally, be presumed to be paid, and so his Honor should have held, ruled and decreed.

Thomson, Herndon, for appellants.
Dawkins, Gadberry, contra.

PER CURIAM. Some of the facts stated in the grounds of appeal do not appear in the record; judging from which, the Court discovers no error in the decrees. And it is ordered that the same be affirmed, and the appeal dismissed.

JOHNSTON, DUNKIN and WARDLAW, CC., concurring.

Appeal dismissed.

10 Rich. Eq. *305

*JOHN T. SATTERWHITE v. JOSEPH DAVENPORT.

(Columbia. Nov. and Dec. Term, 1858.)

[Equity \hookrightarrow 256.]

Exception being filed to the answer for insufficiency, the presiding Chancellor, without referring the matter to the Commissioner, sustained the exception, and ordered the answer to be amended within thirty days. On appeal, held, that the course adopted was not irregular, and the judgment of the Chancellor was sustained.

[Ed. Note. For other cases, see Equity, Cent. Dig. § 529; Dec. Dig. \hookrightarrow 256.]

[Equity \hookrightarrow 256.]

The Chancellor is the Court, and may, in deciding matters before the Court, dispense altogether with the aid of the Master or Commissioner.

[Ed. Note. For other cases, see Equity, Cent. Dig. § 529; Dec. Dig. \hookrightarrow 256.]

Before Johnston, Ch., at Newberry, July, 1858.

This bill was filed on the 20th May, 1858, by John T. Satterwhite, administrator of Reuben C. Golding, who died an infant, against Joseph Davenport, his guardian, for account.

The following answer was filed on the 5th July, 1858:

"The defendant, &c., answering, says, that he admits that Reuben C. Golding died intestate, under age, on the 26th day of October, 1857, as stated in the bill, and that letters of administration on his estate were granted to John F. Satterwhite on the 27th day of November, 1857. He further admits that the intestate was, at the time of his death, entitled to a considerable personal estate, which was in the hands of this defendant, and that said bond for the faithful performance of his duty as guardian, by this defendant, was given to the Commissioner in Equity. He further says that said ward was about fifteen years of age, and had been boarding out and going to school the year in which he died—that the amount for his boarding has not yet been obtained, although he has made application to the person with whom he had been boarding for the purpose of making payment, but could not ascertain the amount of the demand—that he has paid a large portion of the accounts against his ward, but not all, and that it has been im-

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possible *for this defendant to get all the accounts ready within the time allowed him since the filing of this bill, but he will have them all in soon, when he will be prepared with his account current of monies received and paid out. That the funds of his said ward were all at interest at the time of his death, and the defendant has not been able to procure them since, and will not be able to do so within the next twelve months, and therefore submits, that, not expecting so sudden a termination of his guardianship, it will operate as a great inconvenience to him to be required forthwith to advance all

the funds of his said ward's estate: Wherefore he prays to be allowed a reasonable time to obtain said guardianship funds, as also for his reasonable costs and charges."

The plaintiff excepted to the answer for insufficiency in this, that the defendant having admitted his liability to account, should have filed with his answer an account current, and that his reason set forth in his answer for not doing so is insufficient.

His Honor, the presiding Chancellor, made the following order:

The answer in this case having been excepted to on the ground that the defendant has not filed with it his account, and the exception having been sustained, it is ordered that the defendant be required to amend his answer within thirty days, by filing, on oath, his said account therewith.

The defendant appealed on the grounds:

1. That His Honor erred in hearing and deciding on the exception to defendant's answer before the fifteen days had expired, allowed by the 15th rule of Court, to the defendant to determine whether he would amend his answer or risk a hearing before the Commissioner.

2. Because His Honor erred in hearing and deciding on the exception to defendant's answer before it had been heard and certified insufficient by the Commissioner, from whose decision the defendant was at liberty to appeal to the Court or not, as he might think proper.

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*3. Because His Honor erred in deciding that the reason given in the answer for not filing an account current, was not sufficient, whereas it is respectfully submitted that the defendant showed by his answer, that it was not in his power to render a full account of his guardianship within the time allowed for putting in his answer after bill filed and before Court.

Fair, for appellant.

Baxter, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. We find nothing substantial in this appeal. It assumes that the Chancellor is obliged to use the aid of the Master or Commissioner. I have elsewhere, I believe in an unreported Lancaster case, more fully expressed my opinions on this point: The Chancellor is the Court, and he may, if he chooses, dispense altogether with the aid of the Master. The burden of defendant's complaint is that he was not allowed fifteen days to consider of the propriety of amending his answer, when in fact he was allowed by the Chancellor thirty days for such amendment; and if the appeal has operated as a supersedeas, as we are informed at the bar it has, (although we do not mean to intimate that this was the necessary result of appeal,) actually the defend-

ant has obtained four months for filing his account current.

The third ground of appeal does injustice to the Chancellor. It is conceded here that the answer was not read on circuit; and of course the Chancellor did not determine as to the sufficiency of the excuse for not filing the account current. We are of opinion, however, that sufficient indulgence has been granted to the defendant.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *308

*ALEXANDER FORSYTHE v. DAVID McCREIGHT.

(Columbia. Nov. and Dec. Term, 1858.)

[*Judgment* ⇨645.]

After a verdict for plaintiff in an action of debt, defendant filed his bill in this Court for injunction, alleging the same matter he has pleaded as defence to the action at law, and the discovery of additional testimony: *Held*, that the judgment at law was conclusive.

[*Ed. Note.*—For other cases, see *Judgment*, Cent. Dig. § 1158; Dec. Dig. ⇨645.]

[*Appeal and Error* ⇨750.]

Plaintiff, in his ground of appeal, having asked only for an injunction, the Court refused to consider whether he was entitled to a decree for account of moneys paid.

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. § 3074; Dec. Dig. ⇨750.]

Before Dargan, Ch., at Chester, July, 1858.

Dargan, Ch. On the 18th February, 1856, the plaintiff purchased from the defendant, McCreight, a tract of land in Chester District, containing two hundred and ninety-seven acres, at \$18 per acre. He paid in cash four thousand dollars, and gave his sealed note for the balance, viz: \$1367, payable 1st May, 1856, and the plaintiff then received titles from the defendant. The defendant brought suit upon this single bill, at October Term, 1856; to which suit this plaintiff appeared and pleaded the general issue. He also pleaded a special plea, in words as follows: "And the said defendant, by his said attorneys, for further plea in this behalf, by leave of the Court now for that purpose first had and obtained, says, that the said plaintiff, his action aforesaid thereof against him, ought not to have and maintain, because, he says, the said sum of money mentioned in the supposed writing obligatory, was in part the purchase money of a certain tract of land, containing three hundred acres, situate in the District of Chester and State aforesaid, bounded by lands of David McWilliams, James Miller, James Boyd, and others, which said tract of land the said plaintiff, on the 9th day of February, 1856, at the place aforesaid, bargained and sold to this defendant, at \$18 per acre, and the said

plaintiff, at and before the time of the said sale, and on the day of the said sale, stated and represented that there was a valuable gold mine on the said tract of land, fraudu-

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lently and deceitfully, *for the purpose of inducing said defendant to purchase said land, and the said plaintiff, at or before the time of said sale, to wit, on the 10th January, in the year aforesaid, at the place aforesaid, in order to produce a belief in the said false and fraudulent representation so made as aforesaid, of a gold mine being on said land, fraudulently and deceitfully caused and procured large quantities of gold ore from gold mines in the State of North Carolina, to be placed and deposited in pits dug in said plantation, by said plaintiff, and also the day and year aforesaid, at the place aforesaid, caused and procured gold dust mixed up with the clay in said pits dug by him on said land, fraudulently and falsely intending to produce the belief of the said defendant, that a valuable gold mine existed on said plantation, or tract of land, and thereby enhance fraudulently and falsely the value of said land; and on the day and year aforesaid, at the place aforesaid, and before the sale aforesaid, took up and carried the gold dust and gold ore so placed fraudulently and put by him in said lands as aforesaid, to a jeweler, and caused the gold therein to be extracted, and thereby, on the day and year aforesaid, at the place aforesaid, fraudulently represented that the gold extracted from the ore aforesaid was the product of the ore existing by nature on said land, and by reason of said false and fraudulent representations and acts of plaintiff, so made to said defendant aforesaid, induced him, the defendant, to purchase said tract of land at eighteen dollars per acre at the place aforesaid, and on the day aforesaid, and the said defendant avers, that no gold existed naturally on said land, and that the real value of said land did not exceed five dollars per acre, and that the said plaintiff, by his false and fraudulent representations so made as aforesaid, induced this defendant to pay him, the said plaintiff, the sum of eighteen dollars per acre for the said tract of land, and paid him, the plaintiff, the sum of three thousand five hundred dollars, in part of the price so agreed upon for said tract of land, and executed said supposed writing obligatory to

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secure the payment of the balance of the purchase money of the said land, the day and year aforesaid; and the said defendant avers, that the said plaintiff on the day and year aforesaid, at the place aforesaid, well knew that no gold existed on said land, and well knew that by false and fraudulent misrepresentations aforesaid, so made as aforesaid, the said defendant was induced to give for the said lands the said sum of money aforesaid, and that the said tract of land

was not worth more than five dollars per acre for agricultural purposes, and well knew, on the day and year aforesaid, that the only inducement of the said defendant to make said purchase was the belief, in the mind of the said defendant, by reason of the false and fraudulent misrepresentation so made by the said plaintiff, that a gold mine of great value existed on said land so bought as aforesaid; therefore this defendant says, that the consideration of the said supposed writing obligatory has wholly failed, to wit: on the day and year aforesaid, and at the place aforesaid, all of which this defendant is ready to verify, wherefore he prays judgment, whether the said plaintiff ought to have, and maintain his action aforesaid against him." In answer to this plea, the plaintiff (in that case) filed his replication, denying all the allegations therein contained, and made a tender of issue, and the defendant having joined issue, the same with the general issue came on to be tried at Fall Term of the Court of Common Pleas for Chester district, for 1857. And the same having been submitted to the jury, the said jury found a verdict in favor of the plaintiff for fifteen hundred and two dollars and forty-three cents. The defendant in that action, (the plaintiff in this) gave notice of a motion for a new trial in the Court of Appeals at its next term, on four grounds, which were in words following, to wit:

1. "Because the presiding judge erred in ruling, that an affidavit to continue the case, stating what certain witnesses would prove, must be made by the defendant himself, and not by the attorney as his agent.

2. "Because from the proof, it was clear

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that the land, the *consideration of the note sued on, was not worth more than five dollars per acre; that the plaintiff, by artifice and fraud, had produced a general belief that a valuable gold mine existed on said land, and by reason of this belief, so fraudulently produced by him, obtained for said land eighteen dollars per acre, when from the proof, it was clear, that not a particle of gold had ever existed by the operation of nature, on said land; and the verdict of the jury, allowing the plaintiff the full benefit of his proof, was not only contrary to the evidence, but without any evidence to sustain it."

3. "Because it was clear from the proof, that the plaintiff had caused, and procured gold filings and gold ore to be placed on his land, and caused the same to be extracted and exhibited to the defendant, thus inducing the certain belief that a real gold mine existed on said land: and the verdict of the jury allowing him the full benefit of said fraud is contrary to law."

This appeal came on to be heard before the law Court of Appeals in Columbia, at December Term, 1857, when the same was dismissed. The plaintiff entered up his judgment on

the said verdict, for ——— dollars, which, together with interest and costs, amounted to the sum of one thousand six hundred and sixty-seven dollars and thirty-one cents, for which sum the said plaintiff sued out his writ of fieri facias on the ——— day of ——— A. D. 1857, and lodged the same with R. G. Pagan, the Sheriff of Chester district, who threatened to levy the same on the goods and chattels of the defendant in satisfaction of said execution.

The defendant in said execution, Alexander Forsythe, on the 2nd March, 1858, filed a bill against David McCreight, the plaintiff in said execution, and R. G. Pagan, Sheriff as aforesaid, of Chester district, praying for a perpetual injunction to restrain the enforcement of the said execution; substantially, it is a bill filed for the purpose of obtaining a new trial of the issue already tried in the Court of law, in the action which has been describ-

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ed, wherein David McCreight *was plaintiff, and Alexander Forsythe, the plaintiff in this bill, was defendant, on the ground of alleged newly discovered testimony.

The plaintiff, in his bill, states the contract for the purchase of the land, the cash instalment, the execution of the single bill for the balance of the purchase money, the suit at law instituted against him by said McCreight on said single bill, and he charges the fraud upon him by the said McCreight, and the circumstances attending it, and the manner in which it was done, substantially as it was stated in his special plea in the aforesaid action at law. And after stating the result of the said trial at law, the issuing of a writ of fieri facias against him for the amount of said verdict, interest and costs, and that he, the said plaintiff, had paid into the hands of said Sheriff Pagan, the sum of sixteen hundred and eighty-four dollars in lieu of bond, for the purpose of obtaining time to apply for a writ of injunction, he proceeds to charge that at the time of the said trial at law he had no knowledge of evidence, by which he could show that the said David McCreight had procured and caused to be procured fraudulently and for the purpose of enabling him to sell said land at a price greatly above its intrinsic value, gold filings and gold ore brought from mines in North Carolina, to be deposited in pits dug by him on said land. That before the said trial, he had made the most diligent search to procure such testimony, but his efforts in that respect were unavailing, and at said trial he was unable to prove that the said David McCreight had so fraudulently salted said alleged gold mine, and by reason of the want of proof, the said judgment of said Court was rendered against him for the sum aforesaid. That since the trial of said cause (the plaintiff alleges) that he has discovered testimony certain and reliable, and showing conclusively, beyond reasonable doubt, that the said

David McCreight did, by himself and agents employed by him, fraudulently, procure gold filings and gold ore, and did cause the same to be mixed up with the earth in the pits dug

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by him on said land, and did thus *fraudulently, craftily and deceitfully produce the conviction on the mind of the plaintiff, that a rich and valuable gold mine existed on said land. And that by such fraudulent and deceitful actings and doings of the said David McCreight, he effected a sale to the plaintiff of said land, and obtained eleven dollars per acre for said land more than it was worth. The firm conviction on the plaintiff's mind, that a valuable gold mine existed on said land, was the sole and exclusive motive operating on him in making said purchase. The plaintiff further says, that about four weeks from the time of said sale, the said McCreight left this State to parts unknown to him, and that ever since, he has remained out of the limits of the State, except during one short visit, of which the plaintiff was not aware, until said McCreight had again left, so that he, the plaintiff, had no opportunity of filing a bill of discovery against the said David McCreight, to compel him to disclose his fraudulent actings and doings aforesaid. The plaintiff further states that the evidence he has discovered since said trial, was not communicated to him, but to his attorney by his attorney's friend, who had received it confidentially, from the witness, who was a near relative of the said David McCreight. He further states, that he had paid into the office of the Sheriff of Chester district, the sum of sixteen hundred and eighty-four dollars, the full amount of the said recovery had against him, which sum he was compelled to pay said Sheriff before he could have time to apply to this honorable Court for an injunction to restrain the enforcement of the said writ of fieri facias after discovering the said testimony aforesaid. He prays for an injunction against the said Pagan, restraining him from paying the said money to the said David McCreight, and for a perpetual injunction against the enforcement of the said judgment and execution, and in case the said David McCreight should appear and make himself party to the bill, he prays that he, the said David McCreight, may be decreed to account to him for the difference between

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the true value of *the said land, and the sum which plaintiff had agreed to pay him, and for further relief.

The defendant has not appeared to answer, but by his solicitor, he has submitted a plea in bar to the plaintiff's suit. He has pleaded the former action at law between those parties, and the trial on the same subject matter, and the verdict and judgment, which he has set forth with great precision, in bar to the plaintiff's bill in this cause.

Thus the case stands. I have endeavored

to present it as clearly as possible. It is a case of novel impression. I have not derived any assistance or light from the argument or suggestion of counsel.

It is, as I have said, an anomalous case. I am aware of no instance where, after a trial and judgment at law, this Court has entertained a bill for a new trial, and to try the same issue over again in this Court, on the ground of newly discovered testimony, interest reipublice ut sit finis litium. This maxim of law has a weighty influence in the disposition of such cases and in the formation of the rules and regulations under which they are entertained. The Courts of Law and Equity have each afforded relief on the ground of newly discovered testimony, in a cautious and guarded manner, and to a limited extent, on rules based much upon the same philosophy, but varying somewhat in particulars. Each of those Courts has, so far as I know, confined itself, in giving relief on these grounds, to cases arising, and by proceedings carried on, in its own jurisdiction and forum. The court of equity does sometimes, in reference to its own decrees, and under the most cautious and stringent rules, entertain an application for a rehearing, on the ground of newly discovered evidence. One of the rules is that the aggrieved party must previously apply by petition to the Court for leave to file such a bill. The evidence must be material and credible, and to this end he must disclose, by affidavit, what the newly discovered evidence is, and the name of the witness, that the Court may judge of its materiality and credibility, and

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know whether it *will substantially vary the case made on the first trial. The evidence must be such as existing at the trial, was unknown to the applicant, or could not have been known and procured by him with a proper degree of diligence. The evidence must not be cumulative, that is, it must not be evidence of the same character, and on the same point, as was introduced on the first trial, however insufficient that was. And the application must be made within a reasonable time. If the plaintiff is entitled to come into this Court at all with such a case, for which I see no precedent or authority, I suppose he must come in on the same condition, and stand on the same ground, with a party who was applying to this Court for rehearing of its own judgment, on the ground of newly discovered testimony. One of these conditions, viz: that of applying by petition to the Court for leave to institute such a proceeding, it seems to me would hardly apply. At least I do not perceive clearly how it would apply. But all the other conditions would apply, and would be exacted if the case were to be entertained here. But the plaintiff in this instance has not disclosed the name of his witness; nor that he could be able to procure his testimony, nor what that

testimony would be if it were obtainable. How could the Court pronounce whether the alleged newly discovered evidence would substantially vary the case made on the trial already made.

Another condition is, that the alleged newly discovered evidence must not be cumulative. When the evidence is not stated, how is the Court to judge if it be not cumulative. Stated in the general manner in which it has been, it does appear very much of the same character and complexion with some of the evidence actually heard on the former trial. The general manner in which the plaintiff has stated the alleged newly discovered evidence I have already shewn. In his fourth ground of appeal from the verdict of the jury, he says: "it was clear from the proof that the plaintiff had caused and procured gold filings and gold ore to be placed on the land, and caused the same to be extracted

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and exhibited to the *defendant (the plaintiff here) and others, inducing certain belief that a rich gold mine existed on said land. The verdict of the jury, allowing him the full benefit of the said fraud, is contrary to law." Now the evidence which he says in this ground of appeal the jury has disregarded, is the evidence which he now alleges that he has recently discovered; it is of the same tenor and import; it is cumulative. And if compared with and judged by the report of O'Neill, Justice, the same conclusion arises, that is, that the evidence that the plaintiff designates as newly discovered, is similar to, and of the same character with, that which he now seeks to make the ground work for another trial.

The plaintiff, in this bill, alleges that the defendant, within a short time after the perpetration of the fraud, left the State, and has never returned, except for a brief visit, of which the plaintiff was ignorant until the defendant had again departed, so that he, the plaintiff, had no opportunity of filing a bill of discovery against him, for the purpose of compelling him to discover the fraud which he had committed against him. I do not perceive the force of this reasoning. I am unable to see any good reason why plaintiff in this bill might not at any time during the pendency of the action at law upon the sealed note, have filed a bill of injunction and discovery against the defendant, (plaintiff in said action at law,) upon which, the suit at law would have been enjoined, and a discovery in that way compelled, though the plaintiff in that action could not be reached by process. For certainly this Court would not permit an absent party to prosecute an inequitable demand by an action at law, thus abusing the machinery of our State jurisdiction for the prevention of justice, if a discovery is necessary to a successful defence, and is sought in a proper manner. This the defendant has not done. He has thus lost

the advantage of a discovery from the defendant in this suit. And I think that he has no right to call upon this Court to aid him, and to afford him a remedy for his own laches.

I have said that under certain very strin-

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gent rules, the *Courts of Law and of Equity, each recognizes the discovery of new evidence as a sufficient ground for a new trial. But one of the primary rules regulating this practice is, that the application for a new trial must be made before the jurisdiction that directed the former trial. *Footner v. Figes*, 2 Sim. 319; *Ex parte Baker*, 1 Cox 481. Such has been the uniform practice of our Courts.

The mode of procedure in equity I have already indicated. In the Law Court, the application is made on motion, supported by affidavit of the newly found witness, setting forth the facts, shewing that they are material, not cumulative, &c. The principles upon which a new trial is ordered, are very similar in both Courts; except that in the Court of Common Pleas, no new trial will be granted on the ground of newly discovered parol evidence. *Faber v. Baldrick*, 3 Brev. 350; *Ecfert v. Descoudres*, 1 Mill 69 [12 Am. Dec. 609]; *Ex'ors of Evans v. Rogers*, 2 N. & McC. 563; *Jenkins v. Price*, 1 N. & McC. 155.

As to the time, within which the motion must be made in a Court of Law, the practice does not seem to be very clear. Generally, motions for a new trial on the ground of misdirection, or misconduct on the part of the jury, the verdict being against the evidence, &c., must be made immediately after the trial, and in our practice, they go before the Court of Appeals at its next term. Motions for a new trial on the ground of newly discovered testimony, generally take the same course. But in the *King v. Gough* it was decided that a new trial may be granted at any time before judgment is signed, 2 Doug. 1791. And in sundry English cases, which I have examined, the question of granting a new trial on the ground of newly discovered testimony, was decided irrespectively of time. In *Harrison's Digest*, 2 vol. p. 1531, a case is cited for the following rule; that it is never too late to move for a new trial on a discovery of new facts, if it be done in a reasonable time.

I am not prepared to say, that the plaintiff would be too late in this application, if a proper case had been presented for the interposition of the Court, and if it had been presented before the proper tribunal and in a proper manner.

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*But I am of opinion, that tried by the rules which regulate the practice of either Court on this subject, the plaintiff's case must fail.

It is to be remarked, that the plaintiff does

not call this an application for a new trial, though it is such, to every intent and purpose. It does not purport on its face to be an application for a new trial, though the former trial and recovery are very particularly set forth. By a liberal interpretation, it might be considered as of that character. It is only in that aspect that it is worthy of any serious consideration, or of the trouble and research that I have bestowed upon it. In any other point of view, it would be an absurdity to say, that the former trial was not conclusive upon the plaintiff. And though I strongly suspect that the defendant has perpetrated a nefarious fraud, it is the plaintiff's misfortune to have suffered a wrong, for which the Court cannot afford him a remedy. It is the common misfortune of a party, who, having justice on his side, is without the good fortune of having witnesses at the proper and critical time to support him in his just claims.

It is ordered and decreed, that the bill be dismissed.

The plaintiff appealed and moved this Court to reverse the decree on the grounds:

1. Because according to the facts and circumstances set forth in the complainant's bill, not being denied by the answer of defendant, or traversed by the plea in bar, the plaintiff was entitled to a perpetual injunction according to the prayer of his bill.

2. Because the Chancellor erred in holding that the injunction granted by the commissioner, could be dissolved before answer filed by the defendant.

McAliley, for appellant.

Hemphill, Gaston, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. If there is any virtue in

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the doctrine that *the adjudication of a matter by a competent Court is a bar to the stirring the same subject in a different forum, (a) the bill in this case has been properly disposed of; nor is it deemed necessary to add anything to the observations of the Chancellor.

It is argued for the appellant, however, that he was by the frame of his bill entitled to an account for, and repayment of, the monies paid by him in cash, and of course not covered by the plea put in, in relation to the note, nor excluded by the trial at law.

It is far from clear that the frame of his bill is such as to entitle him to an investigation of this matter; nor is it quite sure that he might not have obtained a remedy at law for this money, by way of discount. Be these matters as they may, his appeal, which merely claims an injunction of the suit at

(a) 2 Hill, Eq. 214.

law, is not sufficient to raise the question argued.

It is ordered, that the appeal be dismissed, and the decree affirmed.

DUNKIN and WARDLAW, CC., concurred.

Decree affirmed.

10 Rich. Eq. *320

*JOHN L. MILLER and Wife v. M. J. LAW and Others.

(Columbia, Nov. and Dec. Term, 1858.)

[Judicial Sales \hookrightarrow 7; Partition \hookrightarrow 104.]

The Commissioner has a discretion, subject to the control of the Court, to withdraw land from sale after it has been offered, and even after a bid has been received and cried. If he does so, the highest and last bidder is not entitled to a conveyance, there being no contract with him.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 20; Dec. Dig. \hookrightarrow 7; Partition, Cent. Dig. § 344; Dec. Dig. \hookrightarrow 104.]

Before Dunkin, Ch., at Chambers, November, 1858.

The bill, filed in Sumter, was for partition of a tract of land containing about seven hundred and eighty acres. After a protracted litigation a decree for partition was taken by consent. The commissioners appraised the land at six dollars an acre and recommended a sale which was ordered—the terms being, “so much cash as will pay the costs of this suit, and the fees by the Court heretofore ordered—for the balance, bond with approved personal surety, payable in one and two years, with interest from the day of sale, with the mortgage of the premises.”

The land was advertised for sale on sale day in October, 1858. The facts in relation to the offer and withdrawal of the same from sale, are stated in the affidavit of Samuel Mayrant, one of the defendants, which affidavit is as follows:

“Personally appeared S. Mayrant, who makes oath that, on the sales day in October, 1858, the lands described in the annexed advertisement, were publicly offered for sale by W. F. B. Haynesworth, Commissioner in Equity for Sumter district, before a large concourse of persons, after due proclamation by his cryer, calling for bids at so much per acre. That this deponent bid the sum of fifty cents per acre, which was cried by the crier for at least the space of twenty-five minutes. The Commissioner then announced that he would not let the land go for that

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price, and this deponent notified *him that he claimed the land at his bid, and offered compliance.

“That in a short time afterwards, say about half an hour, the Commissioner again put up the land, the cryer crying the last bid of

fifty cents per acre; this deponent then offered a bid of seventy-five cents per acre, which the cryer took, and cried for about the period of five minutes. No other bid was made, and this deponent claimed the land at his bid and offered compliance. The Commissioner then declared that he would not let the land go at that price, and suspended the sale, and said he would take the responsibility. This deponent then demanded his titles, and made a tender of the money.”

Notice was served on the Commissioner, that a rule would be moved for requiring him to shew cause why the bid of S. Mayrant, of seventy-five cents per acre, should not be set down and entered as the last and highest bid, and why he should not make title to the said S. Mayrant upon his compliance with the terms of sale.

The return of the Commissioner admitted the facts stated in the affidavit, set forth that the bid was insufficient to satisfy the costs and the fees ordered to be paid, and submitted that the matter was within his discretion; that his responsibility was to the parties, and not to a bidder, who had no rights until his bid was accepted.

His Honor, Chancellor Dunkin, refused the rule, and the said S. Mayrant appealed on the grounds:

1. Because the crying the bid was an acceptance of the offer to purchase at the amount of it, provided no higher one was obtained, and the Commissioner was bound to knock down the same, and complete the sale to such highest bidder.

2. Because the Commissioner was the organ of the Court, to carry out its prescribed directions, and has no power to change the terms and conditions fixed in the order, so as to affect the sale, by refusing to make a conveyance to the highest bidder.

3. Because, in view of the circumstances,

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the said S. Mayrant was, of right, entitled to the order asked of the Chancellor, and the actings of the Commissioner were arbitrary, and the power exercised by him, if sustained by the Court, dangerous in its consequences, and prejudicial to sales decreed by it.

Moses, for appellant.

Bellinger, Law, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. Whether the Commissioner rendered himself liable, as for misconduct, in refusing to keep up the biddings and to close a contract with Mr. Mayrant upon his bid, or not, it is certain that no contract was closed with him; and he is not entitled to have a conveyance, either under a rule, or under a bill exhibited for that purpose.

But it is the constant practice to allow commissioners to withdraw property, temporarily, from sales, when they see that to press

the sale would be to sacrifice the property. I am of opinion they should have this discretion, under the control of the Court. It may be liable to abuse; in which case the Court can control it by peremptory orders, or otherwise. But, on the other hand, when judiciously exercised, as in this instance, it is most wholesome.

It is ordered that the appeal be dismissed.

DUNKIN, C. concurred.

Appeal dismissed.

10 Rich. Eq. *323

*JANE E. MOORE and Others v. DR. L. Z. WILLIAMSON and Others.

(Columbia, Nov. and Dec. Term, 1858.)

[Partition \hookrightarrow 85.]

Where, in the partition of lands, the value of improvements is to be computed, the process is, to allow, not the cost of the improvements, but the value which they have imparted to the premises.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 241; Dec. Dig. \hookrightarrow 85.]

[Partition \hookrightarrow 94.]

A party dissatisfied with the rate at which land is recommended, by commissioners in partition, to be assigned to another, may always bring the property to a sale by making and securing a bid for a material advance in price over the value assessed by the commissioners.

[Ed. Note.—Cited in Aldrich v. Aldrich, 75 S. C. 369, 377, 378, 55 S. E. 887, 117 Am. St. Rep. 909; Parrott v. Barrett, 81 S. C. 255, 261, 265, 62 S. E. 241; Ayer v. Hughes, 87 S. C. 386, 69 S. E. 657, 658.

For other cases, see Partition, Cent. Dig. § 297; Dec. Dig. \hookrightarrow 94.]

Before Dargan, Ch., at Lancaster, July, 1858.

John Stewart, who died in 1857, directed his lands, consisting of two separate tracts, one lying on Waxhaw, and the other on Cane Creek, and his personal estate, to be divided between his grand-son, John H. Stewart, and his four daughters, one of whom was the defendant L. H. Williamson, wife of Dr. L. Z. Williamson. The Cane Creek tract of land had been in the possession of Dr. Williamson since the year 1841, and he had put upon it a number of improvements. A dwelling house, built by him, was burnt in 1843, and he had shortly afterwards built another. This tract contained about two hundred and forty acres of land. In the will it was directed as follows:

"Also the lands upon which Dr. Williamson resides are my own, and have not been advanced, but in adjusting the advancements, I do not desire that my daughter, Harriet, should account for the rent, on account of the improvements, unless Dr. Williamson insists the improvements are of more value than the rents; if so, the commissioners on the division, may value the improvements and like-

wise assess the rent, and then Dr. Williamson may make his election. If he elects to charge for the improvements, the rent must be assessed, and form a set off to the improvements as far as it will go."

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*The bill was for partition of the whole estate. Dr. and Mrs. Williamson, in their answer, insisted that the value of all the improvements, put by Dr. Williamson, on the Cane Creek land, should be estimated; and they reserved the right to elect until said estimate, as well as the estimate of the value of the rents, should be made.

At June sittings, 1857, it was, by consent, ordered that a writ of partition do issue, directing the commissioners therein to be named, to go upon the lands described in the bill as the lands on Cane Creek, and to partition and divide the same according to the directions contained in the last will of John Stewart, deceased, and considering the answer of the defendants, Leander Z. Williamson and wife, that they estimate the value of the rents of said lands since they have been in the possession of the said defendants, and also the value of the improvements thereof, which have been placed thereon by the said Leander Z. Williamson, and embody the same in their return to said writ.

A writ of partition was issued, to which the commissioners made return, as follows:

"In obedience to the said writ we went upon the lands on Cane Creek, and after looking over the same carefully have come to the conclusion that said lands could not be divided among the parties in interest by metes and bounds, without manifest injury to all the parties. We then appraised the said lands as it now stands, at twelve dollars and fifty cents per acre, and recommend that the same be vested in Prudence Harriet Williamson, wife of Leander Z. Williamson, at the above named valuation. The reason we make this recommendation, is that the said Prudence Harriet Williamson was placed on these lands by her father, John Stewart, deceased, and that manifest injustice would be done Harriet, if this is not done, as the said Harriet would then be deprived of a house to dwell in, and perhaps thereby be put to great inconvenience and loss, and her husband, Leander Z. Williamson, is in very moderate circumstances.

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*We then, as directed in the writ, valued the improvements thereon made by Leander Z. Williamson, and have valued the same in the aggregate at the sum of two thousand three hundred and twenty dollars, and we have assessed the rent of said lands since Leander Z. Williamson has resided on the same, at one thousand six hundred dollars. From this it appears that John Stewart (deceased,) owes Leander Z. Williamson a balance of seven hundred and twenty dollars.

The plaintiffs excepted to the return.

1. Because the commissioners recommend that the lands on Cane Creek sought to be partitioned, be vested in Prudence Harriet Williamson, one of the distributees, at an assessed valuation far below the true value of said land.

2. Because the commissioners have assessed the value of the improvements placed on said lands by Leander Z. Williamson, at a sum far beyond the amount the same has been enhanced in value by said improvements.

3. Because they have made the supposed cost of said improvements, the standard of the value thereof.

4. Because having in fact ascertained the value of the lands, without the improvements, to be nine dollars per acre, they should have applied the value of the improvements at three 50-100 dollars per acre; twelve 50-100 dollars per acre being their valuation of the lands with the improvements.

I hereby pledge myself that the lands referred to in the above exceptions, if exposed to public sale, shall bring five hundred dollars more than the valuation set thereon in the return of the commissioners, or that I will take said lands at such increased valuation.

June 29th, 1858.

J. T. K. Belk.

The defendants, Williamson and wife, also excepted to the return.

1. Because the commissioners, in valuing the improvements, made on the lands in the possession of Dr. Williamson, allowed him only for the buildings now on said lands, but made no allowance to him for a dwelling

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house erected thereon *by L. Z. Williamson, and burned down in the life-time of the testator, John Stewart—in this it is submitted said Commissioners erred.

From testimony taken before the Commissioner, it appeared that the Commissioners in partition had estimated the value of the land, without the improvements, at nine dollars per acre, and then had added thereto so much as they thought the improvements, in their present condition, had added to the value of the land, and had fixed that amount as the assessed value. In estimating the value of the improvements, they had been governed by the amount Dr. Williamson had expended in putting them on the land.

The case came before his Honor Chancellor Dargan, on the return, the exceptions thereto and the testimony taken before the Commissioner. His Honor made the following order:

On hearing the return of the Commissioners to the writ of partition, exceptions thereto, and argument of counsel in this cause, it is ordered that the plaintiffs' exceptions be sustained, and that the exceptions of defendants, Leander Z. Williamson and wife, be overruled.

It is further ordered, that said return be

re-committed to the Commissioners, with instructions, that in assessing the value of the improvements placed on the lands by the defendant, Leander Z. Williamson, they have reference alone to the enhancement in value of said lands, by such improvements, and not to the cost thereof.

It is further ordered, that said lands, after having been duly advertised for at least twenty-one days, be sold by the Commissioner on some convenient sale day to be selected by him, on a credit of one and two years; the purchaser to give bond with sufficient surety for the payment of the purchase money, with interest from day of sale; and it is further ordered that the plaintiff, J. T. K. Belk, be held to a bid at said sale, for said lands, corresponding with the offer made by him in connection with plaintiffs' exceptions aforesaid.

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*It is further ordered, that the defendants, L. Z. Williamson and wife, account for the value of the rent of said lands since testator's death, and that the Commissioner report thereon; and it is further ordered, that possession of the aforesaid lands be withheld (under the terms to be made) from the purchaser, until the first day of January next.

The defendants, Williamson and wife, appealed on the grounds:

1. Because it is submitted the Chancellor erred in setting aside the return of the Commissioners appointed to assess the value of the improvements placed by L. Z. Williamson on the land in his possession; recommitting the same with instructions, that, in assessing the value of such improvements, they have reference alone to the enhancement in value of said lands by such improvements.

2. Because the Chancellor overruled the exception to the Commissioners' return on the part of L. Z. Williamson, and held he was not entitled to be paid for a dwelling house erected by him on the land in his possession, and burned down in the life-time of John Stewart, the testator. In this it is submitted he erred; and at all events, no rent should be charged against said L. Z. Williamson until after the term when said house was burned down.

3. Because the Commissioners in their return to the writ of partition, assigned to the defendant, Prudence Harriet Williamson, the Cane Creek tract of land, and recommended that the same be vested in her at twelve dollars and fifty cents per acre; and his Honor, the Chancellor, ordered said return to be set aside and said tract of land to be exposed to public sale; when it is submitted, there was no valid objection to the return of the Commissioners, and the same should have been confirmed.

Williams, for appellants.
Moore, contra.

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*The opinion of the Court was delivered by

JOHNSTON, Ch. Nothing is better settled in our practice, (not only in cases of intestacy, but in cases under contract, as may be seen in the case of *Stoney v. Shultz* [1 Hill Eq. 465, 27 Am. Dec. 429],) than that where the value of improvements is to be computed in a division, the process is to allow not the cost of the improvements, but the value they impart to the premises. Whatever may be the rule in other States or countries, this is our rule; and may be traced back as far as 1832, if not to an earlier time. A rule to allow the cost of improvements would subject the owner of the premises to the want of judgment or economy of the improver, and render him liable to be built out of his land, by the improvidence of his tenant.

It is equally a notorious practice in partition cases, that a party dissatisfied with the rate at which land is recommended to be assigned to another party, may shake the proposed assignment, and bring the property to a sale by making and securing a bid for a material advance in price over the value assessed by the Commissioners. The Court would not attend to an insignificant advance, (since such a practice would tend to hang up causes indefinitely, without sensibly promoting the justice of cases,) but wherever the advance is for the substantial benefit of all the parties interested in the partition, the Court is bound to attend to it.

It is ordered that the appeal be overruled, and the decree confirmed.

DUNKIN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *329

*DAVID GLOVER v. JOHN W. HEARST.
(Columbia. Nov. and Dec. Term, 1858.)

[*Life Estates* ¶11.]

Tenant for life of a plantation and everything on it, received as an entire mass, and under one devise: *Held* liable, upon the principles declared in *Calhoun v. Furgeson*, 3 Rich. Eq. 160, to account for the provisions she received, as well as other personality.

[Ed. Note.—Cited in *Brooks v. Brooks*, 12 S. C. 444, 447, 451, 455.

For other cases, see *Life Estates*, Cent. Dig. § 30; Dec. Dig. ¶11.]

Before Wardlaw, Ch., at Abbeville, June, 1858.

The testator, Christopher W. Mantz after directing his executors to sell a tract of land for payment of his debts, and, also, if necessary for that purpose, "such property as best could be spared from his plantation, devised and bequeathed, as follows:

"Item 4th. It is my will and desire, that my plantation be kept up, and that the re-

mainder of my property, after the payment of my just debts, be kept by my beloved wife, Mary P. Mantz, upon my plantation; to be controlled and governed by her, and for her to enjoy all the benefits and profits arising merely from the use of same, after fully supporting and supplying all the wants of the plantation, during her natural lifetime; and here let it be understood, that all future increase will not be regarded as profits, but will remain and be regarded as a part of my estate. To the foregoing part of this item, I wish my executor to give his attention and to render all such assistance in counselling and directing, as may be necessary for the interest of all therein concerned."

The will then directed that after the death

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of his wife, the *property be all sold, and the proceeds divided in the manner and among the remaindermen named.

After the death of the tenant for life, this bill was filed by her executor against the executor of Christopher W. Mantz, for account.

The case came before the Court on exceptions, to the Commissioner's report, which is as follows:

This bill was filed by David Glover, executor of Mary P. Mantz, deceased, against John W. Hearst, executor of Christopher W. Mantz, deceased. Upon appeal, the Court of Appeals decided that, under the will of C. W. Mantz, deceased, Mrs. Mary P. Mantz was a life tenant and entitled to the crop raised on the plantation for the year 1856, and that "the representative of the tenant for life must reimburse from the estate of his testator the executor of C. W. Mantz's will, for his expenditures for the annual wants of the plantation, and for the capital without interest, during her life, any portion of testator's estate sold for the payment of debts, not used for this purpose, and received by her; and also, the executor of the tenant for life must account with the executor of her husband, for all such estate of the husband as went into her possession at her husband's death, and not remaining in specie at her death, on the principles declared in *Calhoun v. Furgeson*, 3 Rich. Eq. 160, and previous cases not therein overruled."

John W. Hearst, qualified as executor of C. W. Mantz's will, and after the property went into Mrs. Mantz's possession, supposing himself to be still acting in that capacity, sold some of the crops of cotton raised on the place, and received the proceeds, and made various payments on account of the annual expenses of said estate for several years. The statement of his receipts and expenditures is made with the view of ascertaining the amount to be reimbursed him by the executor of Mrs. Mary P. Mantz.

In 1852, J. W. Hearst sold cotton of Mrs. Mantz, and received the proceeds as follows:

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*1852, Sep.	Proceeds	7 bales of Cotton	\$249 28
"	"	8 " "	256 50
"	Nov. 20.	8 " "	257 48
"	Dec. 17.	7 " "	210 07
				\$973 28
1852.	Expended by 1st Return	.....		644 37
				\$328 91
1853, June 13.	Proceeds	7 bales	.....	\$225 57
"	Feb'y 2.	7 " "	.....	295 83
				\$521 40
				\$759 31
1852.	Expended by 2d Return	.....		\$440 22
				\$320 09
1854.	Received nothing and expended by 2d Return	.....		\$221 12
				\$ 98 97
1856.	Received nothing and expended	.....		\$ 43 80
				\$ 55 17
1857.	Received nothing and expended	.....		\$312 00
				\$257 17
Amount due executor				\$257 17
On the 22d April, 1855, Mrs. Mary P. Mantz received from the executor excess over proceeds of property sold to pay debts, the sum of				\$111 10
Interest thereon from the death of Mrs. Mantz in July, 1856, to 6th Nov., 1857				9 85
				120 95
				\$378 12

C. W. Mantz died in December, 1851. In February, 1852, an inventory and appraisement of his estate was had by the executor, and returned to the proper office. Mrs. Mary

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P. *Mantz, in accordance with the will of said C. W. Mantz, took possession of the plantation, and every thing on it used for farming purposes, including a large quantity of provisions, &c., and used the same till her death in 1856, in the month of July. No inventory and appraisement was made of her estate, or of the estate of C. W. Mantz, deceased, remaining at her death, until some time afterwards, in consequence of a controversy between the executor of C. W. Mantz and the executor of Mary P. Mantz, as to who was entitled to the possession of the property till the end of the year. In the latter part of October, 1856, an inventory and appraisement of the estate of Mrs. Mantz was made by her executor, and returned to the Ordinary's office, including, among other things, the crop of corn, &c., which was then partly gathered.

On the 5th November, 1856, an inventory and appraisement was made by the executor of C. W. Mantz, of the property which went into Mrs. Mantz's possession, under the will of C. W. Mantz, and which remained at her death, including the crop, &c., raised that year, and on the 6th, a sale thereof was made by the executor. In addition to the other property which went into Mrs. Mantz's possession at the death of C. W. Mantz, and which was turned over to him by the executor of the tenant for life, she also received the crop of provisions, bacon, &c., then on

hand, valued at the time of the appraisement at the sum of \$1,321.20, and it is insisted upon by the executor of C. W. Mantz that the estate of the tenant for life must account for the value of the same; and also, for the value of a horse not forthcoming at Mrs. Mantz's death, which she had sold in her life time, for ninety dollars. In other respects it is admitted that the estate was turned over in as good plight as when it went into possession of the tenant for life, and was substantially the same.

I am of opinion that the estate of the tenant for life should not account to the remaindermen for the value of the provisions, &c., on hand at the death of Mr. Mantz. The testator seems to have intended to give to

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his wife the use and benefit of the property specifically for her life, with all the rights and privileges incident to its possession and enjoyment. The provisions, &c., were articles consumable in their use, and the very consumption of them was necessary for the enjoyment of the property by the tenant for life, and the preservation of the estate for the remaindermen. The testator directed his plantation to be kept up, and it can scarcely be supposed that he intended Mrs. Mantz's estate should be at the expense of supporting it. There was no evidence that the tenant for life had made merchandise of the provisions on hand at the death of Mr. Mantz, or had made any other than a specific and legitimate use of them, or that her management had been other than prudent and judicious, and indeed I had no evidence of the quantity of provisions on hand, if any, at the death of the life tenant.

But in reference to the horse sold, I think she ought to account for its value—ninety dollars. She got the benefit of its sale, or is to be presumed to have done so, and there was no evidence that it was replaced, and that that sum was invested in anything necessary for the farm. At her death, the same number of horses were not turned over to the executor of the testator, and there was no evidence that any of those that went into her possession had died. If, however, the respective money value of the horses, at the dates of the death of the testator and the tenant for life, should be the measure of her accountability, her estate should not be held responsible for that sum. At the death of testator the value of the horses and mules, as appraised, amounted to \$606.00. At the death of the tenant for life they were sold for \$815.00, most of them being the same. The value of the estate, received by the tenant for life, was appraised at \$1,846.88, exclusive of the provisions, &c. At her death the property delivered to the executor of testator amounted to \$1,970.10, being an excess of \$123.22: but as most of the property delivered to the executor of C. W. Mantz, and sold by him, was the same which had

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*been received by the tenant for life, I think her estate ought to account for the value of the horse not forthcoming.

J. W. Hearst, as executor, sold the crop which had been raised on the place in the year 1856, on 6th November, 1856—due 6th November, 1857. Its value, as appears from the sale bill, was \$1,824.26, which has been decreed to belong to the executor of Mrs. Mantz; and the accounts between the two estates will stand thus:

Amount due by J. W. Hearst, executor.....	\$1,824 26
" due to executor of C. W. Mantz, (ante)	\$378 12
Amount due to executor, value of horse sold	90 00—\$ 468 12

Amount due by estate of C. W. Mantz to estate of Mary P. Mantz, 6th Nov., 1857..	\$1,356 14
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But should the view I have taken, as to the accountability of Mrs. Mantz's estate for the provisions, &c., which went into her possession at her husband's death, be erroneous, and her estate be chargeable with the value thereof, then the account will stand as follows, viz:

Amount due by executor of C. W. Mantz, being the value of the crop of 1856, sold by him, and decreed to belong to the estate of Mrs. Mantz.....	\$1,824 26
Amount due executor of C. W. Mantz, (ante)	\$ 378 12
Price of the horse sold by Mrs. Mantz	90 00
Value of provisions consumed, &c. 1,321 20—	1,789 32

Balance due executor of Mary P. Mantz, 7th Nov., 1857.....	\$ 34 94
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The decree is as follows:

Wardlaw, C. This case is presented for judgment by exceptions to the Commissioner's report on the account ordered by the decree of the Court of Appeals. This re-

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port, *supplied where needful by the report on exceptions, states the fact clearly and succinctly, and discusses the principles involved fully and ably, so that all statement and much discussion on my part are rendered superfluous. I adopt and confirm the conclusions of the report in all particulars, except as to the liability of the estate of the tenant for life to account for the provisions, consisting of bacon, corn, oats, lard, fodder, &c., received by the tenant when she took possession. Indeed no other point was seriously contested before me; for the plaintiff abandoned the exception as to the gin, and insisted on the matter of interest only in the alternative that commissions claimed by the defendant were allowed; and as to these commissions I approve of the Commissioner's reasoning and conclusion.

The Commissioner was directed by the Court of Appeals to state the account "on the principles declared in *Calhoun v. Furgeson*, 3 Rich. Eq. 160, and other cases not therein overruled." The case named discusses the liability of the representatives of the tenant for life in two aspects, first, when the

bequest to the tenant for life is specific, or in such terms as exhibit the intention of testator that the estate shall be enjoyed in specie; and, secondly, where the bequest is residuary, or the whole mass of the estate is conferred on the tenant for life by one entire gift. Without adverting to the distinctions in the subdivisions of these two classes, it is sufficient to remark that the present case belongs to that class where the entire mass of property is bestowed by one gift. And as to this class *Calhoun v. Furgeson* explicitly recognizes the general authority of *Patterson v. Devlin*, *McMul. Eq. 459*, and *Robertson v. Collier*, 1 Hill. Eq. 370, and affirms their doctrine that "in such a case, the perishable articles cannot be considered as belonging absolutely to the tenant for life; neither can they be sold, because they are necessary for the preservation of the estate. The tenant for life must, therefore, be considered as a trustee for the remainderman, and must preserve the estate with all its appurtenances

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*in the situation in which he received it. He will be entitled to the increase of the stock and the rents, and profits of the land; but he must keep up the stock of cattle, horses, provisions and implements of husbandry in the condition in which he received them; for although some of the articles may be consumable in the use, and others are wearing out, yet, when taken all together, being reproductive, the estate must be made to keep up its own repairs." The Court proceeds to reason that in these two cases the doctrine may have been misapplied in extending the liability of the tenant for life beyond faithfulness as a trustee in the management of the estate generally, to liability for preservation of all particulars of the estate in the condition in which it was received. And in the particular case, which was like the present in the form of the bequest, adjudged that the representatives of the life tenant were not liable for an accidental deficiency of the crop of provisions in the year in which the tenant for life died, when general fidelity as a trustee was established, and the estate as a whole was turned over to the remaindermen in as good plight and condition as when received. I thoroughly approve the case of *Calhoun v. Furgeson*, but I think it was not meant to decide generally that the tenant for life of an estate given in mass was not liable for provisions. What I suppose to be the error of the Commissioner, is in applying speculative remarks in that opinion, concerning specific bequests of particular portions of estate consumable in the use, to a different subject and class where perishable or consumable articles are given as appurtenances of a whole estate by a single donation. In the instance under consideration, there was no accidental deficiency of crops in the last year of the tenant for life; on the contrary, a crop of provisions was made, far exceed-

ing that made in the year when the interest of the life tenant began.

To allow the estate of the tenant for life to retain the crop of the year when her estate commenced and that of the year in which she died, would be doubling the advan-

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tage intended *by the Act of 1789 to life tenants. I am of opinion that the plaintiff must account to the defendant for the provisions received by Mary W. Mantz, according to quantity, and unaffected by the appreciation or depreciation which the lapse of time and the change in the affairs of the commonwealth may have produced.

It is ordered and decreed that the report be recommitted to the Commissioner, to be corrected as to the provisions received by Mary W. Mantz, and that in all other respects the report be confirmed.

The complainant appealed and now moved this Court to reverse so much of the decree as overrules a part of Commissioners report, allowing the complainant the crop made during the year the tenant for life died.

1. Because, by law, the whole crop belongs to the representatives of a deceased life tenant.

2. Because in this particular case, the money, and not property, is bequeathed to the remaindermen.

Thomson, Fair, for appellant.

McGowan, contra.

PER CURIAM. This Court is satisfied with the decree appealed from; and it is ordered, that the appeal be dismissed.

JOHNSTON, DUNKIN, and WARDLAW, CC., concurring.

Appeal dismissed.

10 Rich. Eq. *338

*JOHN WILLIAMS and Others v. GEORGE NEEL and Others.

THOMAS A. FLOYD and Others v. GEORGE NEEL and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Equity ⌘148.]

A creditor's bill to set aside deeds of gift made at various times to the several defendants, children of the debtor, is not objectionable for multifariousness.

[Ed. Note.—Cited in *Barkley v. Barkley*, 14 Rich. Eq. 26; *Edwards v. Sartor*, 1 S. C. 270; *State of South Carolina v. Foot*, 27 S. C. 348, 3 S. E. 546; *Sheppard v. Green*, 48 S. C. 174, 26 S. E. 224; *Black v. Simpson*, 94 S. C. 317, 77 S. E. 1023, 46 L. R. A. (N. S.) 137.

For other cases, see *Equity*, Cent. Dig. § 356; Dec. Dig. ⌘148.]

[Creditors' Suit ⌘53.]

Leave will be granted at any time to amend a bill so as to make it a creditor's bill; and where several such bills are instituted by

different creditors, all will be stayed but one, and all the creditors allowed to come in under the decree in that suit.

[Ed. Note.—For other cases, see *Creditors' Suit*, Cent. Dig. § 210; Dec. Dig. ⌘53.]

Before Johnston, Ch., at Newberry, July, 1858.

The bills in these cases were filed by different creditors of George Neel to set aside certain deeds of gift made by him at various times to the several defendants, his children. The defendants demurred for multifariousness, and his Honor, the presiding Chancellor, overruled the demurrers. The defendants appealed.

Fair, for appellants.

Jones, Garlington, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. These causes were heard together. The former bill is stated to have been filed in August, 1857, the latter in November of the same year. To both suits the defendants demurred for multifariousness. All the plaintiffs are stated to be creditors of George Neel, who is alleged to be insolvent.

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*The charges are that, at various times, he made voluntary gifts of property to his children, the several defendants, who are alleged to be in possession of the same. The purpose of the plaintiffs is to set aside the deeds and subject the property to the payment of the grantor's debts. No actual, or intentional, fraud is charged on any of the parties. The principle is very well established that "where the interests of the plaintiffs are the same, although the defendants may not have a co-extensive common interest, but their interests may be derived under different instruments, if the general objects of the bill will be promoted by their being united in a single suit, the Court will not hesitate to sustain the bill against all of them." Story, Eq. Pl. § 534. Upon this principle it has been held that "distinct and several judgment creditors may join in one bill for discovery and relief to set aside conveyances which have been made by their debtor in fraud of his creditors—for they all have a common interest in the suit; and if they succeed, the decree will be beneficial to all in proportion to their respective interests." *Id.* § 537, a.

In addition to these general reasons it may be added that it is a favorite object of Equity jurisdiction to do complete justice and prevent a variety of litigation. If the allegations of the plaintiffs should be successfully maintained, in administering the proper relief the Court may deem it necessary to have the several donees before them in order to adjust the equities which may arise among themselves. See *Screven v. Joyner*, 1 Hill, Eq. 252 [26 Am. Dec. 199]; *Thompson v.*

Perry, 2 HILL, Eq. 204 [29 Am. Dec. 68]. The Court is of opinion that the demurrers in both cases were properly overruled.

In the case first entitled (*Williams v. Neel*) the second ground of appeal is that, if the bill be not multifarious, yet the demurrer should have been sustained and the bill dismissed on the ground that it should have been a "creditor's bill." But no such objection appears in the ground of demurrer which is for multifariousness only. Upon such objection being taken it is not unusual

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for the Court, at any *time, to give leave to the plaintiff to amend his bill in this respect if it be deemed necessary; (a) or as suggested by the Chancellor in *Hallett v. Hallett*, 2 Paige, 18, 19. "If several suits are pending in favor of different creditors, the Court will order the proceedings in all the suits but one to be stayed, and will require the several parties to come in under the decree in such suit, so that only one account of the estate may be necessary." But all this is matter for the Circuit Court, and not for this tribunal.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *341

*J. C. BLACKWELL, Adm'r, Mary Ridgill, v.
R. M. RIDGILL, Adm'r, J. Ridgill.

(Columbia. Nov. and Dec. Term, 1858.)

[Wills. \S 614.]

The testator, by his will, which was in one paragraph, without dot, division or mark of punctuation, first devised and bequeathed to his brother, J. R., who resided with him, some real and personal estate, and then declared as follows: "I give and bequeath to my wife M. all the lands where I now reside on I also give to my wife M all of my personal property and I also give to my wife all of my household and kitchen furniture I also give to my wife all of my stock horses cattle hogs and poultry and I also give to my wife all that plantation or tract of land known by the name of the Murphy tract the above to be and remain my wives and at her disposal her life time and after her death to be J. Rs." The will then contained some further devises and bequests, and amongst them an absolute bequest to testator's wife, of his notes, accounts and cash after payment of his debts:—*Held*, that "the above" referred to all the preceding devises and bequests to the testator's wife M., and was not confined to the devise of the Murphy tract; and consequently that the limitation to J. R. extended to all the property mentioned in the previous devises and bequests to the wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1398; Dec. Dig. \S 614.]

(a) *Johnson v. Bank*, 3 Strob. Eq. 329.

Before Dunkin, Ch., at Sumter, June, 1858.

Dunkin, Ch. This bill was filed 24th November, 1857, stating the death of plaintiff's intestate on the second day of the preceding month, and that the defendant had taken possession of all her effects in his capacity as administrator of James Ridgill, deceased and that under an order from the Ordinary, he had advertised them for sale on the 26th November. Application was made at Chambers at Columbia, on 25th November, to stay the sale until the rights of the parties could be adjudicated. No argument was offered, and the exigency seemed to allow but little time for consideration; a provisional, or temporary injunction was ordered. The determination of the cause depends on the con-

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struction of Robert *Ridgill's will, a strictly correct transcript of which accompanies this decree. At the date of the will (1834) and also at the period of testator's death, (1849) his brother James Ridgill who lived and died a bachelor, resided in the same home with the testator and his wife, who were without children. James Ridgill continued to reside there until his own decease, some years afterwards, leaving Mary Ridgill, his brother's widow, still surviving until October last. These facts afford very slender assistance in giving construction to the will. It is, however, very clear that the same interpretation must be adopted as if James Ridgill, instead of the widow, had been the survivor. The Court has never been called on to determine the meaning of a written instrument in which the field of argument was more limited, or the correct solution less certain or satisfactory. In some wills the punctuation may aid conjecture, or the division into sections indicate the intention. This will is a single paragraph, without dot, division or mark of punctuation from beginning to end. The sole inquiry is whether the "the above" refers to all that is previously given to his wife, or only to the tract of land known as the Murphy tract, the devise of which immediately precedes those terms. It is manifest that the testator contemplated the survivorship of James Ridgill. He was a member of his household. The testator had other brothers, but he remembered them only by a nominal legacy. To James, he devises two tracts of land and some other articles. But his widow he places in his own situation, giving her the homestead and all his personal property. In addition, he devises to her the Murphy tract of land and then follow the words "the above to be and remain my wife's, and at her disposal her life time and after her death to be James Ridgill's." James had always lived with them.

The testator probably contemplated that he would not change his home, and he cer-

tainly supposed he would outlive his widow. Giving to his wife all about them and particularising with superfluous minuteness, as

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if he took pleasure *in giving to her, or was apprehensive that something might be omitted, he then expresses the amplitude of the enjoyment by declaring the "above to be and remain my wife's and at her disposal." But she had no children, and on her decease, his brother James would have no home. He therefore provides in familiar but expressive terms "to remain my wife's and at her disposal her life time, and after her death, to be James Ridgill's." His widow and his brother were the prominent objects of his affection, of his solicitude and bounty. If James Ridgill had survived the widow, it is difficult to suppose that the testator intended that he should quit the homestead and give place to strangers in blood. Rather on such considerations than from any fixed conviction as derived from the language of the instrument alone, the Court has adopted the conclusion that the bill must be dismissed—see *Lowe v. Lord Huntingdon*, 4 Russ 532; *Wigram on Wills*, 36—and it is so ordered and decreed, but without costs.

Copy Will.

In the name of God Amen

I Robert Ridgill of the State of South Carolina in the District of Sumter clarendon county Being of Perfect mind and memory make this my Last Will and Testament first I Desire to be Decently Buried my Estate and Effects I Bequeath and Dispose of in manner and as follows I Give and Bequeath to my Brother James Ridgill the Lands on ox Swamp which were formerly owned by William Ridgill De'd I Also give and Bequeath to James Ridgill one Tract of land on ox Swamp which I Purchased from Harmon Platt I Also give and Bequeath to James Ridgill my carpenter and plantation Tools I give and Bequeath to my wife Mary Ridgill All the Lands where I now Reside on I also Give to my wife Mary Ridgill All of my personal property and I Also Give to my wife All of my household & Kitchen furniture I also Give to my wife All of my Stock horses cattle hogs and poultry and I Also Give to my Wife All that plantation or

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Tract of land known *by the name of the Murphy Tract the Above to be and Remain my Wifes and at her Disposal her lifetime and After her Death to be James Ridgills I Also Give Give to my Nephew Robert Ridgill Gamble All of my part of land that came from the Estate of David Nelson I Also Give All of my Notes accounts & cash to my Wife after paying my Debts if there should any Be left I also give to my Brother Richard Ridgill five dollars and I Also Give to the heirs

of William Ridgill De'd five dollars I do hereby constitute and appoint my Wife Mary Ridgill and my Brother James Ridgill to be the whole and Soal executors of this my last will and Testament this 19th February 1834

Robert Ridgill

Test

Robt. V. White,
Peter Jayroe,
John F. Gamble.

The plaintiff appealed and moved this Court to reverse the decree, on the ground:

Because the limitation, after the death of testator's widow, to James Ridgill, is confined to the Murphy tract of land, and does not extend to the plantation on which the testator resided, or to the personal estate bequeathed to his widow; the said plantation and personal estate being given to her absolutely.

Galluchat, Spain, Richardson, for appellants, cited *Blewer v. Brightman*, 4 McC. 60; *Moon v. Moon*, 2 Strob. Eq. 327; *Ellam v. Westly*, 4 B. and C. 667; 10 Eng. Com. L. R. 749.

Moses, Blanding, contra.

The opinion of the Court was delivered by

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*DUNKIN, Ch. It is proposed to add little to what is said in the Circuit decree. It was urged that *Moon v. Moon*, 2 Strob. Eq. 327, was authority for a different view. That was also a will upon the construction of which diversity of opinion might well be entertained, and it was determined by a divided Court. But in that case land was given and slaves (by name). The slaves (by name) were given over after the life estate, to be sold by the executors and the proceeds divided. No further disposition was made of the land. "We think it very material to shew," (said the Court) "that these subjects were disjoined, and given with a separate intention as to each; that, while the negroes are limited in remainder, the testator makes no further mention of the land." But in Robert Ridgill's will no such disjunction is marked. There is no repetition of a part of the property before given, and a bequest over of that part. On the contrary, no intention is manifested to separate what is before given. "The above to be and remain my wife's and at her disposal her lifetime, and after her death to be James Ridgill's." Both real and personal property were included in the preceding gift to his wife. And, in a subsequent clause, he bequeaths to her, without qualification, "all his notes, accounts and cash."

Looking, as the Court is authorized to do, upon the cases cited, to the condition of the testator's family, they are not prepared to say that any different construction would be more likely to effectuate the intention of the

testator than that adopted by the Circuit Court.

The appeal is dismissed.

JOHNSON and WARDLAW, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *346

*EX'ORS OF J. S. LOTT and Others v. THOMAS DeGRAFFENREID and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[*Limitation of Actions* ⚡60.]

A bill to set aside a deed for fraud upon creditors of the grantor, is barred after four years from the date of the deed, although the grantor reserves a life interest in the land conveyed.

[Ed. Note.—Cited in *Gregory v. Rhoden*, 24 S. C. 93, 99; *Tucker v. Weathersbee*, 98 S. C. 410, 82 S. E. 640.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 333-341; Dec. Dig. ⚡60.]

[*Limitation of Actions* ⚡67.]

Recording of a deed of land is notice to the creditors of the grantor.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 377; Dec. Dig. ⚡67.]

[*Limitation of Actions* ⚡100.]

Where the plaintiffs are executors, and the statute of limitations commenced running in the lifetime of the testator, an averment in the bill of want of notice to the plaintiffs is no answer to a plea of the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 492; Dec. Dig. ⚡100.]

[*Fraudulent Conveyances* ⚡132.]

A possession consistent with the terms of the deed is not evidence of fraud where the creditors have notice of the terms; the deed being recorded.

[Ed. Note.—Cited in *Nelson & Co. v. Good*, 20 S. C. 236.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 414; Dec. Dig. ⚡132.]

[*Limitation of Actions* ⚡165.]

The happening of an event which gives a right of possession to one having an expectant interest, does not revive the right of creditors to file a bill to set aside the deed for fraud.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 649; Dec. Dig. ⚡165.]

[*Fraudulent Conveyances* ⚡146.]

Where a mother conveys a number of slaves to her son, her possession of three, for her comfort and convenience, is not sufficient evidence of fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 455; Dec. Dig. ⚡146.]

[*Limitation of Actions* ⚡60.]

Where there is a valid sale of slaves, and the grantor afterwards voluntarily releases the debt, a bill by creditors to set aside the release for fraud is barred after four years.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 333-341; Dec. Dig. ⚡60.]

[*Limitation of Actions* ⚡177.]

[Cited in *McGowan v. Hitt*, 16 S. C. 612, 42 Am. Rep. 650, to the point that a creditors'

bill for the purpose of setting aside fraudulent conveyances of the debtor is barred by the statute of limitations, by the lapse of four years from the execution of the deeds, unless it be averred in the bill that the fraud was not discovered till within four years before the bill was filed.]

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 665; Dec. Dig. ⚡177.]

Before Wardlaw, Ch., at Chester, July, 1858.

Wardlaw, Ch. The pleadings in this case are voluminous, and some of them, so far as I can judge, from the imperfect copies furnished to me, are irregular and incomplete. It is not necessary to the judgment to be pronounced, that I should attempt any full summary of the pleadings and facts.

The original bill, filed May 2, 1849, alleged that the plaintiffs are creditors of Sarah DeGraffenreid by assignment to them of her sealed note to James B. Pickett, dated Nov. 17, 1837, and due one day after; upon which judgment, in the name of the said Pickett

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for their use, was obtained in Nov., *1841, against her for \$1,813, and interest and costs; that this sealed note was given for the balance due by the said Sarah to the said Pickett for the guardianship by her of his wife, her daughter; that the said Sarah had fraudulently conveyed her lands to her son, Thomas DeGraffenreid on May 5, 1836, for the nominal consideration of \$5,330, not in fact paid, and that about the same time she transferred to him all or most of her slaves by collusion; and the bill prayed that these conveyances and transfers which defeated satisfaction of the debt to plaintiffs, should be set aside, and that the estate, or at least the price agreed to be paid for it, should be made liable for said debt. The plaintiffs obtained leave from the Court to amend their bill generally, and on May 20, 1854, filed a bill of revivor and supplement, which contains additionally nothing important, except the statement that Thomas DeGraffenreid, as her agent, received large sums of money from her credits with instruction to pay the proceeds to plaintiff, and that he had become since her death the administrator of her property, and also except the prayer that the said Thomas should account for the sums of money he had received as her agent.

The answers, with much extraneous matter, deny all intention of fraud, aver that the conveyances of the land were duly recorded, and the consideration fully paid, and that the transfer of the negroes was before the execution of the single bill to Pickett, and that although the price for them, \$15,000, was not in fact paid, the note for the purchase money was given and surrendered by said Sarah to Thomas, and receipt in full also given by her; that defendant, Thomas, had been in the actual adverse pos-

session of the lands and negroes since 1836; that this defendant had received some moneys as agent of his mother, but none with instructions to pay the plaintiffs, and that in fact he had paid all to his mother: that the transactions in question occurred many years ago, and all of them of much importance within the full knowledge of Pickett, and with constructive notice to plaintiffs,

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and under all the circumstances defendants rely upon the staleness of plaintiffs' claim, and the statute of limitations.

The plaintiffs offered in evidence an assignment, dated January 26, 1847, by Sarah DeGraffenreid to them of so much of certain notes and demands entrusted by her for collection to Mr. N. R. Eaves, as would satisfy the plaintiffs' judgment. Mr. Eaves testifies that he paid over to Mrs. DeGraffenreid all the funds collected by him, indeed more, without notice of the assignment, and that plaintiffs can expect nothing from the assignment.

Defendants offer in evidence the receipts of Pickett to Mrs. DeGraffenreid, dated April 3, 1837, in full of the share of his wife, who was her ward, and the receipts of Sarah DeGraffenreid to her son, Thomas, acknowledging that he had paid her \$15,000 for twenty-six negroes on Jan. 1, 1836, and \$5,340 for the lands on March 31, 1837: the receipt for the price of the lands being dated Feb. 17, 1839. Defendants further prove that Thomas was in possession of the lands and negroes from 1836; except that his mother retained a home on the land, which she had reserved by one of the deeds, and three of the negroes, Hector, Joe, and Harriet, to wait upon her person, and about her house. She died in 1848. She had usually lived with her son, Thomas, but lived in a separate house the last four or five years of her life.

I am of opinion that the defence of the statute of limitations must prevail as to all the grounds of complaint in the original bill. The conveyances of the lands were duly recorded, and this registry gave constructive notice to all persons that Thomas DeGraffenreid claimed the title; and his adverse possession of the lands for thirteen years afterwards, before bill filed, would ripen his claim into right, even if it began in fraud. But there is no satisfactory proof of such fraudulent beginning of his claim to the land. He swears in his answer that he paid the purchase money, and his answer is supported by his mother's receipt, by the presumption from the lapse of time, by the notoriety of his ownership and possession,

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and by the acquiescence of Pickett and all claiming under him, and there is no countervailing evidence of any weight. The residence of his mother on the land is consistent with the express reservation to her in

the deed of a home thereon, and scarcely under any circumstances could have been obstructed by her son who had the proper feelings of human nature. All these same circumstances support his title to the negroes, except that there was no registry of his title, (and this is not required by law, and would not create constructive notice,) and no actual payment of the purchase money. That she was allowed to keep three of the negroes in her more immediate service, although under the general control of her son, is surely not overwhelming evidence of fraud between parties who were affectionate, and properly understood the duties growing from their relation of mother and son.

In the discussion before me, however, the right of the plaintiffs to relief is urged, not from the fraudulency of the original contracts of sale and purchase of lands and negroes between Sarah DeGraffenreid and her son Thomas, but from the fact that the price of the slaves was not paid by the purchaser to the seller. This fact of non-payment is confessedly true. He did not pay the price to his mother, and received from his mother as a donation the note which was the evidence of this contract to pay, with her receipt for the money. Yet this was no part of the original contract. Her right to give before she paid her debts, to be generous before she was just, might have been reasonably questioned within the term before the bar of the statute applied. But neither she nor any in her right as creditor, or otherwise, could reclaim her gift after four years. The only claim of herself and creditors, was in the nature of assumpsit for money had and received by him to her use, and should be prosecuted within the term, barring simple contracts. Questions about notice have no application, as he was the purchaser of the legal title, and payment by him of the price must be presumed from his long possession of the property. His acknowledgment

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that he had not paid does not remove the bar of the statute, when it is accompanied with no acknowledgment of the subsistence of the debt, nor promise to pay it, on the contrary with a denial of any liabilities on his part. This disposes of the original bill. The new matter in the supplemental bill concerning moneys received by Thomas as his mother's agent, if received by him more than four years before the bill was filed, as I conclude they were, is also barred by the statute of limitations, on the principles already stated. Besides, there is no evidence of his receiving any money as her agent, which he did not pay to her, as is manifest from his answer and from the testimony of Mr. Eaves. Still further, the right of a creditor to pursue the debtor of his debtor, in disputed liabilities, beyond the attachment law and other cases provided

for by the Statute, can hardly be admitted. At least the plaintiffs must have shown clear proof of the indebtedness of this defendant to his mother on this account, before they became entitled to charge this defendant under color of an amendment as to matters not involved in the original litigation.

I suppose that the plaintiffs are entitled to an account from Thomas DeGraffenreid of the personal estate of Sarah DeGraffenreid in his hands as her administrator. So far as this estate consists of legal assets subject to the lien of a judgment or *fi. fa.* they are entitled to payment according to the priority of their lien; so far as it consists of mere credits or equitable assets, they are only entitled rateably with all her creditors, and all creditors must be called in according to the procedure of the Court.

Other matters have been introduced into the case, of which some notice may be expected by the parties, but as these matters seem to me foreign to the true issues, brief notice will be taken of any of them, and some of them altogether pretermitted, leaving the parties to propose their briefs for a review of my opinion from the pleadings and evidence. Much is alleged about the lunacy and recovery of Tscharna DeGraffenreid, and his title under one of the deeds of 1836,

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whether *by force of the condition or the conveyance of Thomas DeGraffenreid. And as to all this I need only express the opinion that everything depends on the fairness of the deed, or the collusion between Sarah and Thomas DeGraffenreid. It is objected by defendants that the representative of Allen DeGraffenreid should be made a party; but as the plaintiffs do not seek to look into the guardianship of Allen and Sarah DeGraffenreid, as indeed they could not seek with any show of right, the dealings of Allen DeGraffenreid about the guardianship could only be used to ascertain the amount of her estate. If alive he could only be a witness, and is not a necessary party in this case. The statement of Coleman, as to the assets turned over by Allen to his mother Sarah, is not only irrelevant but to me unintelligible. So the calculations and argument intended to exhibit that the judgment of the plaintiffs against Sarah DeGraffenreid was far too large a sum, because certain commissions and payments to the credit of Sarah were omitted when she gave the note, and suffered the judgment to be rendered, can have no present bearing, as all these matters were concluded by the judgment.

It is ordered and decreed that the bill be dismissed, as to all matters and parties, except the accounting of Thomas DeGraffenreid concerning the administration of the estate of Sarah DeGraffenreid, and it is referred to the commissioner to take this account on the principles and practice herein suggested.

The plaintiffs appealed on the grounds:

1. Because the Chancellor erred in holding, that the statute of limitations was a bar as to the land conveyed to Thomas DeGraffenreid, and which was to be the property of Tscharna DeGraffenreid, a lunatic, upon his being restored to his proper mind, since the right of the said Tscharna did not accrue until 1852, when he ceased to be a lunatic; the estate could not run in his favor, until his right had accrued.

2. Because the said Sarah DeGraffenreid having reserved to herself a life estate in

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lands, which were to be the property *of Tscharna DeGraffenreid upon his restoration to sanity, and the said Sarah DeGraffenreid having lived thereon until the time of her decease, the statute of limitation could not run in favor of Tscharna until the accrual of his right to possession, and the Chancellor erred in holding it as a bar to complainants' bill as to said lands.

3. Because the Chancellor erred, in holding that the possession of Sarah DeGraffenreid of four of the slaves from the time of the purchase or gift of the said slaves to her son Thomas, was not fraudulent as to creditors.

4. Because the delivery by Sarah DeGraffenreid to Thomas DeGraffenreid of his note for fifteen thousand dollars in 1840, being given for twenty-six slaves purchased of his mother in 1836, was fraudulent as to creditors, and said fraudulent delivery of said note to the said Thomas being unknown to said complainants until within four years of the filing of their said bill of complaint, the Chancellor erred, in holding that the statute was a bar against said fraud.

5. Because the Chancellor erred in holding that notice to James B. Pickett, the original payee, was a notice to John S. Lott, to whom the note was transferred after its execution, and long before the delivery of said fifteen thousand dollar note to Thomas DeGraffenreid by Sarah DeGraffenreid, the gift of said note and not the sale of said slaves for which said note was given, being the fraud which defeated the payment of the claim of complainants.

McAliley, for appellants.

Eaves and Thomson, contra.

The opinion of the Court was delivered by

JOHNSON, Ch. The first and second grounds of appeal appear to me to be misconceived. The conveyances of the land, dated the 5th of May, 1836, were neither good or bad at their execution. If good, they pass-

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ed all the right of the grantor, *subject to the reservation in the deeds of a life estate in herself. This life estate, while it existed, was open to the creditors of Sarah DeGraffenreid, and they might have secured a remedy out of it, corresponding to her in-

terests. After its efflux their remedy in that way was gone. On the other hand, if the deeds were vitiated, as is surmised, by fraud, the creditors might have proceeded at once, not only against the grantor to carve a remedy out of the estate she had reserved to herself, but against the grantees to set aside the title which passed to them at the execution of the deeds, though their possession was postponed. The statute ran, naturally, from the execution of the deeds, and had full effect in four, not ten years, as has been often determined, unless the party charging the fraud, avers that he only discovered it within four years before filing his bill; in case of such averment, the opposite party may contradict the averment, by proving notice or the means of knowledge upon him more than four years before bill filed. This doctrine is settled in this Court.

These deeds were registered within the statutory period, and imparted the notice necessary to put the creditors of Mrs. DeGraffenreid upon the alert, and the statute ran against them.

Besides, it is no where said in the original bill (filed May 7, 1849,) that either Pickett or his administrator, or Lott or his executors, were unapprised of the execution of the deeds, or of the alleged fraud. Such an averment was reserved for the bill of revivor and supplement, (filed May 20, 1854,) by the representatives of Pickett and the executors of Boyce, executors of Lott, in which they say, "which fraudulent actings and doings of Sarah DeGraffenreid, Thomas DeGraffenreid and Tscharna DeGraffenreid were unknown to your orators until within four years before the commencement of this suit."

But the statute began its operation in the life-time of Pickett and Lott, not in the time of their representatives, and would complete its effects notwithstanding the latter might be ignorant of the alleged wrong.

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*It is argued that Mrs. DeGraffenreid's possession was fraudulent and deceptive. But the deeds were registered, and undeceived the parties as to the right in which she held. It informed them that her possession was consistent with the deeds, and was not only her own possession but that of Thos. and Tscharna, to whom her conveyance ensued.

It is argued, again, that Tscharna's right only sprang up in 1852, when his insanity was removed. Well, then, this title was in Thomas until that time, and upon being cured of its fraud by the efflux of the statute, passed over as a good title to Tscharna. At all events the creditors had lost their right in the land, which right it is not to be supposed would spring up again, to be asserted against a new party, when they might find such a one in possession.

I concur with the Chancellor in respect to the third ground of appeal.

The custody by Mrs. DeGraffenreid of the four slaves allowed for her comfort, after his purchase in January, 1836, is too well accounted for by reasons and principles, the direct opposite of fraud, to require or allow of its being set down to that account. Mere custody is not the possession of an owner. To custody must be added the right under which the property is held. This was determined, if authority were required, in *Penn v. Blocker*, and I content myself with referring to that case.

The fourth ground of appeal refers to a matter charged neither in the original nor supplemental bill.

The original bill charged that the transfer of the twenty-six slaves, (January, 1836,) was without consideration and fraudulent.

The answer to that bill, (filed July 3, 1851,) denies the charge, and avers that the slaves were purchased by Thomas, from Mrs. DeGraffenreid, for the full and fair price of \$15,000, which he secured by his note, and he exhibited her receipt and bill of sale for the negroes. That answer proceeds: "This defendant admits that his mother, Sarah De-

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Graffenreid, *not long after his purchase of the said negroes, (the precise time he cannot now remember, but he thinks and believes some time between April and August, 1840,) gave him, and delivered up to him his note for the purchase money of said negroes, and he paid her nothing for the same. But it was her own free and voluntary act, not asked for by him, nor expected when he purchased the said negroes." He goes on to aver that this purchase of 1836, was well known to Pickett when he subsequently (in 1837) took his note, now sued on, from Mrs. DeGraffenreid.

The fact now insisted on in the fourth ground of appeal, of the voluntary release and surrender of the note given by Thomas for the negroes, was thus spread before the plaintiffs by the record in July, 1851; and notwithstanding there was an order granted to amend the original bill, ample enough to have covered this matter, the parties neglecting this release of the purchase money for the slaves, persisted in the original charge that the slaves were fraudulently alienated ab initio, and no charge as to the giving up of Thomas' note has ever been made either in the original or supplemental bill.

It is now admitted that the alienation of the slaves was by a fair sale, and the Court is satisfied such was the character of the transaction. But the plaintiffs now lay hold of the delivery up of the note, by way of appeal, which they neglected to make part of their bill. We are of opinion their appeal is without proper foundation, nor do we think that having so long and so palpably neglected to introduce into the bill that which they now regard as so important, they are

entitled to the benefit of an amendment, at the risk of indefinite litigation and expense.

It is ordered that the decree be affirmed, and the appeal dismissed.

WARDLAW, Ch., concurred.

DUNKIN, Ch., dissented.
Appeal dismissed.

10 Rich. Eq. *356

*W. W. PETTUS and Others v. S. P. SUTTON and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[*Executors and Administrators* ⇨478.]

The whole estate consisted of the sale bill, which fell due in December, one year from its date. The administrators having ascertained that the debts were very inconsiderable, charged themselves early in the next year with the amount of the sale bill, deducting therefrom their expenditures. *Held*, that the administrators were not exempt from liability for interest for the year in which they charged themselves with the amount of the sale bill.

[*Ed. Note.*—For other cases, see *Executors and Administrators*, Cent. Dig. § 2063; Dec. Dig. ⇨478.]

[*Trusts* ⇨219.]

The rule exempting trustees from liability for interest until the end of the year is not absolute, but dependent on the circumstances of the cases.

[*Ed. Note.*—For other cases, see *Trusts*, Cent. Dig. § 316; Dec. Dig. ⇨219.]

Before Dargan, Ch., at York, June, 1858.

This was an appeal from the decree of the Ordinary on the accounts of the defendants, administrators of William Pettus. The only evidence against the defendants was (1.) the sale bill, bearing date the 27th December, 1855, due, with interest from date, on the 27th December, 1856; (2.) the return of the defendants, made on the 18th February, 1857, in which they charged themselves with the amount of the sale bill, and the interest thereon, until it fell due, in all, \$16,179.94, and then deducted their expenditures up to that time, including their commissions, \$515.60, leaving a balance of \$15,664.34; and (3.) their second return of further expenditures and commissions on paying the whole amount, which deducted from the amount of the first return, without interest, left a balance in their hands of \$15,153.24.

The Ordinary's decree was made on the 22d February, 1858. It charged the defendants with the balance in their hands of \$15,153.24, with interest thereon from the 27th December, 1857, thus exempting them from liability for interest for one year from the day the sale bill fell due.

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*His Honor, Chancellor Dargan, held that the defendants were liable for the interest, and so modified the decree as to charge them with interest from the 1st of January, 1857. The defendants appealed.

Clawson, for appellants.

Williams, Beatty, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. I greatly regret that in these cases unanimity in the Court has not been attained. The dissent of the most experienced member of the Court disturbs me. My opinion, however, is firmly in concurrence with the circuit decree. It never was an absolute rule in the Court to allow trustees a full year to hold funds exempt from interest. The practice has been flexible, dependent on the circumstances of the cases presented. This is well explained in the case of *Baker v. Lafitte*, 4 Rich. Eq. 392.

In the present instance, the administrators had more than a year to ascertain the condition of the estate; and finding that the intestate owed no considerable debts, they charged themselves early in the following year with the total of the sale bill. Trustees are not allowed to make profit in the execution of trusts; and yet should be saved, to a proper extent, from the moth of interest.

I do not perceive in this case any reason, from the condition of the estate, to exempt the administrators from payment of interest for a year after the sale bill fell due.

It is ordered and decreed that the appeal be dismissed, and the circuit decree be affirmed.

DUNKIN, Ch., concurred.

Decree affirmed.

10 Rich. Eq. *358

*WILLIAM CLOUD v. WILLIAM L. CALHOUN and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[*Deeds* ⇨148.]

A father, shortly after the marriage of his daughter, conveyed slaves to a trustee for the use of his daughter during her lifetime, and after her death without children, then for the use of her husband so long as he should remain single; "but if he marry again, then they, with their increase, are to return and be divided among the remainder of my heirs." *Held* that the limitation was valid, and that "heirs" meant such persons as upon the happening of the contingency would answer the description of heirs apparent of the donor.

[*Ed. Note.*—For other cases, see *Deeds*, Cent. Dig. § 478; Dec. Dig. ⇨148.]

[*Trusts* ⇨249.]

Upon the happening of the contingency, *held*, that the trustee, or his representative, might file a bill against the husband and heirs apparent of the donor for delivery and division of the slaves.

[*Ed. Note.*—For other cases, see *Trusts*, Cent. Dig. §§ 355, 360; Dec. Dig. ⇨249.]

[*Deeds* ⇨148; *Trusts* ⇨51.]

Held, that the limitation was not void as in restraint of the subsequent marriage of the son-in-law.

[*Ed. Note.*—For other cases, see *Deeds*, Cent. Dig. § 478; Dec. Dig. ⇨148; *Trusts*, Cent. Dig. § 71; Dec. Dig. ⇨51.]

[Trusts \hookrightarrow 38, 39.]

It is not necessary to the validity of a deed of trust that the trustee should accept the deed, or even that he should know of it.

[Ed. Note.—Cited in *Withers v. Jenkins*, 6 S. C. 125; *Gregory v. Rhoden*, 24 S. C. 93.

For other cases, see Trusts, Cent. Dig. §§ 56, 58; Dec. Dig. \hookrightarrow 38, 39.]

[Trusts \hookrightarrow 22.]

Delivery of a trust deed to a witness to be recorded is sufficient delivery.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 31, 32; Dec. Dig. \hookrightarrow 22.]

[Equity \hookrightarrow 153, 340.]

A statement in an answer, exhibiting matter of independent defence, or matter of avoidance in a confession with avoidance, is not evidence for the defendant.

[Ed. Note.—Cited in *Belcher v. McKelvey*, 11 Rich. Eq. 18; *Gibbes v. Guignard*, 1 S. C. 376.

For other cases, see Equity, Cent. Dig. §§ 388, 700; Dec. Dig. \hookrightarrow 153, 340.]

[Husband and Wife \hookrightarrow 29.]

Where a father, before delivery of slaves to his son-in-law, makes a deed of trust, settling the slaves on his daughter, with limitations, mere neglect on the part of the father to give notice of the deed to the son-in-law, is no fraud upon his marital rights.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 158–168, 205, 882; Dec. Dig. \hookrightarrow 29.]

[Husband and Wife \hookrightarrow 30.]

A deed from a father to a trustee, of property to be held in trust for the benefit of his married daughter and her family, is not a marriage settlement.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 169; Dec. Dig. \hookrightarrow 30.]

Before Wardlaw, Ch., at Abbeville, June, 1858.

This case will be understood from the circuit decree of his Honor, Chancellor Wardlaw, which is as follows:

Wardlaw, Ch. William L. Calhoun, of Abbeville, and Margaret W. Cloud, daughter of William Cloud, of Chester, intermarried January 5, 1853. Afterwards, by deed bear-

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ing *date February 1, 1853, the said William Cloud professed, in consideration of natural affection for his said daughter, to give and deliver to his brother-in-law, William Hemphill, as trustee for said daughter, and any children she might have, twenty-three slaves, including Bob and Mary, concluding with the following terms: "Which said negroes I do put into the quiet and peaceable possession of William Hemphill, for the support of said Margaret and her children, if any, during her life-time, and at her death, if no children, her husband, W. L. Calhoun, can, if he chooses, keep them so long as he remains single; but if he marry again, and my daughter leave no children, then they, with their increase, are to return and be divided among the remainder of my heirs, unless my daughter, Margaret W. Calhoun, shall think best to make a will, if so, she is at liberty to will them to whomsoever she may think proper; and I, the said William Cloud, do warrant and forever defend the

said negroes to William Hemphill, as trustee for the said Margaret and her children forever against all persons whomsoever claiming said negroes, according to the true intent and meaning of this instrument of writing." When this deed was signed and sealed no person was present besides the donor and two attesting witnesses, and it was delivered to A. Brown, one of these witnesses, to be put on record in Chester, with a statement that no inconvenient despatch was necessary, and Brown kept it in his possession until January 17, 1854, when he made probate of its signing, sealing and delivery, and procured it to be registered in Chester. It was recorded in the Secretary's office at Columbia, April 8, 1856, and in the Register's office at Abbeville, May 4, 1857. Margaret W. Calhoun died April 9, 1855, without issue and without will; and said William L. Calhoun contracted a second marriage, April 26, 1857. William Hemphill died intestate on July 5, 1853, and William Cloud acted as administrator of his goods and credits. The heirs apparent of said William Cloud are his five daughters.

This bill was filed June 26, 1857, by Wil-

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liam Cloud, as *plaintiff, against William L. Calhoun and the daughters of plaintiff, with the husbands of such of them as are married, as defendants, for the delivery of the slaves above mentioned and account of their hire. The title of the plaintiff is stated alternatively, as the representative of the trustee (in which character he seeks delivery for partition among his children, who, it is alleged, are the persons intended by the term heirs in the instrument of gift,) or by way of resulting trust to himself for life, if heirs be understood technically. The children of William Cloud, in their answer, insist that they are now, by the course of events, entitled to the slaves, and they generally affirm the bill and co-operate with the plaintiff. William L. Calhoun resists altogether the plaintiff's claim, and avers that the negroes were delivered to him in absolute property soon after his marriage with plaintiff's daughter, and that he had no notice of the deed, nor of any restriction of his rights as owner, until about the time of his second marriage.

Various points of greater or less importance are disputed between the parties. First, it is denied that plaintiff is administrator of William Hemphill, and it is argued that under 17 and 35 sections of A. A. of 1839, (11 Stat. 43, 48,) proof of title as administrator can be made only by certificate under seal of the Ordinary. The purpose of the Act in this respect, however, was to provide that a particular mode of authenticating grant of administration should be competent and sufficient, without at all infringing on other modes of proof. The Ordinary for

Chester at the time was aged and imbecile, and kept his office in a confused and defective manner; but the warrant of appraisal, recording the inventory and appraisal, and the settlement of the administrator with the distributees, and other evidence which it would be too tedious to detail, although it is all in writing and ready for use in case of appeal, entirely satisfy my judgment that plaintiff was appointed administrator of Hemphill. Then, it is urged that, conceding plaintiff is successor in office of

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the trustee named *in the deed, the trust is only for the benefit of Margaret Calhoun and children, and terminated on her death without issue; and that plaintiff should not be permitted to stir a litigation between co-defendants in which he has no interest nor duty. There is some force in this technical objection, and it might have prevailed, if the children of plaintiff, who are the substantial claimants against defendant, Calhoun, had not adopted and appropriated the bill in this aspect, or if the defendant named sustained special disadvantage by the mode of procedure pursued. Where, however, all the parties in interest are before the Court and subject to its judgment, and the issues between them are presented in a form which prejudices none of them, it is of no great importance on which side of the record as plaintiffs or defendants the parties may be arrayed; and it would be sacrificing the substance for a shadow, to compel the parties to encounter the delay and expense of new although more formal litigation. The answer, or defence, of defendant, Calhoun, in the present proceeding is as efficacious, and his position in all respects as good, as if the allegations of the bill had been made by the children of plaintiff alone, or conjointly with their father. The Court does not encourage barratry, but the interference of the plaintiff is not pragmatical. It was provided in the deed that, on the death of Margaret Calhoun, without issue and will, the slaves were to return and be divided among the other heirs of donor, and if heirs mean children, then in the event which has happened, the duty of making distribution devolved on the trustee; and if full effect be given to the maxim, *nemo hæres est viventis*, then a trust resulted to the donor, or the property reverted to him either absolutely or until his heirs by his death, were manifested. The plaintiff, in his bill, states that he intended in the employment of the terms, "remainder of my heirs," to describe surviving children; and why could he not by bill waive his private right in behalf of his children, or assert his rights only for their benefit? The counsel for defendant, Calhoun, in another view of

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the case *while disputing the title of plaintiff as trustee, and insisting that "heirs" must have its technical interpretation, con-

ceded that if the property were given to this defendant, with valid limitations over, a trust for benefit of plaintiff resulted when the event on which the property was to go over occurred. Even if the word heirs is to be understood as used inaccurately to denote heirs apparent or children, the plaintiff still has such scintilla of right or duty as authorizes him to implead the defendants. I am of opinion that the donor in this instrument did employ the word in this secondary sense. It is plain that the word "then" in the context refers to the antecedent, "if he marry again, and my daughter leave no children." *Archer v. Jegon*, 8 Sim, 446. And the other words, "increase," "return," "be divided," "remainder," all tend to fix the event when the property was to go over at a time when the donor must have contemplated the possibility of his being living, and having no heir strictly, but having surviving children; and donor intended to provide for these children whether he should be dead or living. It is always open to inquiry and construction whether a donor uses the word heirs in its strict sense. *Holman v. Fort*, 3 Strob. Eq. 71 [51 Am. Dec. 665]; *Bailey v. Patterson*, 3 Rich. Eq. 158; 2 Jarm. Wills, 12.

An essential particular in the execution of this deed, delivery is disputed, but with no such plausibility as to require extended discussion. There is no evidence that Hemphill, the immediate donee, ever accepted the trust conferred on him or recognized the existence of the instrument; and it may be justly assumed that he never heard of the deed. Equity, however, never permits a trust to fail for lack of a trustee, and the assent of one named as trustee in an instrument of gift is utterly immaterial. The assent of those who become beneficially entitled is always presumed, in the absence of proof of repudiation. Parting with the possession of the deed by the grantor at the time of its execution, not as an escrow, even for the purpose of recording, as in this case to the witness

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*Brown, is in itself delivery. *Dawson v. Dawson*, Rice Eq. 244; *Folk v. Varn*, 9 Rich. Eq. 306; *Ingram v. Porter*, 4 McC. 198; *Brooks v. Bobo*, 4 Strob. L. 40.

Defendant Calhoun does not claim under the deed, and insists that the slaves were given to him absolutely by his father-in-law, and actually delivered to Thomas Crenshaw his agent and overseer, before the execution of the deed. Plaintiff, in January, 1853, a few days after the intermarriage of Calhoun and wife, promised to give to his daughter or son-in-law about twenty negroes, and in consequence thereof Mr. Calhoun sent a wagon and team, under charge of his overseer, from Pendleton to Chester, to receive and transport the negroes. Crenshaw arrived at Dr. Cloud's with the wagon Sunday evening, January 30, and was then shown by plaintiff some of the negroes, and was

requested to abide the next day, that the plaintiff might attend a sale on Monday, 31, and purchase, if practicable, a substitute for Bob, one of the slaves who had recently married the female slave of a neighbor. Crenshaw tarried on Monday; and the plaintiff proceeded to the sale, and returned home about 4 o'clock in the afternoon, and then stated he could not purchase a negro to be put in Bob's place, and showed Crenshaw the negroes to be carried away, and directed him to set out early the next morning. Crenshaw started with the negroes homewards about daylight on Tuesday, February 1, and reached the plantation of defendant, Calhoun, a week or ten days afterwards. Immediately after starting, Crenshaw received a letter from Dr. Cloud to Mr. Calhoun, dated February 1, 1853, afterwards delivered, stating—"Mr. Crenshaw leaves this morning with the negroes, and I think will attend to their comfort on the road. I detained him one day to attend the sale of some negroes in order to get a man to send in Bob's place, as he has a wife, but failed. If he conducts himself well, and wishes to return next year, I may send another in his place." The two subscribing witnesses to the deed, A. Brown and John W. Robertson, testify that it was

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executed about 9 o'clock in the morning at a school house, without being able to fix the day of the week or month, but they, together with Catharine Westbrook, swear positively that the deed was executed while the negroes were in the actual possession of plaintiff, and state circumstances confirming their affirmation. The deed in the handwriting of plaintiff was produced by him when executed, and as the date is in different ink, I suppose that the instrument had been drawn up some indefinite time previously, and that it was in fact executed on the morning of January 31, when plaintiff was on his way to the sale, and misdated. At all events, I conclude unhesitatingly that it was executed before the negroes passed into Crenshaw's custody. It is by no means clear that the deed would have been ineffectual if executed after Crenshaw had received the negroes, and before he delivered them to defendant Calhoun, for Crenshaw may well be considered to some extent the agent of plaintiff for the transportation and delivery of the slaves.

The bill, which is sworn to, states that the deed was executed on the date it bears, and it was urged in the defence that the plaintiff was thereby estopped in law and inhibited by good faith from proving the true date. This is an extravagance. The most honest men may commit mistakes, and no principle of law or honor prevents the acknowledgment and exhibition of innocent mistakes. Defendant Calhoun denies that he had notice of the deed until after the death of his wife, and urges that the failure to give him notice of the restrictions and limitations

therein of his ownership amounts to fraudulent concealment avoiding the instrument. This denial is in response to a charge of the bill that this defendant acquiesced in the provisions of the deed; and his ignorance of the deed must be assumed until the fact of notice be established by evidence equivalent to the testimony of two witnesses. The answer of his co-defendants explicitly avers his knowledge of the provisions of the deed and acquiescence therein, but this is evidence against the respondents only and not against their co-defendants; and I may say in pass-

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ing, *that the frame of this answer is objectionable when it transcends the statements of the bill and replies to the answer of their co-defendant, previously filed. No implication of notice from the registry of the deed can arise, for no statute requires the registration of such instruments. This defendant admits in his answer, and this is much the strongest evidence of notice offered in the case, that his wife did speak to him of her father having made some illegal settlement, and he proceeds to aver that on inquiry of plaintiff he was assured the settlement was illegal and advised not to trouble himself about the matter. In my judgment the answer does not prove itself as to this latter averment, but the admission is too vague and equivocal to commit defendant. The bill alleges that plaintiff bought from defendant his possessory right in Bob, one of the slaves named in the deed; and the answer avers that this sale was absolute and unconditional for the price of \$1,000. Here again the answer is not self-proving beyond simple denial that the possessory right only was transferred; but in every sale the presumption is that the whole property was sold in the absence of contrary proof. The bill also alleges that Mary, one of the slaves, was returned by defendant to plaintiff after Margaret Calhoun's death, and the answer states that Mary was given to defendant as a maid-servant for his wife soon after the marriage and long before the other slaves were delivered, and that defendant after the death of his wife, in compliance with her request in her last sickness, gave this slave, as of his own right to dispose, to his wife's sister. Now the effect of this answer is to put plaintiff to proof that Mary was surrendered in recognition of his title, but certainly the answer is not of itself evidence of the circumstances of the original gift of this slave, nor of the motives and circumstances leading to her return. From the sort of slave, and from the fact that she was not one of those transported by Crenshaw, it is very probable that Mary was delivered before the other slaves, but the answer does not establish the fact. Except as to their bearing on the question

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*of notice, the facts concerning Bob and

Mary are unimportant in this case, for by concession these two slaves are under the control of plaintiff.

In the trial of causes, I frequently encounter what is considered to be misconception of counsel as to the effect of answers. Positive denial in an answer of a fact stated in the bill is conclusive in favor of respondent, unless rebutted by evidence equivalent to the testimony of two good witnesses; and sometimes an admission in form is so qualified and explained in its integral parts as to be really a denial. But a statement in an answer exhibiting matter of independent defence, or matter of avoidance in a confession with avoidance, as much needs proof as any unadmitted allegation of a bill. In rare cases it may be difficult to determine whether a particular averment in an answer be responsive or suggestive of independent defence or avoidance; but the modern course of Courts of Equity is to restrict the effects of answers as evidence. Any other course puts the case of a plaintiff too much within the disposal of an unconscientious adversary. In this State it has been lately determined, that in bills for account by distributees against administrators, the answers of the latter that some of the chattels had been given to them by intestate, or that they had retained the moneys without making interest, needed extrinsic proof. *Reeves v. Tucker*, 5 Rich. Eq. 150; *Duncan v. Dent*, 5 Rich. Eq. 7. So on a question of advancement, defendant's answer admitting that he had received the chattel given, but alleging that he had paid his father for it, is not evidence of the fact of payment.—[*Ison v. Ison*] *Ib.* 15.

Considering then that defendant, Calhoun, during the life of his former wife, was ignorant of the provisions of the deed, the question is presented, whether the omission to give him notice is a fraud, intended or operating to defeat the ownership he apparently acquired by the delivery of the slaves to him by his father-in-law soon after his marriage? There is no evidence that

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Margaret W. Calhoun had more explicit notice of the existence and contents of this deed than her husband. Concealment and forbearance to speak are not equivalent in their effect upon contracts. The distinction is well expressed by Cicero, as quoted and approved by Lord Mansfield in *Carter v. Boehm*, 3 Bur. 1910: *Aliud est celare, aliud tacere; neque enim id est celare quicquid reticeas; sed cum quod tu scias id ignorare, emolumenti tui causa velis eos, quorum intersit id scire.* Good faith forbids any party by concealment of that which he alone knows, to draw the other into a bargain which he would avoid if he possessed equal information. This principle is applicable to all contracts, but with diminished force to donations, where the assent of the donee may be implied and his interest promoted, notwith-

standing restrictions and limitations unknown to him may be incorporated. As to gifts at least, Cicero's definition of concealment restraining it by the motive of lucre or other base inducement, is altogether reasonable and just. The distinction between reticence and concealment is taken in our case of *Rainsford v. Rainsford*, *Dud. Eq.* 57. There it was held that an executor was not bound to give other notice of legacies than by deposit of the will in the proper office for record, "but if he wilfully does anything to obstruct intelligence of its contents from reaching the legatees, or with a fraudulent intent refuses to answer any fair and reasonable inquiries where his answer would naturally lead the legatees to a knowledge of their rights, he is guilty of a fraudulent violation of trust. The least concealment with a view to defeat the trusts, is a violation of trust." It would be difficult to maintain, in the present case, that any declaration or act of the plaintiff, after the execution of the deed, which constituted the delivery of the slaves and passed vested and contingent rights to others, could serve to defeat the deed: but if the absoluteness of the gift to be inferred from his tradition of the property had been limited by secret declarations at the time verbal or written, it might be that in a contest between him and his son-in-law, where the rights neither of

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creditors nor remaindermen were involved, the plaintiff would fail if proved guilty of concealment. No refusal, however, to answer reasonable inquiries nor other positive act whatsoever on the part of plaintiff tending to mislead the defendant, is shown or alleged. As is said in the last of our law cases on this subject, *Lark v. Cunningham*, 7 Rich. 57, 376: "Something more than merely the husband's ignorance of what the father said or did must appear, to make it a fraud on his marital rights." It is well said in the same case, "it is not unreasonable to presume that the husband is willing to accept a donation, although it may be a limited one, and not as much as he might wish or hope for." It is true that Mr. Calhoun avers in his answer, that "at no time before or after his marriage would he have condescended to accept the complainant's bounty on the terms contained in that instrument," but this sentiment from whatever source it may originate, idiosyncrasy or accidental combination of circumstances, is not common to mankind, and cannot be the basis of judicial action. Nothing offensive appears in the terms of gift, and surely a gift of valuable chattels to one for life, with remainder to his issue by a particular wife, is better than no gift at all. The forbearance of plaintiff to inform his son-in-law of the terms may be explained by referring it to motives of prudence and delicacy, without any impeachment of his own good faith or the honor of

the son-in-law. I forbear to engage further in the controversy, still sub judice as to the effect of parol declarations of the father qualifying the interest of the son-in-law in chattels delivered to him, made before or at the time of delivery, but not communicated to the latter. The question is discussed in *Banks v. Hatton*, 1 N. and McC. 221; *Brashears v. Blaisingame*, Ib. 221, note; *White v. Palmer*, McMul. Eq. 115; *Edings v. Whaley*, 1 Rich. Eq. 310; *Lark v. Cunningham*, *supra*; *Watson v. Kennedy*, 3 Strob. Eq. 1; *Henson v. Kinard*, Ib. 371; *Richmond v. Yongue*, 5 Strob. L. 46. The last two cases control my judgment, that where the delivery of chattels takes effect

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from a deed of the father with *limitations over or conditions, the whole title of the son-in-law is acquired under the deed, whether he is informed of it or not, and that the donor cannot enlarge this title by any subsequent delivery of the chattels to the disparagement of the rights of others conferred by the deed.

It was argued that this deed was void as in restraint of marriage, and 1 Sto. E. J. 274,290, and many cases were cited, but this doctrine is considered inapplicable, as the deed was made after the marriage of the parties affected by it.

It is ordered and decreed that the defendant, William L. Calhoun, deliver the slaves now in his possession, named in the deed bearing date February 1, 1853, with their increase, to the plaintiff, and account with him before the Commissioner for their hire since April 26, 1857; and that said plaintiff distribute said slaves, together with Bob and Mary, among his daughters, the defendants, and pay over to his daughters the amount of such hire and the value of the labor of Bob and Mary. Each party to pay his own costs.

The defendant, W. L. Calhoun, appealed, on the grounds:

1. Because the property claimed under the deed was absolutely given to defendant by the plaintiff, and delivered to him.
2. Because the deed is a fraud on defendant's marital rights.
3. Because the property is not effectually given over and the condition is void.
4. Because the limitation over is in restraint of marriage and void.
5. Because the deed is a marriage settlement to which defendant, Calhoun, was no party, and not being recorded according to the Act of Assembly, is binding on the husband only where he has notice or is a party to it.
6. Because "heirs" in the deed was used technically and not in a sense to denote children.
7. Because the deed is fraudulent and void as to defendant, who was kept in profound ignorance of it, and both its existence and contents were concealed from him.

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*8. Because the deed was not duly executed and delivered before the property passed into the defendant's possession.

9. Because the efficacy of defendant's answer as proof was restricted to a mere denial of plaintiff's allegations.

10. Because on the death of plaintiff's daughter, Margaret, without children, and the second marriage of defendant, Calhoun, the trusts of the deed ceased and determined, leaving the property discharged of all trusts and vesting legally in the remaindermen. His Honor, therefore, erred in holding that there was even a scintilla of right in plaintiff as trustee to implead the defendants.

Petigru, Noble, for appellant.
McGowan, contra.

First.—The deed was signed, sealed and delivered, and took effect, before the property was delivered either to the agent of the defendant, Calhoun, or to himself.

1. The evidence is quite satisfactory as to the time when the deed was delivered.

2. Delivery to the witness for the purpose of registry, is delivery to Hemphill the trustee.

3. The assent and acceptance of Hemphill was unnecessary.—*Dawson v. Dawson*, Rich. E. 243; *Ingraham v. Porter*, 4 McC. 198; *Jaggers v. Estris*, 3 Strob. E. 379.

4. But if the assent of trustee is necessary, it will be presumed in this case. Hemphill was the brother-in-law of Cloud. He lived near him and he had made him trustee in other deeds.

Second.—The deed having been legally executed and delivered, constitutes in all things the law of the case; provided, always, it was executed in good faith.—*Richmond v. Young*, 5 Stro. 47; *Henson v. Kinard*, 3 Stro. 371.

We deny that there is in the whole case the slightest evidence of bad faith. The

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onus is upon the appellant, but he *has shown none. It was the custom of Dr. Cloud to entail the negroes he gave his daughters. There was no secrecy here, and there is nothing unusual or out of the ordinary course.

1. Omission to record within three months is no evidence of bad faith, or legal objection to this deed. The omission was accidental, and not desired by Dr. Cloud. It was unnecessary to record. *Brown v. Wood*, 6 Rich. E. 175.

2. The ignorance of husband—mere forbearance to speak of the matter, is no evidence of bad faith.—*Richmond v. Young*, 5 Strob. 46; *Henson v. Kinard*, 3 Strob. 371; *Lark v. Cunningham*, 7 Rich. 57 and 376; *Moore v. Gwyn*, 4 Iredell Eq. 275; *Collier v. Poe*, 1 Devreux, E. 55.

3. The deed was not a marriage settlement within the meaning of the act, but a voluntary gift by the father after marriage. He had the right to give or not to give, and to

place upon the gift any condition he pleased, always provided it was done in good faith.

Third. The deed, then, being the law of the case, we maintain that the true construction of the deed requires us to give to the word "heirs," the signification of children. "The remainder of heirs," evidently means, in reference to Mrs. Calhoun, "the remainder of my children."—*Holman v. Fork*, Stro. E. 72; *Lockwood v. Jessup*, 9 Const. 272; 4 *Pickering*, 289; 1 *Devreux & Battle* E. 396; 9 *Mass.* 307.

Fourth.—The trust is not executed. The trustee—and he being dead—his administrator properly filed this bill. The trust is not executed until the property is recovered and delivered.

1. The property is personalty, and is conveyed absolutely to the trustee. The trustee has the legal title.

2. The remainder over was a contingent remainder—a double contingency—viz: that Mrs. C. should die without leaving children, and also without will. The purposes of the trust required absolute estate. *Fletcher on Estates of Trustees* 11.—*Biscoe v. Perkins*, 1

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Ves. and Beame, 485; *Summerwith v. Littlehidge*, 6 *Taunt.* 213; *Harris v. Pugh*; 4 *Bingh.* 335; *Doe v. Passingham*, 6 *Barn & Cress.* 305.

3. Uses by the operation of the statute of Henry VIII, became merged in the legal estate; but special trusts and trusts of chattels were not within the provision of the act; the former because the use as well as the legal interest was in the trustee; the latter because a termor is said to be possessed and not to be seized of the property. *Lewin on Trusts and Trustees*, page 9.

4. The absolute estate being in the trustee, it survives to his administrator, and must remain there. If the fee became vested in the trustee, the inheritance remains in him, unless, perhaps, a shifting use should be created by the terms of the will or deed.—*Ex parte John Gadsden*; *South Carolina Law Journal*, 343; 3 *Rich.* 467.

5. A trust executed is where the limitations of an equitable interest are complete and final; in the trust executory the limitations of the equitable interest are not intended to be complete and final, but merely to receive instructions for perpetuating the settlement at some future period. *Lewin*, page 25.

6. The rule is where something remains to be done—as pay debts, make sales, or "return and be divided."—*Willis on Trustees*, 13; 1 *Madd. Chan.* 452; *Rice v. Burnet*, *Speer.* E. 591; *Holmer v. Pitts*, 2 *McMullen*, 298; *Jones v. Cole*, 2 *Bail.* 330; *Joor v. Hodges*, *Speers* E. 596; *Keilly v. Fowler*, 2 *Fearne*, p. 396, note o.

Fifth. The trustee was necessarily a party to the proceedings. 1 *Daniel's*, C. P. 247. *Martin v. Martin*, 2 *Johnson*, 238; *Fish v.*

Howland, 1, *Paige*, 28; *Story Eq. P. Sec.* 201, 209, and note.

In equity, it is sufficient that all parties interested should be before the Court, either as plaintiff or defendant. *Calvert on Parties*, page 3.

But when the whole case is out, and all the parties are before the Court, the rights

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of the parties will be adjudged. **Ancker v. Ling*, 3 *Stro. E.* 210; *Bank v. Rose*, 1 *Rich.* 294. It was proper that the bill should be filed in the name of the trustee; first, because the estate was in him for the purposes of recovery, division and delivery; and second, because the reversion would necessarily be vested in him, if the Court should hold that the word "heirs" should be construed technically, and on that account the limitation over should fail.

The opinion of the Court was delivered by

WARDLAW, Ch. I always regret to be the organ of this Court in affirming my own decrees on circuit. But from the large number of appeals from my judgments, I am obliged in the regular rotation of labor among the members of the Court to perform frequently this disagreeable duty.

On the points argued before me on circuit, my opinions were carefully and fully expressed; and I do not find on reflection that I can add much which is profitable.

On some matters brought into discussion by the appeal, some remarks may be suitably made. It is urged earnestly that the deed of gift in controversy in this case is a marriage settlement, requiring by our statutes to be registered. Undoubtedly, every gift by a parent to his son or daughter, after marriage, partakes to some extent of the nature of a marriage settlement, as intended to provide for the sustentation of the child and any issue of the marriage. It is not suggested that such a gift in strictness of definition is a marriage settlement, for such settlement always proceeds on the consideration of marriage. But it is argued that the leading case of *Price v. White*, *Bail. Eq.* 244, *Carolina L. J.* 297, followed by many subsequent cases, decided that a voluntary conveyance by a husband of his property to his wife and children was a marriage settlement, needing registration, and that every conveyance having substantially the same purposes should be put in the same category. If the doctrine of *Price v. White* were considered open to discussion, opposite views might be reasonably entertained; but treating that doctrine as settled, certainly no case in this State has

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intimated that a gift to wife and *children by other person than a husband was to be regarded as a marriage settlement. Indeed, in cases of post-nuptial settlement by a husband, on some new consideration proceeding from the wife, such as the renunciation of

her inheritance, the Court has distinctly refused to apply the doctrine of *Price v. White*; *Banks v. Brown*, 2 Hill Eq. 558 [30 Am. Dec. 380]; *Sibley v. Tutt*, McMull. Eq. 320; *Napier v. Wightman*, Speers, Eq. 367. But it is a mere abuse of terms to call a donation by a father for the benefit of the family of his son or daughter, or by any third person, a marriage settlement. If a judge should give his law library to his son after marriage, with limitation over to his grand-son, who happened to be a practicing lawyer, would that be a marriage settlement? If a fond father should give to his daughter, Fanny, after her marriage, a gold goblet, inscribed with that name, with remainder to his grand-daughter of the same name, would that be a marriage settlement? But really the Court cannot in proper respect for itself renew the discussion of settled points, however earnest and able may be the expression of dissatisfaction by counsel. It is quite clear from the cases cited *supra*, and in the circuit decree, that this Court never treated a post-nuptial gift, except by the husband of his own property, as a marriage settlement; and that on the contrary gifts by third persons, although in sustentation of the family, were uniformly considered not to be marriage settlements. *Banks v. Brown*. This point is assumed, if not decided, in the cases of *Lark v. Cunningham*, *Henson v. Kinard*, *Richmond v. Youngue*, *Baskins v. Giles*, Rice Eq. 315; *Le-Prince v. Guillemot*, 1 Rich. Eq. 187, and other cases.

In the same connexion, it is strongly insisted that the deed in question was an underhand arrangement, in fraud of the marital rights of the principal defendant, and void because not communicated to him.

Peculiar opinions on the part of parties, or their advisers, cannot justify Courts in departing from the ordinary course of judgment. It is within the knowledge of mem-

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bers of the *Court that some of the most learned lawyers and most honorable men in the State have pursued precisely the course of the plaintiff here; and we think it would startle the common sentiment of the people of the State, to announce from the seat of judgment that it was a fraudulent concealment in a father to settle property on his daughter without conferring with his son-in-law. On this point, however, we are content with the reasoning of the circuit decree.

Again, it is urged that the limitation over in this case is void as in restraint of the subsequent marriage of the principal defendant. Without entering into doubtful disputations, it may be conceded that where a life estate, or greater interest, is granted to one, to be defeated on a condition subsequent if he marry, that the condition is void and the estate unaffected by the condition. But here no estate whatever is conferred on Mr. Cal-

houn. An option or privilege of retaining the custody and enjoyment of the slaves while he remained widower of his wife, Margaret, is bestowed on him, but no defeasible estate for life, or otherwise, is bestowed. But if such estate be conceded to be given to him, it is by express limitation to him while he remains single, and not on a condition to be void if he marry again. His second marriage is mentioned only to describe the time and event on which the property was to go over, and not to prescribe a condition defeating a larger estate previously given to him. I have not leisure to indulge in disquisitions about the nice distinctions between limitations and conditions, and content myself with referring to note 4 in *Rop. on Leg. 797*; *Story E. J. sec. 396*.

It is admitted that the limitation over is not void for remoteness, as it depends on the second marriage of one then in life; but it is argued that on the interpretation given in the circuit decree to the word "heirs," children might exclude grand-children, or remoter descendants of a decedent child of donor. It may be that the words of the decree, used in application to the actual state of things where all the children are surviving, are somewhat loose; but it was not in-

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tended to *intimate that children would exclude others who might be heirs apparent under our statute of distributions. It is not a case where a contest arises between children and other descendants, by reason of the use of the word children, as in *Ruff v. Rutherford*, Bail. Eq. 7; for the word describing the limitees over is "heirs," large enough in meaning to include all heirs apparent under our statutes of distributions. In strictness, the term heirs is inappropriate to personality, and must from necessity be interpreted in a secondary sense. In this case, when the donor refers manifestly to his daughter, Margaret, as one of his heirs, and then speaks of the remainder of his heirs on her death, his meaning is transparent. I add to the authorities in the decree on the interpretation of the word heirs: 6 *Cruise*, Dig. 184; *Bowen v. Porter*, 4 *Pick.* 208; *Sims v. Garnett*, 1 *Dev. & Bat. Eq.* 394.

It is ordered and decreed that the circuit decree be affirmed and the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *377

*J. N. McELWEE, Jr. v. L. H. MASSEY and JOHN FOSTER.

(Columbia. Nov. and Dec. Term, 1858.)

[*Equity* ⇐ 247.]

Where a demurrer for multifariousness is sustained, the plaintiff may, if the demurrer goes only to part of the bill, leaving other parts

untouched and maintainable against all the defendants, obtain leave to amend the bill by striking out the objectionable parts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 520; Dec. Dig. ⚭247.]

[Equity ⚭271.]

Where the demurrer goes to the whole bill, the Court will sometimes withhold a decision upon the demurrer, and give the plaintiff leave to amend; and may, it seems, give such leave, even after demurrer to the whole bill has been sustained.

[Ed. Note.—Cited in *Edwards v. Sartor*, 1 S. C. 270.

For other cases, see Equity, Cent. Dig. §§ 558-560; Dec. Dig. ⚭271.]

[Equity ⚭150.]

[A creditors' bill filed against A., to whom the debtor had made an assignment of his estate for the benefit of his creditors, and against B., to whom the debtor had sold slaves, praying that both the assignment to A. and the sale to B. might be set aside as fraudulent and void, was held objectionable for multifariousness.]

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 377; Dec. Dig. ⚭150.]

Before Dargan, Ch., at York, June, 1858.

Demurrer for multifariousness. The bill alleged that W. B. Dunlap, being indebted to the plaintiff and others, executed an assignment of his estate to the defendant, L. H. Massey, for the benefit of his creditors: that amongst the preferred debts were several stated to be due to the defendant, John Foster, on sealed notes—the plaintiff's debt being in a lower class. The bill further alleged that the principal debt stated to be due to John Foster was pretensive and fraudulent, and that shortly before the execution of the assignment Dunlap made a bill of sale of four slaves to the said John Foster; that said bill of sale was also fraudulent and pretensive, and that Dunlap had left the State. The prayer was that the assignment to Massey be set aside as fraudulent and void, and the assigned estate distributed among all the creditors; that the principal debt stated to be due to John Foster be disregarded, and that the bill of sale to the said John Foster of four slaves be set aside and declared null and void

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and said slaves sold and the proceeds applied to the payment of the debts due by the said W. B. Dunlap.

His Honor sustained the demurrer and ordered that the bill be dismissed.

The plaintiff appealed.

Clawson, Smith, for appellant.
Williams, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The assignment of W. B. Dunlap to the defendant, L. H. Massey, does not purport to be a general assignment of his estate. The defendant, Massey, has, therefore, no concern in any way with the alleged fraudulent transfer of four slaves by Dunlap to John Foster, and, on that ground the bill

was properly obnoxious to the charge of multifariousness. But for the other matters charged in the bill the same may be well maintained, as it appears to the Court, against both defendants; as is stated by Mr. Mitford (Mitf. Pl. 254,) after a demurrer to the whole bill is allowed the bill is out of Court; and to avoid this consequence, the Court has sometimes, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill, paying the cost incurred by the defendant—and, in a note, cases are cited in which the Court, upon allowing a demurrer, have given the party leave to amend. But (he continues) where a demurrer leaves any part of the bill untouched, the whole may be amended notwithstanding the allowance of the demurrer.

In Story's Equity Pl. § 532, a case is cited where a suit was brought against a corporation to establish eight charitable trusts created by distinct instruments and different donors at different times, for charitable purposes generally similar in their nature; and no other corporation was interested in any of them but the last charity. It was held by the Court, upon a demurrer for multifarious-

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ness, that the bill was maintainable for the first seven charities; and that the bill might be amended by striking out the eighth charity, in which another corporation was interested.

The Court is of opinion that leave should have been given to the plaintiff to amend his bill by striking out all that part which relates to the alleged fraudulent transfer of four slaves by W. B. Dunlap to the defendant, John Foster, the plaintiff paying to the defendant, S. H. Massey, the costs on the demurrer. It is now so ordered, and the decree of the Circuit Court, dismissing the plaintiff's bill, is reformed accordingly.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

10 Rich. Eq. *380

*ABRAHAM DUKE and Wife v. R. M. PALMER, and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Wills ⚭693.]

Where the will gives an estate for life in chattels, with direction that at the death of the tenant for life, the chattels be sold and divided, the executors have no power to sell before the termination of the life estate, without leave of the Court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1657; Dec. Dig. ⚭693.]

[Husband and Wife ⚭8.]

Where the wife has an expectant interest in chattels, though a transfer, or concurrence in the transfer of her interest, by herself and husband, will not bind her if she be the survivor when the expectancy falls in, yet if, at that time, they both be living, and he then be ca-

pable of reducing the expectancy into possession, they will both be bound by the transfer.

[Ed. Note.—Cited in *Shuler v. Bull*, 15 S. C. 432, 433.

For other cases, see *Husband and Wife*, Cent. Dig. § 25; Dec. Dig. ¶8.]

Before Wardlaw, Ch., at Abbeville, June, 1858.

This case will be sufficiently understood from the Circuit decree, which is as follows:

Wardlaw, Ch. Russell Cannon died in the summer of 1824, leaving a will, dated July 10, of same year, attested by two witnesses, whereof he appointed his wife, Jean, and his son, Elijah, executors, and whereby he bequeathed to his wife a negro, Simon, and other chattels absolutely, and also the slaves Rose, Willis, and Cate, during her life, and at her death to be sold and equally divided among his lawful heirs; and further directed that the residue of his estate after her death should be sold and equally divided among his children. This will was admitted to probate in the office of the Ordinary of Pendleton, September 6, 1824, and Elijah Cannon at the same time qualified as executor. Upon the death of testator, the widow, Jean, succeeded to the possession of the slave, Willis, and she retained him until the spring of

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1834, when *with her co-operation, Elijah Cannon sold Willis, then about twenty years old, to Sheriff Haynes, for \$525, which, by the evidence, was a full price for an absolute estate in the slave. At the time of this sale plaintiffs resided about four miles from Haynes' within the present Pickens District, and they abiding at the same place. Jean Cannon became an inmate of their family some years afterwards, and so remained until her death in 1855. Willis was instructed to some extent by Haynes in the work of a blacksmith, and after other transfers of him, was sold by Thomas Garvin to defendant, Palmer, on March 23, 1848, with warranty of the title, soundness and good character of the slave, for the price of \$700. Garvin is reputed to be solvent; Haynes died about twelve years ago, leaving some estate; and about the same time Elijah Cannon removed to Texas, where he is now residing, in Grayson county, with a competent estate. Harriet Duke is a daughter of testator, and in her right plaintiffs filed this bill, March 10, 1858, against the purchaser Palmer, resident in Abbeville, and against her co-heirs or distributees, who are children and grandchildren of testator, and all resident without the limits of the State. The bill prays for partition of Willis and account of his hire against defendant, Palmer, and for general relief against all the defendants. It is taken pro confesso, against all the defendants, except Palmer, but he by answer stoutly contests the claim.

This defendant alone is vigorously pursued; and he defends himself in the first

place by the plea of purchaser for value without notice. The plaintiffs allege that he purchased at an inadequate price, and infer from this that he was aware of the defectiveness of the title he acquired; but he denies all actual notice of any right to the slave, legal or equitable, on the part of plaintiffs, and alleges and proves that he paid a full price for full title. If the estate in the slave specifically had been limited to the heirs of testator after the life interest of the widow, theirs would have been a legal title to which this plea would have been inapplicable.

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*It appears by the bill that plaintiff, Harriet, while sole, and her son Ranson Duke, after Elijah Cannon left the State, obtained grant from the Ordinary of Pickens District of the administration of the estate of Russell Cannon, with the will annexed; but that plaintiffs have been advised that this grant was improvident and inefficacious to revoke the letters testamentary of Elijah Cannon. It is not clear that this advice was sound—Ex parte Galluchat, 1 Hill, Eq. 150; and it is at least probable that such grant of administration by the Ordinary would be respected by other tribunals until revoked by the Ordinary.

In the alternative that the slave is legally limited in remainder, the defendant urges that the remedy at law is plain and adequate, and ousts this Court of jurisdiction, and this defence would deserve favorable consideration, for it is not the course of Equity to afford its remedies, (where the law Court may intervene,) in favor of a claim so stale and suspicious as that now presented. It is urged in reply that partition, a great head of Equity, affords the only relief, as the defendant has acquired the title of Elijah Cannon, one of the common distributees of the remainder, and perhaps that of Jean Cannon, if she be an heir of testator. The scheme of the bill is that Jean Cannon and Elijah Cannon, as her agent, sold only her interest for life, and of course their interests in remainder, remain unaffected by the sale. Parties, however, are not concluded as to the right of a cause by statements in a bill and particular arguments of counsel; and it is proper to consider the result on the hypothesis that Elijah Cannon sold as executor. If he did so sell, he rightfully transferred not only his and the widow's shares, but the interests of all the legatees. It is said that the will conferred no authority on him to sell; and that, if it did, he had discharged his whole functions of executor and terminated his office previously, by delivery of the property to the tenant for life, who thus became substituted trustee for the remaindermen. Considering the authorization by the will in-

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dependently of the gift for *life, the power of the executor to sell is unquestionable. Even as to lands, if a will directs sale for

distribution of the proceeds among legatees, without declaring by whom the sale shall be made, executors may sell and convey; 5 Stat. 15: and as to chattels, executors as legal owners with trusts must sell them frequently, even when specifically bequeathed, for payment of debts, and may always sell them to an honest purchaser, without imposing on him obligation to inquire into the necessity of sale, or to see to the proper appropriation of the proceeds; 2 Wm's Ex'rs. 670. Then as to the point that the executor in this case was *functus officio* before the sale, the affirmative conclusion would be inevitable if the slave himself had been limited in remainder to the heirs of testator. *McMullin v. Brown*, 2 Hill, Eq. 459; *Alexander v. Williams*, 2 Hill, 522; *Spear & Galbreath v. Rice*, Harp. 20. In that posture the estate of plaintiffs, with that of their cotenants, would be legal, and they would be remitted to the dilemma as to the jurisdiction of the Court. It may be said further that possibly *Elijah Cannon* sold as executor and also for himself and as his mother, as proprietors of the life interest and portions of the remainder; but if he sold at all as executor he sold the whole estate in the slave, and the fullness of the price paid and all the circumstances of the case exclude the supposition that he sold only the life interest and portions of the remainder. He sold to a neighbor without furtiveness; and the plaintiffs were probably cognizant of the sale and consenting to it, and none of the other heirs has made complaint. If, indeed, I had concluded that the estate in remainder was legal, I might have hesitated to determine that, having ceased to be executor, he acted otherwise than he might act lawfully as agent of his mother and in his own right. Whether or not the widow had any share in the remainder, is a question doubtful in itself and too unimportant to justify protracted investigation.

In my opinion, however, the estate of plaintiffs and others in the same right is merely

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equitable. Willis was not given *to them on termination of the widow's interest, but he was directed to be sold and the proceeds divided. Their interest was not in the chattel itself but in the money into which it should be converted. In this aspect the plea of purchaser without notice applies *prima facie*, but then the objection supervenes that the defendant is fixed with implied notice from the registry of the will. *Ellis v. Woods*, 9 Rich. Eq. 26. Nevertheless, I further think that where the life estate only is legal and the remainder equitable, as in this case, the office of the executor is not discharged but merely suspended by the delivery of the chattel to the tenant for life, and is properly resumed at the termination of the life estate. In such condition of things it would be the duty of the executor to resume possession and con-

trol of the chattel, when the particular interest was determined, for distribution among those ultimately entitled. Here *Jean Cannon's* interest was surrendered and the office of executor reinvested during her life, but this anticipation of the natural period—her death—does not impair the authority of the executor to sell and distribute. In my judgment, *Elijah Cannon* had *prima facie* right to sell, and in the absence of all collusion between the original and any subsequent purchaser and the executor to abuse the executor's authority, that *Palmer's* title must be protected, especially as it is fortified by the statute of limitations.

It appeared in evidence that, if the plaintiffs had not in fact been paid their portion of the price of Willis, assets arising from the sale of other portions of the property given to *Jean Cannon* for life, remained for such satisfaction; this evidence was gratifying in the prospect that the plaintiffs were not likely to lose, but did not come within the pleadings so as to justify a decree in this proceeding against the absent executor, and it affords an additional ground for refusing remedy against *Palmer*.

It is ordered and decreed that the bill be dismissed.

The plaintiffs appealed on the ground:

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*Because it is respectfully submitted his Honor erred in ruling that *Elijah Cannon*, the executor, had the right to sell Willis in the life-time of the tenant for life without the consent of the remaindermen.

Perrin & Cothran, for appellants.

McGowan & Thomson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The Act of 1824 declares that no sale of personal property thereafter made by an executor or administrator, without an order from the Court of Ordinary, or Court of Equity, shall be valid in law or equity, except it be directed by the will.

This sale was made by the executor in the spring of 1834, and must depend for its validity on the power granted by the will. In England, it is very well settled that such power given by the will to the executor to sell real estate, must be strictly construed; and that when a time is fixed for the sale, the executor is not permitted to anticipate the time; "a power of sale, like all other powers, can be exercised only in the mode, and subject to the conditions, if any, prescribed by the instrument creating the power. Therefore, where the trust is to sell after the death of the tenant for life, a sale in his life time will be bad." *Hill on Trustees*, 478, citing *Sir James Wigram V. C. in Blacklow v. Laws*, 2 Hare. 40.

By the terms of this will, the negroes were bequeathed to testator's wife "during her natural life, and at her death to be sold

and equally divided amongst his lawful heirs." The power is not expressly given to the executors, to make the sale and division; but this as properly results from their appointment. But the period fixed by the testator for the sale and division was at the death of his widow. If the exigencies of the estate required a departure from the provi-

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sions *of the will, it was the duty, as it was the right, of the executor to seek and obtain the sanction of the Court. In the absence of such authority, the sale in 1834 was a breach of trust on the part of the executor; and upon the authority cited in the decree, the purchaser from him is affected with notice of the trust.

As the widow was entitled to the possession of the negroes during her natural life, and she co-operated in the sale, the plaintiff's right of enjoyment did not arise until the decease of the widow in 1855. This right was an equity to have the negroes then sold, and the proceeds distributed according to the provisions of the will. See *Bush v. Bush*, 1 Strob. Eq. 377.

In dismissing the plaintiff's bill, the Chancellor relied not merely upon the right of the executor either *virtute officii*, or under the express authority of the will, but also on the assent if not co-operation of the parties ultimately entitled, as inferred from the circumstances detailed in the decree; and he regarded this inference as strengthened by the fact that none of the heirs, except the plaintiff, Harriet Duke, had entered any complaint. The decree, however, remarked, following the statements of the bill, that Harriet Duke had become a widow, and that in her right, the claim was interposed. She was certainly a *feme covert* at the time of the sale by the executor in 1834. In *Terry v. Brunson*, 1 Rich. Eq. 78, it was held that though a vested right of the wife may be effectually assigned by her husband, her contingent interest will survive to her against his assignee, even though the assignment was made for a valuable consideration, and with her concurrence; and, in the recent case of *Larey v. Beazley*, 9 Rich. Eq. 119, the Court ruled that, where a wife has an expectant interest, in chattels, whether such interest be vested or contingent, legal or equitable, no act of the husband or of any third person, in vesting the husband, a wife, or both, with the present or particular

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estate, will operate to vest the *future or expectant interest of the wife in her husband—other intermediate cases had fully recognized the general principle. And relying upon the statements of the bill, as repeated in the decree, that these proceedings were instituted in right of Harriet Duke, who had become *discovert* since the sale in 1834, the Court was of opinion that her right was

not precluded by the acquiescence, assent, or co-operation of her husband in that sale. But, upon an inquiry suggested at the hearing, and upon examination of the evidence, and, since, upon the admissions of the plaintiff's solicitor, it now appears that the statement of the bill, that the plaintiff, Harriet Duke, had become a widow, was made on misapprehension; and that, in fact, the plaintiffs, Abram Duke and wife, who prefer this bill, are the same persons who were married prior to the sale in 1834; at whose house the life tenant subsequently lived and died, and who (the Chancellor infers) sanctioned the sale made by the executor, with the co-operation of the tenant for life. This statement materially varies the rights of the parties. In the well considered cases of *Mathe-ney v. Guess*, 2 Hill Eq. 67, and *Reese v. Holmes*, 5 Rich. Eq. 564, the general principle is recognized and affirmed that neither the husband alone, nor the husband and wife jointly, have the power during the coverture, to assign the wife's expectant interest, so as to defeat the right of the wife in remainder when it falls in, should the husband be then dead. But, while the inefficacy of a husband's assignment made before he acquired the right to reduce, and who did not live to acquire that right, is thus affirmed, both cases recognize the distinction made by Lord Lyndhurst in *Honner v. Morton*, 3 Russ. 65, that, should the husband survive until the right falls in, and then be capable of reducing the same into possession, "his previous assignment will operate on his actual situation, and the property will be transferred."

The defendant seeks no aid from this Court. No act is to be done by him. If

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Abram Duke had been himself the *expectant legatee, the circumstances detailed in the decree of the Circuit Court would be quite sufficient to warrant the decree which declines to grant him any assistance in assailing the title or disturbing the possession of the purchaser.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *389

*JOHN BALLARD and Wife, and Others, v. THOMAS H. CONNORS, and Others.
(Columbia. Nov. and Dec. Term, 1858.)

[Wills 524.]

The testator, as to certain lands, declared that, should they not be sold by himself, "then I wish my executors to dispose of them to the best advantage, and when in funds for the same, I wish for them to divide the money among the whole of my surviving children, share and share like, to them and their lawful heirs for-

ever:"—*Held*, that the testator, by the term "surviving," meant the children who survived him, and not those who were living when the funds arising from the sales were in the hands of the executors.

[Ed. Note.—Cited in *Selman v. Robertson*, 46 S. C. 273, 24 S. E. 187.

For other cases, see Wills, Cent. Dig. § 1117; Dec. Dig. ¶524.]

Before Dunkin, Ch., at Sumter, June, 1858.

This bill was for settlement of the estate of Charles Connors, who died on the 5th March, 1843, leaving a last will and testament. The plaintiff, Unity Ballard, was the administratrix of Jared B. Connors, one of the children of testator, who died in April, 1848. So much of the Circuit decree of his Honor Chancellor Dunkin, as relates to the only question made in the Court of Appeals, is as follows:

Dunkin, Ch. In the last disposing clause of the testator's will, it is provided as follows: "It is my will and desire that, should any of my children die under age, or without leaving lawful heirs, such property as they received by my will to be taken and divided equally among my surviving children," &c. None of the children died under age before they received their property, and it was assumed, (as the Court thinks justly,) that the contingency did not occur upon which the property which they had received should be taken and divided among the survivors. The clause proceeds: "Should my Mill Plantation and that tract of Land on

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Black River, bought of William Lloyd, be not sold by myself, then I wish my executors to dispose of them to the best advantage, and when in funds for the same, I wish for them to divide the money among the whole of my surviving children, share and share alike, to them and their lawful heirs, forever." The Lloyd tract of land was sold in 1848, and the intestate, Charles P. Connors, received his full share of the proceeds, as appears from his receipts to the executor, of June 3, 1848, and 23d January, 1850. As to the mill tract, Charles P. Connors, on 28th December, 1844, by his conveyance under hand and seal, and duly attested, for valuable consideration, transferred to the defendants, Tho. H. Connors and Matthew H. Connors, all his right, title and interest in the plantation known as Charles Connor's Mill Land, on Taw-Caw, &c. The plaintiff, Unity, then the wife of the said Charles P. Connors, duly relinquished all claim of dower in the premises, before the proper officer. Part of the mill tract was sold by the executors in 1853, and the remainder on January 1, 1857. No part of the purchase money was paid until 1856, and for the greater part the term of credit has not yet expired. Any one claiming under Charles P. Connors is estopped by the deed of 28th December, 1844. But in another point of view, it may be important to determine among whom the sales of the Lloyd land and

mill plantation were divisible. At the time of the execution of the testator's will, and also at his decease, all his children were alive. The lands are directed to be sold by his executors, "to the best advantage," and "when in funds for the same, he desires them to divide the money among the whole of my surviving children." The testator left children by two marriages, and in his will he had, in another clause, used the same expression "whole," so as to include both sets of children. But the term "surviving" must refer to the children alive at the sale, or at the receipt of the purchase money. The court adopts the construction, that the children of the testator alive at the receipt of the sales money of the tracts respectively,

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were alone entitled to participate in the *proceeds. See *Hoghton v. Whitgreave*, 1 Jac. and Walk. 146; *Brograve v. Winder*, 2 Ves. Jr., 634. The effect of the Stat. 25 Geo. 2, is only to enlarge the shares of the class. 2 Wm's Ex'ors, 1258. Several issues are presented by the pleadings, and the facts and dates are numerous and complicated. Not without some effort to be accurate, the Court may not have entirely succeeded in stating all the important facts, or discussing the several points submitted by counsel. With the exception of the testimony of the Rev'd Mr. Mahoney and of Mr. Rhame, taken at the hearing all the evidence is in paper, and any omissions on the part of the Court may be easily supplied, and any inaccuracies corrected. After a review of the whole subject matter, the Court is of opinion that the bill of the plaintiffs should be dismissed, and it is so accordingly ordered and decreed.

The plaintiffs appealed from so much of the decree as relates to the distribution of the proceeds of the sale of the Lloyd plantation and mill tract, on the grounds:

1. That, at the hearing on circuit, when the point was made as to said tract of land, and the position assumed by plaintiffs' counsel that said proceeds were distributable among all the children who survived the testator, the defendants' counsel conceded the point, and so admitted.

2. That, by a proper construction of the will, the Court should have held the proceeds of said lands liable to distribution among all the children who survived the testator.

Moses, for appellant.

Blanding, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The single question on this appeal relates to the time to which words of survivorship should be referred.

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*The testator says: "Should my mill plantation and that tract of land on Black River, bought of William Lloyd, be not sold by myself, then I wish my executors to dispose

of them to the best advantage, and when in funds for the same, I wish for them to divide the money among the whole of my surviving children, share and share alike, to them and their lawful heirs forever." Some of the children of testator who survived him, died before the executors sold the lands and collected the proceeds, (the latter particular is not yet completed,) and the controversy is whether their representatives be entitled to take shares of the proceeds of sale.

The first ground of appeal asserts that at the hearing the counsel of the other party yielded the point. This is not admitted before us, and no agreement in writing is produced. If it were surely a Chancellor is not bound to misdecide a question of law, such as the construction of a will, on any consent of counsel.

The second ground of appeal, however, squarely presents the point of construction. It is probably superfluous in respect to any difficulty in the question—it is certainly impracticable in the demands on my time, to discuss this matter elaborately. Some plain propositions seem sufficient for the judgment.

In general, words of survivorship are significant of the death of testator, but when a future period of distribution is fixed by a will, such as the termination of a life estate, or when a legatee shall attain twenty-one years, then for the benefit of the legatees and in increase of the objects of bounty, the terms are referred to the period of distribution. When the enjoyment of the estate by those ultimately entitled, is absolutely postponed to a future day by a supervening estate, it is natural and just to make the chances of survivorship applicable to such future day. But in this case no estate whatever is given to the executors, and a mere power or trust is conferred on them to sell, in the event the testator did not sell, as expressly he contemplated. On the death of

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testator, *the land descended to his heirs or devisees, and it would really enable the executors to make his will by their caprice as to the time of sale, to hold that all his children, living at his death, were not entitled to shares of the proceeds of sale.

It is ordered and decreed that the second ground of appeal be sustained and that the Circuit decree be modified accordingly.

JOHNSTON and WARDLAW, CC., concurred.

Decree modified.

10 Rich. Eq. *394

*JOHN D. PRITCHETT and Others v. WILLIAM H. CANNON and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Wills Ⓒ617.]

Testator bequeathed as follows: "I give and bequeath to my daughter, A. N., two negro

girls, to wit: Hanna and Dina, which is intailed to her brothers, she leaving no lawful issue;" —Held, that the limitation to the brothers was valid, and that they took transmissible interests, which became absolute upon the death of A. N. without issue.

[Ed. Note. Cited in *Dickson v. Dickson*, 23 S. C. 225, 226; *Roundtree v. Roundtree*, 26 S. C. 472, 2 S. E. 474; *Smith v. Clinkscles*, 85 S. E. 1067.

For other cases, see *Wills*, Cent. Dig. § 1431; Dec. Dig. Ⓒ617.]

Before Dunkin, Ch., at Darlington, February, 1858.

Dunkin, Ch. The principal question in this cause arises on the ninth clause of the Will of Zachariah Nettles, deceased, which clause is in the following words, to wit:—"9th. Also, I give and bequeath to my daughter, Anna Nettles, two Negro Girls, to wit: Hanna and Dina; also, I give her one Feather Bed and furniture, one stock Cattle, mark (thus) Poplar Leaf in the Right Ear, and Crop and Slit in the left Ear, and one gray Horse, which is intailed to her Brothers, she leaving no lawful issue." The will bears date 16th November, 1803, and was admitted to probate 30th December, of the same year. Anna Nettles received the property bequeathed to her, and intermarried, in the first instance, with Jordan Sanders, whom she survived, and subsequently with William H. Cannon, whom she also survived. She departed this life in May, 1854, never having had issue.

At the time of the execution of the will, and of the testator's death, he had four sons, to wit: Robert, James, Zachariah and John, brothers of the Legatee, Anna Nettles. These brothers all died, intestate, in the lifetime of their sister, and letters of administration on their respective estates have been

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granted *to the plaintiffs, in the manner set forth in the pleadings. The object of the bill is to recover from the defendants (who are volunteers under William H. Cannon or his widow) various slaves, descendants of Dina, bequeathed to Anna Nettles. The plaintiffs gave in evidence a copy of the will of Zachariah Nettles, under the Act of 1823, (6 Stat. 209.) In the progress of the cause the original will was also introduced, and the record of the proceedings in the Court of Ordinary when the same was admitted to probate. In the original will the words (in the ninth clause) "which is intailed to her brothers, she leaving no lawful issue," were evidently interlined, and it is doubtful whether they were in the same hand-writing with the body of the instrument. But, at the close of the instrument and before the signature of the testator or the attesting clause, were the words, "interlined before signed." There was no other interlineation, except this. The will, as interlined, was admitted to probate, and so recorded, immediately after the testator's death. In this proceeding I should

regard the judgment of the Ordinary as conclusive. (Jarman on Wills, 23.) But if it were not conclusive, I should not be disposed, after the lapse of more than half a century, to disturb his conclusions if they seemed less well sustained than they are by the circumstances of the case. (See 1 Greenleaf Ev. § 564.) It appears from the will of the testator that he left a widow, four sons and four daughters, of whom Anna was the youngest and only unmarried daughter. The will, throughout, bears evident marks of care and deliberation.

For his wife, an apparently proper provision is made during her life, and at her decease the whole of his property not disposed of by his will is directed to be distributed between his four sons and his daughter Anna. In the several clauses bequeathing property to the sons, the desire of the testator is clearly manifested, that in event of the death of either without leaving lawful issue, his share should pass to the surviving brothers. Whether his efforts to accomplish this purpose would have proved suc-

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cessful, it is not important to inquire. *To his three married daughters, each, he bequeaths one negro without qualification or restriction, except that the slave bequeathed to Lucy Smith is to be held by her only, until her son, Samuel Smith, becomes twenty-one years of age, when the slave was given to him absolutely.

In the tenth clause, three slaves, (by name,) are given to testator's grand-daughter, Martha Nettles, "but if she should die and leave no lawful issue, then the three negroes to return to his surviving sons or their heirs.

By the ninth clause, as it originally stood, the property bequeathed to his daughter, Anna Nettles, is described with great particularity. The gift was absolute and the clause complete. The tenth and concluding paragraphs followed, and the instrument was perfect, or ready for the formalities of execution. It appeared as if on re-perusal of the paper it had occurred to the testator to make some such provision in regard to the bequest to his unmarried daughter, Anna, as he had made in relation to the bequests to her brothers and to his grand-daughter, Martha Nettles. But there was no room except by interlineation. To borrow the language of the defendants' counsel, "these words were then crowded in." As the Court has already remarked, it is not clear in whose hand-writing the interlineation was made. But it was manifestly the expression of an after-thought—was done hastily, and in looseness and uncertainty—is in striking contrast, not only with the other part of the clause, but with all the other clauses of the will. It is necessary to analyze the language, and to give effect to the intention, if it may be fairly inferred, however inartificial or technically inaccurate may be the terms employed. The gift to the

daughter is, in the first instance, absolute: no other words were requisite to define the amplitude of her estate. In order to qualify, restrict or defeat this absolute interest, the intention of the testator must be manifested by other and further provisions. The rule on this subject is very well established. In favor of vested interests a Court of Equity not only requires the events which were to

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*divest them to happen with certainty, and in strictness, but must be satisfied as to the ulterior intention, and that such intention can be accomplished. "When" (says Mr. Roper) "the event upon which a legacy is limited over, is not so clearly conceived and expressed by the testator as to satisfy a Court of Equity of his intention, or if understood, to enable it to carry that intention into execution, the bequest over will be defeated, and the primary legatee will take an indefeasible vested interest at the death of the testator." (1 Rep. Leg. 604.) So, Mr. Justice Williams, "an original vested gift shall not be qualified by a subsequent gift engrafted on it, which the law will not allow to take effect, as by a gift over, which is void by reason of being too remote, and the rule is general that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect." (2 Williams, Ex'ors 1087.) The authorities cited in the text show that, although the intention to make some restriction on the absolute interest was sufficiently manifest, yet if the purpose was not definitely expressed, or could not be carried into effect, the whole interest remained according to the original gift.

The inquiry is not testacy or intestacy, but of cutting down or qualifying an absolute bequest, clearly created, upon the happening of a particular event, and for a particular purpose. Let us apply these principles to the qualifying terms of the bequest to Anna Nettles. Assuming that the event described is sufficiently specific, and is not too remote, the inquiry is what meaning shall be attached to the terms "which is intailed to her brothers," and that ascertained, secondly, can the purpose of the testator be accomplished. It is manifest that the testator did not intend an absolute gift to the brothers, in the event supposed, or he would have said so in plain terms. He meant what he said. If his daughter should have no issue, he meant to create an estate tail in her brothers. It is not that he has used language from which the Court would imply an estate tail. The testator has left nothing for implication. He has declared his purpose to

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create an estate *tail in the personalty in the brothers of the legatee. It is scarcely necessary to cite the authority of Mr. Fearne to show that "chattels, whether real or personal, cannot be entailed." (2 Fearne, Rem.

307.) Whether the testator would have given an absolute estate to his sons, if he had been advised, that he could not create an estate tail, is a speculation of very difficult solution, and upon which the Court has no authority to enter. The declared purpose of the testator, and for which alone he was willing to cut down the absolute estate of his daughter, cannot be accomplished, and her estate remains absolute. (See *Winckworth v. Winckworth*, 8 Beav. 576.) In the events which happened no interest could have been vested in either of the sons, as they all predeceased the principal legatee, although in the view adopted by the plaintiffs, the interest might have been transmissible not to their issue, but to their personal representatives. Giving any significant interpretation to the language, used by the testator, this was clearly not the purpose which he sought to accomplish.

But it may be said that this provision should be construed in connection with the other clauses and provisions of this testament. Perhaps this is peculiarly proper, considering the character of this interlineation, and the circumstances under which it seems to have been made. The will was evidently prepared with care and attention. The interlineation subsequently engrafted on it was hasty, incomplete, and aiming apparently at conforming this bequest to others of the same character. But if you are to look at the other clauses for the interpretation of any part of this interlineation, you must look to them for the construction of all the terms used. If the general scheme of the testator's will is to guide the Court, the whole scheme should be regarded. By reference to all the principal disposing clauses of the will, it may be seen that while the testator makes elaborate provision for the issue of the first taker, he uniformly provides that, on failure of issue the property should return to "the surviving brothers," or testator's "surviving

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sons." Such are not only the provisions of the several devises and bequests to his four sons, Robert, James, Zachariah and John, but also to his granddaughter, Martha Nettles. After all this is done, and in sufficiently apt and proper phraseology, the testator qualifies the bequest to his daughter, Anna Nettles, by the terms "which is entailed to her brothers, she leaving no lawful issue." It was properly argued that these latter words meant: "If she should die, and leave no lawful issue at the time of her death"—such was the language used in all the preceding clauses.

But who were the brothers for whom in that event provision was made? If his intention may be sought by collating this with the other clauses, if his general scheme is to prevail, he meant her surviving brothers. Nor is the language inconsistent with this construction, assuming that the testator al-

ways looked at the same ulterior objects of his bounty. But, in that view, as is shown in *Eaton v. Barker*, 2 Coll. 124, the gift over, in derogation of the absolute bequest to testator's daughter, having failed by the events which have happened, the bequest remained, and remains absolute.

In the consideration of this cause, the Court has experienced the embarrassment arising from the attempt to ascertain the meaning of a testator, using technical language, without fully understanding its import, and, very probably, without having any very definite idea of his own intentions. But his primary object is clear. The absolute bequest to his daughter is in simple and plain terms, and with a minuteness of description, which precludes misapprehension. All the doubt and difficulty arises on the parenthetical qualification afterwards introduced. The Court is of opinion that the principal absolute bequest should not be impaired by what, at most, Mr. Fearne terms, "a presumptive construction of an undetermined or illiterate testator's intention."

It is ordered and decreed that the bill be dismissed.

The complainants appealed, and now move this Court to reverse the decree for error in

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this, to wit: That, by the terms of bequest, contained in the concluding part of the ninth clause of Zachariah Nettles' will, the absolute interest in the property mentioned in the said clause including the negro Dina, which, in the direct bequest, is given to the testator's daughter, Anna, is effectually cut down to a life estate, she leaving no lawful issue surviving at her death, and an absolute estate in remainder expectant upon that contingency is well limited over to the brothers of the said Anna, living at the testator's death; that this contingent interest, being certain as to the persons, and uncertain only as to the event, was transmissible, and upon the subsequent successive deaths of the said brothers, their several shares devolved upon their respective personal representatives, which representatives the complainants are; and, the contingency having happened, upon which the said remainder was to take effect in enjoyment, his Honor ought to have decreed for the complainants, and to have ordered the defendants severally to deliver up Dina and such of her issue as are in their possession respectively to the complainants, and also the other relief as prayed.

Spain, for appellants.

The words of the limitation should be construed to read thus: "Which I give to her brothers, she dying having no lawful issue alive at the time of her death."

The former words gave Anna Nettles an absolute interest or estate—these superadded words cut down that estate to a life estate, or defeated her absolute estate on her death having no issue alive.

The interest of the brothers was contingent, and notwithstanding their death, in the life-time of Anna, was transmitted to their legal representatives at her death.

Pinbury v. Elkin, 1 P. W. 563: "One possessed of a personal estate, devises, if his wife dies sans issue by him, that then £50 shall be paid to his brother, good; also good though the brother dies in the lifetime of the wife."

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*1 Wm. Ex'or. 638, referring to cases, says: "These cases establish the principle, that contingent and executory interests, though they do not vest in possession, may vest in right, so as to be transmissible to executors and administrators."

What construction shall prevail?

Jarman says, 1 vol. 315: "No degree of technical informality, or of grammatical or orthographical error, nor the most perplexing confusion in the collocation of words or sentences, will deter the judicial expositor from diligently entering upon the task of eliciting from the contents of the instrument the intention of its author—the faintest traces of which will be sought out from every part of the will, and the whole carefully weighed together."

In such spirit search for the intention of Zachariah Nettles.

1. He did not intend an absolute estate in Anna at all events, but on a contingency which happened not. This is certain.

2. He did intend in the contingency to raise an estate for her brothers. This is also certain.

But intention must yield, rather than violate a rule of law.

It is conceded in the decree that the vice of remoteness does not attach to the words used in creating the limitation, for declaring the contingency on which the interest is to go over.

If the words had been "if she die leaving," &c., the case would have been precisely parallel with *Forth v. Chapman*, 1 P. W. 663.

But the necessary words will be supplied—(1 Jar. 427 and notes) in order to effectuate the intention.

The word "leaving" as placed, may be unintelligible, being referable to no antecedent to give it effect. But it is apparent from the context that testator had in contemplation the death of his daughter, and that he meant to make "after that time" provision for his sons. *Leach v. Micklem*, 6 East., 486.

The words "leaving no lawful issue" of

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themselves import "without leaving issue living at the death of the party," to the failure of whose issue the words relate. *Atkinson v. Hutchinson*, 3 P. W. 258, and notes; *Crooke v. DeVaudes*, 9 Ves. 204; 2 Jar. 418-19. Under a bequest to A or to A and his heirs, and if he shall die and leave no issue or without leaving issue, A would take not

the absolute interest, but the entire interest of the testator, defeasible on his (A's) leaving no issue at his death.

If correct in the view that apt words are used denoting intention that the bequest shall go over on a contingency not too remote, then the question arises who is to take, the contingency having occurred on which the estate was to go over?

The brothers—the words "which is entailed to her brothers" being construed thus, "which is given to," &c.

It is contended contra, that those words are to be construed thus: "Which I give to her brothers and the heirs of their bodies."

This construction makes the word "Entailed" a word of art, and clothes it with a technical meaning.

2 Black. 114-115 says: "As the word heirs is necessary to create a fee, so, &c., the word body, or some other words of procreation, are necessary to make it a fee tail, and to ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate tail." Examples—A grant to A and the issue of his body, or to his seed, or to his children; these are grants only of life estates, the technical word "heirs" being omitted.

"These are the correct and technical terms for limiting an estate tail."

2 Jar. 232: None others are technical, though "such an estate may be created in a will by less formal language."

The question here is not what informal words will create the estate, but whether the word here used is "technical."

It clearly is not. Then to carry out inten-

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tion, if it has a *popular meaning that should be given to it. "To argue that the intention shall be frustrated by a rule of construction of certain words, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind." Note 22 to 2 Black. 381. (Christian.)

"Entailed" not being a word of grant, or creation, it is merely one of description. It merely describes the kind of estate given to the daughter, and points out the persons to take in a given contingency. This is its popular acceptance. Courts may alter the language of a testator, and this most frequently occurs in regard to expressions, which, in common parlance, are often used inaccurately. 1 Jar. 442.

The author gives many instances.

But if testator is presumed to have known what a fee tail was, he must also be presumed to have known of what property it could be predicated. He knew he could not entail personality.

Suppose testator meant a gift to the brother surviving the daughter—then what?

"Whenever the grant, in the first instance, is perfect, it is only to be diminished upon the happening of the contingency which is to defeat it." Per Johnston, C., *W. D. Kersh. Admr. v. Younge*, 7 Rich. Eq. 100.

In this case M. conveyed to trustee property, real and personal, to apply profits to support of H. for life, and after her death to convey, &c., unto the four present children of H., or the survivor or survivors of them, &c., and to their heirs forever, the absolute title. The four children died in the life time of life tenant. "Held that each of the four children took a vested transmissible interest, liable to be divested in the event that he or she died in the life time of H., and that one or more of the others survived H.; and as they all died in the life time of H., the con-

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tingency had not happened on which *their rights were defeated. *Sturgess v. Pearson*, 4 Madd. 441.

When the contingency upon which the interest depends is the endurance of the life of the party entitled to it till a particular period, the interest itself will be extinguished by the death of the party before the period arrives. 1 *Williams on Exors.*, 578.

A gift to A and his heirs, of personalty, carries the whole interest; so a gift to A simply; so a gift to A and the heirs of his body.

If the limitation over is good, and an interest vested in the brothers at testator's death (*Kersh v. Yongue*, and cases cited therein) they take though the limitation over again to the heirs of their bodies may be too remote. What rule of law does such a construction violate?

Harlee, contra, cited 2 *Jarm.* 659; *Perry v. Logan*, 5 Rich. Eq. 219; *Hay v. Hay*, 4 Rich. Eq. 378.

Entailed is a technical word.—*Jacob's Law Dic.* Title Entail; *Bouv. Law Dic.* Entail; 1 Rich. Eq. 396.

If the Court can't carry out intention of testator in full, it will not in part.—*Cox v. Buck*, 5 Rich. 604; *Henry v. Felder*, 2 McC. Ch. 309.

Dargan, same side.

Inglis, in reply.

The opinion of the Court was delivered by

JOHNSTON, Ch. The Chancellor, remarking upon the words, "which is entailed to her brothers, she leaving no lawful issue," says, "It was properly argued that these latter words meant, if she should die and leave no lawful issue at the time of her death."

In this observation we concur. A person is commonly said to leave or not leave issue at

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that juncture of time when he *departs this life; by which event he becomes separated from his earthly connexions, and leaves them

behind him. The addition of "die," "depart this life," or the like, could not intensify the meaning of the word "leave," which is as significant without as with them. And to this effect is the case of *Mansell v. Grove*, 21 Eng. Ch. Rep. 484; *S. C.* 2 *Young and Collyer*. The bequest, in that case, so far as it is necessary to notice it, was of a remainder of residuary personal estate "to Edward Moreton Pleydell, for his life, and his heirs male after him; if he should not leave any son, then to go to Wm. Moreton Pleydell and his heirs male." The Vice Chancellor said: "The question is whether the word 'leaving' and the word 'leave' are to be construed strictly according to the ordinary signification, as importing the not leaving issue at the death of the former taker. The ordinary, if not the universal rule of the Court, in cases of this description, affecting mere personal estate, is that such words import, not an indefinite failure of issue, but a failure of issue at the death of the preceding taker."

The event, in the present case, upon which the property was to go over, or in other words, upon which the prior interest was to be divested, being not too remote; the only question that remains is, are the persons to whom it is limited over so described, and their interests so described, that effect can be given to that part of the will.

The limitation is to the brothers of Anna Nettles. One of these died in the life time of the testator, perhaps before the will was executed, and so he either never had any expectation of interest, or his interest lapsed, and merged in that of the other brothers who were alive when the will came into operation. As to these, the interests whatever they are that were conferred upon them, were not given to them upon condition that they should survive Anna, the first taker. They took at the death of the testator, personal interests so vested as to be transmissible, being contingent only upon the event upon which the prior interest of Anna should terminate.

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*What is the nature of their interests? The testator gives the property to Anna, and if she dies without leaving issue, entails it to them. What was his precise idea of entailing to them what he had given to her, it would be difficult to conjecture, nor is it necessary to ascertain. He was inops concilli, and ignorant of the law, of which the whole will bears evidence. He probably conceived, as the popular belief is, that giving over the property from one member of his family and limiting it to other members, was entailing it. But this is of no sort of consequence whatever. Suppose upon the death of Anna he had limited over the property to the brothers and the heirs of their bodies, by words which applied to real estate would have created an estate tail in England; it is well settled that such words would have given

them an absolute interest in personalty—and this is enough for this case.

These observations dispose of the decree.

Respecting one of the negro girls given by the will, and her issue, the bill admits the ignorance of the plaintiffs as to what has become of them. No remedy is sought as to this family of slaves. The other Dinah, and her increase, are the real subjects of the suit. It is clear that the life estate of Anna, in these negroes vested in Cannon, her second husband; whether he obtained them on his marriage with her, or acquired them afterwards is immaterial. By acquisition of this property he as life tenant, *per auter vie*, became trustee for the remaindermen; and his executors by a wrong distribution of the property under his will, subjected themselves and those to whom they delivered it, to the suit of the remaindermen or their personal representatives.

But we have not enough before us to make the decree—reference being had to the evidence, and to the situation of all parties—proper to be made in the case.

It is, therefore, ordered that the decree appealed from be reversed and set aside; and that the cause be remanded to the Circuit Court, in order that a decree be there made conformable to this opinion: and that the

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evidence now taken and such as *the parties may offer before the Commissioner be received, in order to make up such decree: and that the Commissioner, on such evidence, report the situation of those slaves, in whose hands they now are, and from whom they received them directly and indirectly, with their value, and all other matters necessary to ground a decree upon: with leave to report special matter.

WARDLAW, Ch. concurred.

Decree reversed.

10 Rich. Eq. *408

*ABRAHAM BROWN and EVANDER KIRBY v. HENRY S. DICKINSON, Executor.

(Columbia. Nov. and Dec. Term, 1858.)

[*Injunction* ⚡26.]

A bill will not lie to enjoin an action of trover for slaves, and quiet plaintiff in his possession.

[Ed. Note.—Cited in *Miles v. Wise*, 11 Rich. Eq. 540, 78 Am. Dec. 461; *Wheeler v. Alderman*, 34 S. C. 537, 13 S. E. 673, 27 Am. St. Rep. 842.

For other cases, see *Injunction*, Cent. Dig. § 37; Dec. Dig. ⚡26.]

Before Dunkin, Ch., at Sumter, June, 1858. The bill alleged that in the year 1835, Ann Sessions made a deed of gift of a negro girl named Abbe, to her grand daughter, Esther Elizabeth Sessions, in terms which created in the donee a sole and separate estate, and set forth, in an exhibit, a copy of the deed, taken

from the registry; that said deed is not in the possession of plaintiffs; that Esther Elizabeth afterwards intermarried with Benjamin W. Brown, who died in 1855; that after the death of her husband, Esther Elizabeth sold four slaves, the issue of Abbe, born after the execution of the deed, to the plaintiff, Abraham Brown; and thereupon Henry S. Dickinson, the defendant, executor of the said Benjamin W. Brown, brought an action of trover against plaintiffs for an alleged conversion of said slaves. The bill prayed a discovery of the deed or its contents, and also an injunction. The defendant answered, denying all knowledge of the deed.

The defendant moved to dismiss the bill, on the ground that the plaintiffs, having failed to obtain the discovery, the Court had no jurisdiction to proceed further with the cause. For the plaintiffs, it was replied, that, there being no trustee named in the deed of gift,

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upon the intermarriage of Esther *Elizabeth, her husband became trustee, and that upon his death the legal title went to his executor; that a separate estate in a married woman being a creature of the Court of Equity and not known at law, the title of the plaintiffs would not be recognized by the law Court on the trial of the action of trover, even though the plaintiffs should prove the loss and contents of the deed, and it followed that plaintiffs had no remedy except in this Court, where alone separate estates in married women are recognized.

His Honor refused to dismiss the bill. The defendant appealed.

Moses, Bellinger, for appellant.

Spain, Richardson, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. It would require much investigation before the Court could determine that the interest conferred by the deed upon Esther Elizabeth Sessions, constituted a separate estate in her; and, of course, whether, upon her marriage, the property did not vest *jure mariti*, in her husband.

But it is not necessary to decide these points. The persons to whom she sold the property after she became discover, have been sued, in trover, by the executor of her husband: and they have filed this bill for a discovery against him, and also asking that his suit be enjoined by this Court.

They have obtained no discovery; and the question is whether when a Court of concurrent jurisdiction, so far as the right of property is concerned, has cognizance of that right, this Court will interfere, unless it can grant the plaintiffs here a more complete remedy than they can obtain in the other Court. It is manifest we cannot. These plaintiffs have the possession: and we could do no more than quiet them in it by our in-

junction. The principle involved is analogous to that upon which we should decree a

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delivery of the slaves to *them, if we should be of opinion the title is in them. But the law Court, if it should determine that their title is good, would give judgment against their adversary, and leave them in possession as they now are. If, on the other hand, it should sustain the action of trover brought against them, the effect would be to vest the slaves in them; such being the effect of a verdict and judgment for the plaintiff in trover. So that let the result of the suit at law be which way it may, the plaintiffs here will be secure in the possession of the slaves:—to decree which possession is the only ground of jurisdiction in this Court.

It is ordered that the decree be reversed, and the bill dismissed.

DUNKIN and WARDLAW, CC., concurred.

Decree reversed.

10 Rich. Eq. *411

*J. E. CURETON v. G. W. DOBY and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[*Fraudulent Conveyances* ⚡110.]

The mere fact that a debtor knows when he confesses judgment to a bona fide creditor, that the creditor intends to settle the larger portion of the debt on the debtor's family, will not make the confession fraudulent as against other creditors.

[Ed. Note.—Cited in *Thorpe v. Thorpe*, 12 S. C. 167.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 352; Dec. Dig. ⚡110.]

[*Fraudulent Conveyances* ⚡110.]

A possession in accordance with the terms of the deed is not fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 352-359; Dec. Dig. ⚡110.]

Before Dargan, Ch., at Lancaster, July, 1858.

This bill was filed to set aside, as fraudulent, a judgment confessed by the defendant, Henry R. Price, to his co-defendant, George W. Doby. His Honor, the presiding Chancellor, ordered the judgment set aside, and the defendants appealed.

Moore, for appellant.

Cooke, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The defendant, Doby, having been long the indulgent creditor of Henry R. Price, had removed to the West. Hearing of Price's pecuniary embarrassments, and "influenced (as he says in his answer) as much by his solicitude for the welfare of the family of Price, who was nearly related to him by marriage (as to secure the payment

of his debt) he came on a visit to Lancaster, in June, 1855, on this and other business." Before his return home, to wit, on 23d June, 1855, he left a power of attorney with David

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M. Crockett, *to collect all his debts, and particularly that due by Henry R. Price; and to procure, if he could, a confession of judgment from Price for his debt, and to lodge execution; and if such execution should be older than any except those already existing against Price, and his property should be brought to sale, he authorized his attorney to bid off the property to the extent that the proceeds of sale might be applicable to his execution, and to settle the same, with the exception of one tract of land, to the sole and separate use of Nancy Price, the wife of the said Henry R. Price, during her natural life, and, after her death, to her daughter, Henrietta, in fee. On 10th July, 1855, Price confessed a judgment to Doby, for \$4,739.54, with interest from 13th December, 1851, on a demand which the pleadings admit to be justly due to him. On 14th July, 1855, he confessed another judgment to him for \$648, which, the answer states, was omitted by mistake, but which the plaintiff charges was not due, "as he is informed and believes that the former judgment embraced all that Price owed him." Under various executions Prices' property was brought to sale by the sheriff on 3d December, 1855. The aggregate of Doby's debt was \$6,754.49. Both Price and Doby deny any agreement on which the judgment was confessed, but Price says that he was aware of the power of attorney, and that "after this manifestation of generosity on the part of Doby, he admits that he more cheerfully confessed the judgment;" but he denies that the confession was made with any fraudulent intention, and submits that the arrangement proposed by Doby has not operated to the injury of the plaintiff or of any other creditor. The sales made in December, 1855, and afterwards, amounted to a larger sum than was necessary to pay the debt of Doby, as well as the prior executions, but not enough to reach the junior execution of the plaintiff. There is no suggestion that the property did not bring its full value. Crockett, the attorney of Doby, purchased at the sales, seven negroes, one of whom afterwards died, and he states in his answer, that he hired four to Price, and

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two to another per*son. The fraud in the confession of judgment is alleged to be established by the provision which Doby was to make for the wife and family of Price. Of course, it is equally fraudulent or innocent whether Doby's agent did, or did not, afterwards purchase, at the sheriff's sales, any part of the property. With the exception of the value of the negroes, (\$3,300,) the amount of Doby's judgments has been re-

served by Crockett, his attorney, or is subject to his order. The plaintiff alleges that the amount reserved by Doby for himself, did not exceed two thousand dollars, and that the surplus of the amount due on the judgments, (probably some five thousand dollars) is settled, or to be settled, on the family of Price.

Certainly a judgment may be fraudulent though the amount for which it is confessed be bona fide due. This principle is recognized in *Bird v. Aitken*, Rice Eq. 73, as where one renders assistance to a debtor to enable him to defraud his other creditors, this is a fraud upon the part of him who assists. The bona fides of his own debt will not sanctify the transaction, and *Pickett v. Pickett*, 2 Hill, Eq. 470, is cited as a striking illustration, in which a bona fide purchaser assisted an absconding debtor in eluding his property. But in the same case of *Bird v. Aitken*, it was authoritatively adjudged that the mere fact of securing a preference of his own debt by a confession of judgment "does not constitute an unlawful or fraudulent hinderance, as to the unpreferred creditors." "It cannot be doubted," says Chancellor Harper, "that the mere preference of one creditor to another cannot impeach the transaction; and, if there were nothing else in this case than that Aitken had given a voluntary preference by confessing the judgment, that could not be impeached though he might have foreseen that the effect would be to defeat other creditors. That would not be a fraudulent, but a lawful, purpose. There is no fraud either in the debtor or the preferred creditor." The Court of Appeals affirmed the doctrine, and furthermore held that there was nothing in that case to invalidate the transaction. While the law thus

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allows the *debtor to give a preference among his creditors, it will not allow him to secure an advantage to himself, at the expense of creditors, as the price of such preference—that, in every case, the inquiry should be as to the rights of the creditors—and in preserving those rights care should be taken that an act of spontaneous kindness and indulgence on the part of the creditor be not confounded with fraud in the debtor. The best feelings should not be chilled and stifled by an overweening tendency to detect

collusion. "My own experience," said the late wise and venerable President of this Court, in *Maples v. Maples*, Rice Eq. 300, "my own experience is that a great deal of fraud is committed in carrying out the rules which have been prescribed for its prevention." In this case Price expected and believed that, if his property should be sufficient to reach and satisfy the execution, his humane and generous creditor would settle upon his family the larger part of the money to be realized. If there were any question of the reality and bona fides of the debt, such unwonted liberality might provoke suspicion. But it is substantially conceded that the debt was justly due. The debtor's property was exposed to public sale—brought a fair price—and the proceeds have been applied to the discharge of this and older execution creditors. At what expense, then, of the junior creditors is it that an advantage is given out of the proceeds of sale to the family of the debtor. The larger portion of the property must have been purchased by strangers, and a considerable portion of the fund belonging to the defendant is still in the hands of the Sheriff. If the defendant thought proper to give it to a third person, or to a charitable institution, no one would doubt his right, nor would any unpaid creditor of Price surmise that the defendant's liberality had been exercised at his expense. Nor is it any more at his expense that the family of Price have been the objects of his bounty. The transaction is yet incomplete. The money is not yet paid over to the defendant's agent, and the settlement has not, consequently, been yet made. But this Court

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considers that as done which is agreed to be done. The property, whatever it be, is held subject to the terms of the settlement. After the case of *Arundell v. Phipps*, 10 Ves. 140, and our own case of *Maples v. Maples*, it will not be contended that a possession is fraudulent which is in accordance with the terms of the deed.

It is ordered and decreed that the decree of the Circuit Court be reversed, and that the bill be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Decree reversed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, SOUTH CAROLINA—
JANUARY TERM, 1859.

CHANCELLORS PRESENT. (a)

HON. JOB JOHNSTON.
HON. FRANCIS H. WARDLAW,
HON. BENJ. F. DUNKIN.

10 Rich. Eq. *416

*JANE THOMPSON, by Next Friend, v.
JAMES THOMPSON.

(Charleston. Jan. Term, 1859.)

[*Divorce* ⚡240.]

The amount to be allowed as alimony depends on the circumstances of each particular case.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678, 680; Dec. Dig. ⚡240.]

[*Husband and Wife* ⚡283.]

That the husband lives in adultery with another woman is a circumstance entitling the wife whom he has abandoned to a large share of his income.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 1063; Dec. Dig. ⚡283.]

[*Divorce* ⚡240.]

The conjugal conduct of the parties, the extent of their respective incomes, the sources of these incomes, the condition in life of the wife, are all circumstances to be considered.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 675-678, 680; Dec. Dig. ⚡240.]

Before Dargan Ch., at Charleston, January, 1858.

Dargan, Ch. This is a bill for alimony. There had formerly been a proceeding of the same character between these parties. The bill in that case was filed on the — of — A. D. 1848. It was heard at — Term of this Court, A. D. 1849. By a decree of

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this Court, rendered 28th April, 1849, *the bill was dismissed. The defendant pleads in bar that action, and the decree thereon as to all defaults and short comings of his, in the marriage relations, which occurred previous to the rendition of that decree. The plea, as a matter of defence to a bill like this, is well

conceived, but as will be seen hereafter, it will have no practical effect in this case.

Again, after a long estrangement and separation, which had continued for several years, on 31st March, 1852, the defendant returned to his wife and family, and cohabited with her for a time—not exceeding a week. He then suddenly withdrew himself from her society, and has continued to live separate from her ever since. This was an act of condonation. It operates as an amnesty in regard to all prior grievances, and no transactions occurring between the plaintiff and defendant prior to that time and bearing on the issues of this case, can be given in evidence: we can only enquire into facts posterior to the condonation.

But in fact the plaintiff does not claim to be let into any such evidence. She has not attempted to adduce any such. She bases her claim to a decree for alimony upon facts that have occurred subsequently to the 31st March, A. D. 1852, when the reunion and short lived reconciliation took place.

The charges of the bill are that the defendant was of intemperate habits, and frequently beat and abused his wife, the complainant, stating a case amounting to savitia, adulterous intercourse with another woman, and abandonment and desertion, without contributing any thing to her support and the support of his children, which she bore to him, and this without justifiable cause.

In regard to the first charge, there was not a tittle of proof to prove the savitia; entirely unsupported by testimony, it falls to the ground; nothing more need to be said on that subject.

As to the adultery, there was a great deal of testimony, and much of it was con-

(a) Hon. George W. Dargan absent, from sickness.

tradictory. The two principal witnesses brought forward to support this allegation.

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Emily Shepherd and Ann Gaskin, are women of such worthless and abandoned character, and such bad repute, as to render their testimony utterly unworthy of belief. I cannot, with safety, predicate my judgment upon anything they have said. Striking out their evidence upon the question of adultery, I do not perceive that the proof is sufficient to support the charge. Though there are very strong grounds for this suspicion, I can not say that the whole evidence on both sides, taken together, is sufficient to prove, to my satisfaction, that the adulterous intercourse charged, existed, or exists between the defendant and the woman Mary Ellis. The evidence adduced on the part of the complainant, by itself would produce conviction; but when the counter testimony is thrown into the opposite scale, doubt is produced. I cannot rest my judgment upon a fact, the existence of which I doubt. Having thus disposed of the two first charges of the bill, I must now proceed to consider that which remains. I am to decide this claim for alimony upon the abandonment and desertion of the husband and the equity of the wife to a settlement of her own estate, upon which the marital rights have not yet attached. If the husband abandons the wife without justifiable cause, she is entitled to alimony. As to what constitutes the absence of justifiable cause, every case must, in a great degree, stand upon its own peculiar circumstances. It is easy to conceive a case in which a man of a just and honorable mind, and of warm and generous affections, might feel himself constrained to withdraw entirely from the society of his wife without its being such a case as would justify him in the eye of this Court, or exempt him from liability for alimony. The marriage tie is of so indissoluble a nature, as not to be broken asunder for slight and trivial causes; for incompatibility of temper, uncongenial tastes and manners, or insulting language. To some minds these things are hard to bear, but parties placed in these unhappy circumstances, must submit and make the most of this condition. At least the law requires this sacrifice.

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*The causes which have led to the separation of this unfortunate pair, I incline to think, have not been fully revealed in the evidence. There is a mystery about it—some secret causes of disgust and alienation which have not been made public. But so far as the circumstances have been brought out, they leave the defendant without the shadow of justification. The history of the plaintiff, as brought to the view of the Court, does not exhibit her as a pattern of conjugal propriety—very far from it. But her

life and manners present as high, a higher standard of propriety than his.

The defendant, after several years of separation from his wife and family, without contributing anything to their support and maintenance, on the last day of March, 1852, suddenly and unexpectedly returned to the house on the corner of Laurens street, where the family were then residing, and where the plaintiff kept a boarding house. He came to stay, he said, and that he was going to act as a husband and father should act. There is no doubt that a full reconciliation then took place. But, strange to say, without any quarrel, or any complaint on his part, so far as is known, within a week he again abandoned his wife and family, and has lived apart from them ever since. During all this time he has withheld from them all pecuniary aid in the means of living, and for the education of the children, acting towards the latter in the most unnatural manner. He did allow them the use of the house on the corner of Laurens street. And here, I am constrained to say, that Mrs. Thompson, thus deserted, with a large family, consisting for the most part of girls, did, by extraordinary energy and prudence, support herself and her children in a creditable manner, give her daughters a genteel education, and so raised them, as to manners, character and accomplishments, that two of them have formed respectable matrimonial connections. For a person placed in her situation, this was doing much and reflects the highest credit upon her.

I consider the overtures made by Thomp-

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son in May, 1852, about the time or shortly after the furniture was removed, as illusory. He wished her to go to him, and live with him in a house he had rented in Wolfe street. He did this under legal advice, and, doubtless, supposed that in the case of a suit for alimony, it would have strong bearing in his favor. But why did he wish her to give up the rooms and comfortable house in Laurens street, where she had been so long living, and where she could carry on her business as the keeper of a boarding house, and go to the house in Wolfe street, where she could not have these advantages and comforts? The ostensible reason offered for the desired change is plausible. It was alleged to be that the latter house was nearer to the Rail Road shops, where he followed his business and trade. The insincerity of his assigning this reason is shown in the fact that very soon after the separation, one of his hands was severely burned, and in consequence maimed, and he was unable to work. During all his horrible sufferings from this burn, and when utterly helpless, he would not return to his family, and to his comfortable house in Laurens street, but preferred to receive, rather, the charitable attentions of strangers; to

this day he has not labored in the workshops of the Rail Road Company, and it is doubtful if he ever will again be able to work at his trade; yet, he assigns the distance of Laurens street from the workshops, and the punctuality, &c. in the hours of labor required there, as the reason of his unwillingness to reside with his wife in Laurens street. The plaintiff wisely refused to commit herself to that movement, for, as she said, if I go to live with him in Wolfe street, and he falls out with me, then I shall not have a place in which to lay my head. My mind is not without a suspicion that this overture was a ruse by which to get the family out of the house in Laurens street.

Under all the circumstances, my judgment is, that the plaintiff is entitled to a decree for alimony; what the amount shall be, I will hereafter declare.

The next part of the case which I will

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consider, is the *application for a settlement upon the wife of the property which she has recently acquired as heir at law, and distributee of her sister, Mrs. Murray. This will depend upon principles somewhat different from that in which alimony is allowed. As a matter of right, the wife is entitled to a settlement out of her own estate upon which the marital rights have not attached. She is entitled to this, even though the husband is a model of conjugal fidelity and devotion. The terms of the settlement depend on the circumstances of the case, and are in a great degree within the discretion of the Court. If the conduct of the husband is exemplary towards the wife, and their domestic relations agreeable, the Court will not cut him off from all participation in the wife's fortune. But if he has deserted his wife, without justifiable cause, and without making any provision for her, justice demands that the wife should have her estate settled upon her, for her own use, and to his entire exclusion.

In this case we have seen under what circumstances the defendant has separated himself from his wife. His circumstances are easy and competent; his rental is respectable. And so far from making a provision for his deserted wife, he has cast her off, though the whole of his estate was derived from his marriage with her, or has sprung directly out of what she brought him in marriage. He had nothing, and all her real and personal estate, which she owned at the time of the marriage, has been so managed, that the title has vested in him absolutely, to her entire exclusion.

On this state of facts, my judgment is, that all the property, real and personal, which the plaintiff has acquired from the estate of her deceased sister, Mrs. Murray, be settled on the said Mrs. Thompson, the plaintiff, for her own separate use and benefit during her life, and after her death, to

her children who may be living at her death, the issue of deceased children taking in the division the deceased parent's share.

It is further ordered and decreed, that the

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Master enquire, *and report upon a suitable person to be appointed as trustee, and that upon such appointment being made the Rev. Cranmore Wallace, the receiver, do deliver up to said trustee the slaves which have come into his possession as receiver, and account to the said Master for the rents and profits; and that Master Tupper do convey to the said trustee, hereafter to be appointed, as aforesaid, all the real estate to which the plaintiff, Mrs. Thompson, is entitled, from the estate of her deceased sister, Mrs. Murray, to be held by the said trustee, (as also the personalty,) for the uses and trusts declared in this decree: and that until such trustee shall be appointed, the said receiver shall pay over to Mrs. Thompson the income derived from the personal estate in his hands; and in like manner, Master Tupper do pay over to her the rents and profits derived from the real estate.

It is further ordered and decreed, that by way of alimony, the defendant, the said James Thompson, do permit the plaintiff and her family to live in, and occupy, without rent, and free from hindrance and molestation, the house and lot on the corner of Laurens street, where she now resides, until the further order of this Court.

It is further ordered and decreed, that the defendant pay the costs of this suit.

The complainant appealed on the grounds:

1. Because the Chancellor, having decided that the complainant is entitled to alimony, it follows that she should have some provision for her support adequate to her necessities; whereas, it is submitted that the decree has fallen far short of what should be awarded to her. That the abandonment of complainant by the defendant has been aggravated by his lewd and indecent mode of life, and as the property has been acquired entirely through the wife and her means, it is submitted that the whole, or at least the greater portion of the income should be assigned to her.

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*2. Because it is respectfully submitted that the Chancellor erred in his conclusion that the adulterous connection of the defendant has not been established by the testimony.

Simons and Dunkin, for appellants.
Macbeth and Buist, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. This proceeding was instituted for the double purpose of obtaining a settlement on the wife of the property recently accruing to her by succession from her sister Elizabeth Murray, upon which the

marital rights of the defendant have not attached by possession; and of obtaining additional allowance to the wife from the husband's income, by way of alimony for the maintenance of herself and such of the children of the marriage as depend on her means for support. So far as the former purpose of settlement of the new acquisition of property by the wife, is involved in the pleadings, adequate relief is afforded by the decree, and no complaint is made to us by either party. As to alimony, the Chancellor pronounced his judgment that she was entitled to a decree for this object, principally on the ground of the husband's desertion and abandonment, without contributing to the support of herself and children; but limited the allowance for alimony to the rent of the Laurens street house, without report of a Master or any complete ascertainment of the extent of the husband's income. The plaintiff, wife, appeals as to the extent of this allowance, complaining substantially that the decree makes to her a very inadequate allowance, when the extent of the husband's income and the circumstances of aggravation in his conduct, particularly his adultery with Mary Ellis, are properly considered.

We have a general impression that the allowance is inadequate under the circumstances of the case, but we cannot venture to prescribe any additional fixed sum until we

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know *more precisely the extent of the income of the husband and wife respectively; and we desire the aid of further evidence and a report from the Master on these particulars.

The amount of alimony depends largely on the extravagance of the husband's misconduct. Unquestionably his misconduct in this case has been great and without any excuse apparent in the evidence. He has left his wife without pecuniary contribution on his part, to settle two of his daughters in respectable marriages, and to procure remunerative occupations for some of his sons. He vilipends in his answer his wife as rendering a separation from her necessary, by reason of her drunkenness, and offers no testimony in support of the vile charge. He refuses to recognize any claim of his daughters on him, whether presented by written request by one who was sick for flannel to protect her person, or by another to shake hands with him in the street.

But the great matter of aggravation is the alleged adultery of defendant with Mary Ellis. On this point, the Chancellor, while admitting strong grounds of suspicion, expresses doubt as to the sufficiency of the proof. For myself, I concur in his view, that the testimony of the two strumpets should be struck from the case, and treated as not offered or utterly inefficacious in leading to judgment, but we have very respectable opin-

es if producing belief must be regarded. Granting, however, that the testimony of Shepherd and Gaskin (although primarily discredited by Ford, an equally infamous witness,) be erased from the record, enough remains to satisfy us that, as practical men, determining on the affairs of mankind, we must conclude the adultery. It is very distasteful to proceed through the details, but we must to some extent justify our conclusion.

The defendant in his answer does not deny the adultery. His answer is casuistically evasive. He does deny that he lived in "open" adultery with Mary Ellis, and that "he recognized or treated" her as his kept

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mistress, or that there *was "any familiarity or sociability" between them which would have rendered the visits to his separate establishment by his wife and children unseemly; but all this amounts merely to an expression of sentiment on his part that he was not so flaunting his adultery in the eyes of the community and his family as to make visits of respectable females to him compromise their character. In substance he denies notoriety of the illicit intercourse, and by negative pregnant, admits the existence of the intercourse. Again, he admits that an unmarried white female, still retained in his employment, was delivered on his premises of a bastard, (and another bastard seems to have been subsequently produced by her under similar circumstances,) and he says "it is impossible for him to say, and he does not know who is the father of the said child." It may well have been impossible for him to say who was the father of the child, if he suspected others to have intercourse with his paramour, but it was surely possible for him to say, if he had no illicit intercourse with Mary Ellis, that whoever might be, he was certainly not the father of her offspring. And why was she not produced by him to contradict the adultery, if her testimony could have been effective?

The positive testimony satisfies us of the fact of adultery. Mrs. McLaughlin, an unimpeached witness, deposes as to facts inconsistent with any other conclusion. Besides that, the testimony of the defendant's witnesses, especially of his nephew, Thomas Thompson, concerning instances of familiarity in the master's lying on the bed of his servant and fondling her brats—indeed, without pursuing needlessly disgusting details, every portion of the testimony on the point, without a particle of contradiction, compels the conclusion that the defendant is living in degrading concubinage with his menial servant.

Now, we cannot punish him as an ecclesiastical court might for his sin, but we may

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properly consider his miscon*duct as enti-

ting the wife and children, whom he has abandoned, to a large share of his income.

Probably, in expectation of our conclusion as to the fact of defendant's adultery, it was urged that adultery on the part of a husband is much more venial than in the case of the wife, because the latter might impose on the couple spurious offspring for support, succession and inheritance, while the former could have no such consequence. The distinction in the cases of wife and husband is just and well recognized. It may be that occasional acts of adultery on the part of a husband, palliated by long and necessary absence from his wife, or other strong circumstances of temptation, might not entitle the wife to separation and alimony; but where a husband deserts and abandons his wife and lawful children, and lives in the same city in concubinage with a servant, begetting bastards on her body, he has little claim to the indulgence of any tribunal which proceeds for the enforcement of law and morals.

This whole matter as to the extent of alimony depends on the circumstances of each particular case; and we have not the means of information in this cause to determine the precise amount which should be allowed. Counsel differ widely in their estimates of the incomes of husband and wife; and they differ as to the sources from which the estate of the husband has been derived, whether from his labor or accretion from his wife's estate at the date of the contract of marriage. These particulars have necessary influence on the amount of alimony to be allowed. The doctrine on the subject is well summed up by Bishop in his treatise on Marriage and Divorce, section 612. The conjugal conduct of the parties, the extent of their respective incomes, the sources of these incomes from husband or wife, the condition in life of the innocent party without diminution from the degradation of the consort who has sinned—all these circumstances enter into the amount of just allowance for alimony. In some of these particulars we lack information. Besides it seems to us clear

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*that the plaintiff, by way of what is called temporary alimony, or by any other name, is entitled to reimbursement for her expenses in a successful litigation.

It is ordered and decreed that it be referred to Master Tupper to inquire and report as to the extent of the incomes respectively of the parties to this cause, as to the sources of their derivation, and as to the expenses of the plaintiff in this litigation; and that he recommend to the Court what is a suitable allowance to the plaintiff for alimony under all the circumstances of the case. In the meantime the plaintiff must be protected in the enjoyment of the use or rent of the Laurens street house, which has been allowed to her by the Chancellor.

It is further ordered that the circuit decree be reformed according to this opinion.

JOHNSTON and DUNKIN, CC., concurred.

Decree reformed.

10 Rich. Eq. *428

*W. M. ALBERGOTTIE and Others v. B. CHAPLIN and Others.

(Charleston. Jan. Term, 1859.)

[Partition \S 20.]

A bill will not lie to compel persons in adverse possession of lands to surrender them, in order that they may be partitioned between the other parties to the cause, even though the bill alleges that all parties claim under the same will, and prays construction thereof.

[Ed. Note.—Cited in *Reams v. Spann*, 28 S. C. 533, 6 S. E. 325; *Westlake v. Farrow*, 34 S. C. 272, 13 S. E. 469.

For other cases, see *Partition*, Cent. Dig. \S 64; Dec. Dig. \S 20.]

[This case is also cited in *Woodward v. Santee River Cypress Lumber Co.*, 73 S. C. 31, 52 S. E. 733, 114 Am. St. Rep. 76, and distinguished therefrom, and in *Woodward v. Santee Cypress Lumber Co.*, 73 S. C. 35, 52 S. E. 733, 114 Am. St. Rep. 76; *Du Bose v. Kell*, 76 S. C. 320, 56 S. E. 968, as to jurisdiction of courts of equity in actions for partition where title is in dispute.]

Before Dargan, Ch., at Charleston, February, 1858.

Dargan, Ch. The plaintiffs charge, that their great grandfather, Anthony Albergottie, Senr., departed this life early in the year 1815, having duly executed his last will and testament, and leaving the same unrevoked; by which will, in the third clause, he devised his two plantations, Mount Pleasant and Mulberry Hill, to his three grand-sons, in words as follows, viz: "Thirdly, I give, devise and bequeath to my three grand-sons, William Joseph Albergottie, Anthony Albergottie and Thomas Albergottie, my two plantations, Mount Pleasant and Mulberry Hill, share and share alike, and to the heirs of their body, lawfully begotten, from thenceforth and forever. And should my grand-son, William J. Albergottie, die, leaving no issue, then in that case, to be divided between Anthony Albergottie and Thomas Albergottie; and should my grand-son, Anthony Albergottie, die, leaving no issue, then in that case, to be divided between William J. Albergottie and Thomas Albergottie; and should my grand-son, Thomas Albergottie, die, leaving no issue, then in that case to be divided between William J. Albergottie and Anthony Albergottie."

The plaintiffs further state, that the testator left surviving him at his death his said

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three grand-sons, and that at some *uncertain period afterwards, the two plantations were divided among the devisees, the smaller

tract, Mount Pleasant, having in the partition been allotted to Anthony Albergottie, and the larger, Mulberry Hill, having been allotted to William and Thomas Albergottie; and that while the grand-sons lived both the plantations passed out of their possession, but at what time, and in what way, the plaintiffs allege that they know not. The plaintiffs further state, that "Mount Pleasant is now in the possession of John F. Chaplin, and that Mulberry Hill is now in the possession of Stanhope A. Sams, both of Beaufort District, where the plantations are situated, and both of whom lay claim to the plantations as owners thereof."

The plaintiffs further state, that William J. Albergottie died about two years ago, leaving two children surviving him, to wit, the plaintiff, Thomas W. Albergottie, and Rebecca Chaplin, the wife of Benjamin Chaplin; that Thomas W. Albergottie died in January, 1855, leaving a widow, Selina W. Albergottie, and the following children surviving him, namely: the plaintiff, Washington M. Albergottie, Rebecca Albergottie, Thomas C. Albergottie, Mary E. Albergottie, John S. Albergottie and William G. Albergottie. That Anthony Albergottie died in the year 1851, without issue, but leaving a widow, Rebecca Albergottie, surviving him.

The plaintiffs contend, that the testator, Anthony Albergottie, Senr., by the third clause of his will, gave to his three grand-sons, a fee conditional in Mount Pleasant and Mulberry Hill, and that they are entitled respectively to the shares of their parents William and Thomas. That they are entitled to the share of Anthony Albergottie, junr., (who never had issue) by the limitation over upon the fee conditional: or if the words of the will gave a fee simple to the grand-sons, then the limitation upon Anthony's share, is good as an executory devise upon a fee simple over to them.

The plaintiffs contending, that themselves and their brothers and sisters, the children

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of William J. and Thomas Albergottie, are by the limitations of said will, entitled to the said two plantations, Mount Pleasant and Mulberry Hill—have made their brothers and sisters, and John F. Chaplin and Stanhope A. Sams parties defendant; charging that Chaplin and Sams are in possession of the lands devised by the will of Anthony Albergottie, Senr., and that they (the plaintiffs) and their brothers and sisters, are fully and absolutely entitled to the said plantations or lands, and to rent for the same, from the time when their rights respectively accrued, they pray that the said John F. Chaplin may be decreed to surrender the plantation called Mount Pleasant, and the said Stanhope A. Sams the place called Mulberry Hill, and to account for the rents, profits, &c. And as against the other defendants, their brothers and sisters aforesaid, the

plaintiffs pray a partition of the said lands.

To this bill, the defendants, Chaplin and Sams, have filed a demurrer.

The first ground of demurrer is, that the bill asks for a trial of the title to land, and the Court has not jurisdiction in such a case. *Butler v. Ardis*, 2 McC. Eq. 60; *Murray v. Stevens*, Rich. Eq. Cases, 205; *Gibbes v. Elliott*, 5 Rich. Eq. 327.

I concur in this view, both as to the law and that it applies to this case. That the Court of Equity is incompetent to take cognizance of a case involving title to real estate, is so well settled, that it does not admit of question, nor as a general rule, is it disputed on this occasion. The Court will entertain a case involving title to land, where presenting some matter of acknowledged Equity jurisdiction, the question of title comes up incidentally, as in case of partition, &c. If a bill be filed for partition, and one or more of the defendants, who are or might be distributees with the plaintiffs in the same land, and under the same title, set up adverse and paramount title in themselves, denying all right on the part of the plaintiffs: there the Court, retaining the case, will send the question of title to the Court of Law for a trial by jury, and wait-

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ing *until the question of title is properly adjudicated, will then order the partition, or not, according to the circumstances. But this is not such a case. Partition is not sought as against Chaplin and Sams. They are stated in the bill to be holding in adverse possession, and claiming in their own exclusive right. The plaintiffs have not alleged, nor is it said in the demurrer, that the defendants derived title under the will of Anthony Albergottie, Senr. Nor as to this question would it be material for it to be so charged or stated. If the defendants assert an adverse legal title in themselves to the land, to the exclusion of the plaintiffs, it becomes a question purely of legal title, and the Court is divested of jurisdiction.

The plaintiffs charge, that they, together with their brothers and sisters, (whom they have made defendants,) are the legal owners of the lands, as tenants in common, under the will of Anthony Albergottie, Senr., and that Chaplin and Sams are in possession, and without any title, as tenants in common or otherwise: in other words, that they are trespassers. And they pray that the said Chaplin and Sams may be decreed to deliver up the said lands, and account for the rents and profits, &c., and that the same may be divided among themselves, and their co-tenants, their brothers and sisters. This is, to all intents and purposes, an action of trespass to try the title. And the fact that the plaintiffs have joined their alleged co-distributees as defendants, and prayed partition as to them, is not sufficient to disguise the true character of this suit; which is a

bill to try the title of the lands between themselves, and their alleged co-tenants on the one side, and Chaplin and Sams on the other.

Again: the defendants demur for multifariousness and misjoinder. The plaintiffs allege that Chaplin is in possession of the Mount Pleasant plantation, and that Sams is in possession of the Mulberry Hill plantation, each claiming separately, adversely, and in his own right. They allege no joint possession or interest between Chaplin and Sams. Even supposing that the plaintiffs

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are right in their construction of the will under which they claim, and that they have a good title to both tracts of land, and that they have a right to sue in this Court, the cases which they state against Chaplin and Sams are separate and distinct, and they have no right in one suit against two parties to unite a claim for two distinct subjects matter. This objection is fatal.

The other two grounds of demurrer, it is unnecessary to consider. One is a question of practice and the other goes to the merits. I offer no opinion, feeling confident that ultimately the case will not be disposed of in this Court.

It is ordered and decreed that the demurrer be sustained, and that the bill be dismissed with costs.

The complainants appealed and moved this Court to reverse the decree on the grounds:

1. Because it is stated in the bill that the lands in question passed into the possession of the testator's grand-sons, under his will, and afterwards into the possession of Chaplin and Sams, which statements the defendants by their demurrer admit to be true, and the bill being filed for the construction of the will, the Court has jurisdiction, as plaintiffs and defendants claim under the same title, to wit: the will of Anthony Albertgottie, Senr.

2. That Chaplin and Sams have a common interest centering in the main subject of the suit, to wit: the construction of the will of A. Albertgottie; and it is not improper to join them with complainants and with each other, because their interests in the plantations have become separate and distinct.

3. Because the question of multifariousness in pleading, is one addressed to the discretion of the Court; and in this case multiplicity of suits would be avoided by the decision of the rights of the parties in the present form of proceeding.

4. Because the title of the lands has been incidentally brought into question, the main

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purpose of the bill being to obtain a construction of the will, and in such cases it is the approved practice of this Court to retain the bill and order an issue at law to try the title to the lands.

5. Because the bill is filed for partition, and it is not competent for one or more defendants to deprive the Court of jurisdiction by setting up an adverse title.

6. Because in a case where parties have entered upon the lands of infants during their infancy, this Court will not at the instance of the wrong-doer subject the infant complainants to the necessity of relying upon a better title than all the world, which would be necessary in the action at law.

Martin, for plaintiffs.

DeTreville and Brewster, Young, Kirkwood, for defendants.

The opinion of the Court was delivered by

JOHNSTON, Ch. We think the Chancellor's decree is sustained by principles too well established to admit of doubt.

The demurrer admits what the plaintiffs themselves allege, that the defendants "lay claim to the plantations" of which they are in possession "as owners thereof." There is no alleged privity between the parties, nor any thing to constitute the occupants "tenants in common" with the plaintiffs; so that if this Court should order an issue or an action to try titles, the result of such trial could not bring back the cause here for partition. The case, in no respect, resembles the case of *Gibbes v. Elliott*, in which there was a privity among the parties as co-tenants, rendering it proper for this Court to construe the will, in order to ascertain the rights of the parties as co-tenants under it. But this is an open warfare of adverse titles, to oust the defendants, Chaplin and Sams, from the land, in order to partition it among the other parties. This Court is not the forum for

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such a purpose. The occupants are not compellable to discover their title; but the plaintiffs must go to law to sustain their title, if they can; which Court in the trial is fully competent to construe the will.

It is ordered that the decree be affirmed, and the appeal dismissed.

DUNKIN and WARDELOW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *435

*BREWSTER and DICKSON v. A. E.

GILLISON and Others.

(Charleston. Jan. Term, 1859.)

[Wills \hookrightarrow 847.]

Where there have been proper proceedings for administration of an estate, under which all the creditors have been called in to establish their demands, and a decree has been pronounced, under which a legatee has been in possession of his legacy for more than four years, he is protected by the statute of limitations from the claim of a bond creditor who failed to present

his demand and have it established under the decree.

[Ed. Note.—Cited in *Mobley v. Cureton*, 2 S. C. 146; *Lanier v. Griffin*, 11 S. C. 581, 582; *Gregory v. Rhoden*, 24 S. C. 98; *Abercrombie v. Abercrombie*, 25 S. C. 51.

For other cases, see *Wills*, Cent. Dig. § 2160; *Dec. Dig.* ⚡847.]

[*Executors and Administrators* ⚡315.]

Such a decree is, it seems, itself a protection, until by direct application for that purpose, it be vacated or modified for the benefit of the creditor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; *Dec. Dig.* ⚡315.]

Before Wardlaw, Ch., at Beaufort, February, 1857.

The facts of this case are fully stated in the opinion delivered in the Court of Appeals. From the Circuit decree dismissing the bill, the plaintiffs appealed.

Tracy, for appellant, cited *Miller v. Mitchell*, Bail. Eq. 437; *Hovenden v. Annesly*, 2 Sch. and Lef. 632.

The opinion of the Court was delivered by

WARDLAW, Ch. Samuel R. Gillison in his lifetime, July 1, 1843, executed his bond to plaintiffs as assignees of McNeil & Blair, bankrupts, with condition for the payment of \$682.18, with interest thereon payable annually, in five equal annual installments beginning July 1, 1844. He paid punctually the first four installments and interest accrued, and died in the latter portion of 1847, leaving the fifth instalment payable July 1, 1848, and the interest thereon, outstanding and unpaid. His representatives have failed to pay this instalment. At his death he left a considerable estate, which he disposed of by will among his wife and children. His ex-

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ecutor, Thomas S. *Gillison, assumed his trust September 14, 1847, and after partial administration himself died intestate in 1849. Soon afterwards, Robert G. Norton, Ordinary of Beaufort district under the statutes of the State then existing, assumed the administration of the estates of both testator and executor as derelict estates. Robert G. Norton, as administrator of the estate of Samuel R. Gillison, filed his bill in this Court January 10, 1850, against the creditors and legatees of his testator, for the instruction of the Court as to his administration, for the marshalling of the assets of his testator, and for partition of the residue of the estate among the legatees, after the payment of debts; and the Court ordered and decreed, at February sitting 1850, that the creditors of the testator should be called in by the usual procedure to present and prove their demands, that the official administrator should sell so much of his testator's estate as was necessary for the payment of testator's debts—that the residue should be divided among the legatees of testator according to the provisions of his

will, and that the official administrator should account before the Commissioner for his administration of both estates. In pursuance of this decree all of the creditors of testator, except the plaintiffs, presented and proved their demands, and have been fully paid and satisfied, and the residue was distributed among the legatees, and in 1851 the Court by its decree confirmed the payment and distribution. Some six years after the legatees of S. R. Gillison received their respective legacies for separate and exclusive enjoyment (the precise date does not appear by the brief,) the plaintiffs filed this bill against the legatees for satisfaction of the balance in arrear on the bond of testator; and the defendants who have answered plead the statute of limitations. The Chancellor on Circuit sustained this plea. No excuse whatever is offered in the pleadings or evidence for the neglect of the plaintiffs to present and prove their demand, when the Court by its wholesome and approved procedure undertook the administration of the assets of testator; but it is stated at the bar in this Court,

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although no such matter was *suggested on Circuit, that while the plaintiffs had notice of the action of the Court in the administration of S. R. Gillison's estate, they did not present their demand because their bond was mislaid or lost until a date shortly before filing the bill. If this fact were regarded as a sufficient excuse for the laches of plaintiffs it should have been stated in the bill and proved; and it is too late now to found on such statement an application for leave to amend the bill when no such motion is intimated by the appeal. In truth the Court can scarcely ever act safely on oral statements at the bar, outside of the pleadings and evidence, whatever may be their confidence as men in the veracity of their professional brethren. All sound judgments must rest on the pleadings and evidence—on matters appearing judicially. Granting, however, that this excuse had been stated and proved, it seems to us inadequate. If the bond were lost the plaintiffs could still have established their demand on proof of the existence and loss of their bond, and, at the least, on any probable evidence of their claim, they might have obtained from the Court a provisional order, that a fund sufficient for satisfaction of it should be reserved within the control of the Court, for a reasonable time, until fuller proof could be furnished.

The plaintiffs appeal from the decree on the single ground that as the demand of the plaintiffs is on a specialty debt the plea of the statute of limitations does not apply.

This ground exhibits some misconception of the effect of the decree. The Chancellor never intended to determine that a bond, which is not at all within the statute of limitations should, by resistance of payment

for four years, be extinguished, or, as it was expressed in argument, that the seal should be erased from the contract of the parties. He simply refused remedy in this Court to the plaintiffs, where the defendants had been more than four years in adverse possession of their legacies under the decree of the Court. The suit was not on the bond itself, and such suit could be properly prosecuted only in the Law Court; and the statute was

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applied, not to the bond, which is intact, the plaintiffs being left to prosecute their redress elsewhere under the statute of William and Mary, or otherwise, as they may be advised; but it was applied to the remedy sought in this Court. It was considered that legatees in exclusive possession of their legacies for four years under decree of the Court, were entitled to be protected from any peculiar remedy of the Court against them on a mere equity. Their liability is not by bond, and arises only from their possession of estate as volunteers, which, in the hands of their testator, was liable for the payment of his debts before his donations could take effect. If it can be said with technical accuracy that they hold their legacies under trust the trust is merely implied and liable to the bar of the statute of limitations. It seems to me, however, that the sounder view is to consider their liability as arising from the doctrine of the common law as to *indebitatus assumpsit*, for money had and received to the use of another. The result of both views is the same. It is waste of labor to reason discursively on a point which is fully concluded by the authorities. In *Buchan v. James*, Speers, Eq. 382, it is said and adjudged. The well established doctrines of this Court, based on the authority of the English Chancery, is, that the statute of limitations will bar a demand arising out of a trust raised by implication of law. If one receive money or goods of another, believing that they belonged to himself, when in fact *ex equo et bono* they belonged to a stranger, that is an implied trust, and the stranger is entitled to recover, but he may be barred by the statute. Defendants were distributees of the intestate, and distribution had been made more than four years and less than twenty before filing the bill; and distributees or legatees are protected by the statute of limitations against creditors or other claimants, unless they file their bills within four years after distribution. So in *Miller v. Mitchell*, Bail. Eq. 441, it is said, "where there has been an adverse possession and no trust or fraud, time will always bar in analogy to the statute. The demand

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of the creditor against the legatees, is a mere personal demand for money, and the same provision will apply that would bar such a demand at law." The same doctrine is recognized in the following cases: *Massey v. Massey*, 2 Hill. Eq. 496; *Alexander v.*

Williams, 2 Hill. 522; *Fisher v. Tucker*, 1 McC. Eq. 176; *Beckford v. Wade*, 17 Ves. 97; *Andrew v. Wingley*, 4 Bro. C. C. 425; *Townshend v. Townshend*, 1 Bro. C. C. 544.

While we thus give effect to the plea of the statute of limitations, we must not be understood as disparaging the effect of the decree for distribution as in itself a bar, without the aid of lapse of time. It is not necessary in this case to discuss this point, and I content myself with stating my impression unenlightened by argument, that whenever the funds to be administered have passed by its decree from the control of the Court, they are beyond the reach of any claimant until by direct application for this purpose, the decree be vacated or modified for the benefit of the claimant. In the statement of the case, I spoke of the procedure of the Court in calling in the creditors of an embarrassed estate and supervising its administration, as wholesome and approved. The last epithet may not be strictly accurate, for we do sometimes hear at the bar that this procedure is indigenous and not authorized by the practice of Westminster Hall. To most minds our practice is sufficiently vindicated by the remarks in *Thomson v. Palmer*, 2 Rich. Eq. 32; and really it would seem at this day, after the long establishment of the Court of Equity in this State, that our deliberate departure from the principles or practice of the English Chancery should be regarded as authoritative, and establishing, if it is necessary to be so considered, a new and peculiar system of equity for the State. But to those who contemn home productions, it may be satisfactory to quote what is said by an eminent English elementary writer as to the English practice. Mr. Adams, in his introduction to his treatise on the doctrine of equity, p. 55, says: "The manner of administration in equity is on a bill filed either by creditors or by legatees,

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praying to have the accounts taken and the property administered; or if no creditor or legatee is willing to sue, then by the executor himself, who can only obtain complete exoneration by having his accounts passed in Chancery. The personality is secured by payment into Court; a receiver of the real estate and of the outstanding personalty is appointed, if the circumstances require it, and a decree is made for taking the accounts; all actions by creditors are stayed; advertisements are issued for claimants to come in, and the funds are ultimately distributed by the Court so as to protect the representatives from subsequent liability."

Our practice in this State is precisely conformable to what Mr. Adams declares to be the English practice.

It is ordered and decreed that the Circuit decree be affirmed and the appeal dismissed.

JOHNSTON and DUNKIN, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *441

*CHARLES B. GLOVER v. C. A. GRAESER and Others.

(Charleston. Jan. Term, 1859.)

[Assignments for Benefit of Creditors \hookrightarrow 195.]

An assignment for the benefit of creditors described a demand belonging to a preferred class as "about five thousand dollars." The demand was for about four thousand three hundred dollars, due on a memorandum check, which bore interest: *Held*, that the interest as well as the principal was a preferred debt by the terms of the assignment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 616; Dec. Dig. \hookrightarrow 195.]

[Interest \hookrightarrow 14.]

A memorandum check for borrowed money, bears interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 26; Dec. Dig. \hookrightarrow 14.]

Before Dargan, Ch., at Charleston, March, 1858.

This case was heard upon the Master's report, which is as follows:

"I beg leave respectfully to report, that I have been attended by the Solicitors in this case, and have taken the testimony, which I find to be as follows:

"On the seventeenth day of January, 1852, Glovers & Davis, then doing business as factors, in Charleston, borrowed from the plaintiff four thousand three hundred and twenty-eight dollars, and gave their memorandum check, as it is called, which is copied at the end of this report, and marked A. During their continuance in business, nothing was paid on this loan, nor is it in evidence that it was called for, nor was the check ever presented at the Bank for payment. It followed the course usual in such cases, viz.: it was retained as evidence of so much money loaned, to be repaid on call at any sacrifice. The custom is to retain these checks, and not present them at the Bank for payment. In November, 1852, Glovers & Davis made an assignment of their estate to the defendant, as assignee, for the benefit of creditors, and B. D. Boyd was subsequently appointed agent

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of creditors. The plaintiff accepted the assignment. By the terms of this deed, the assigned estate was conveyed in trust to pay, in the first instance, the expenses of drawing the deed, &c., next a balance due W. E. Evans & Co., for cotton and interest; and, in the next place, borrowed money to several persons mentioned, and among them, the complainant, whose debt is set down at "about \$5,000." In the second case interest is not mentioned.

"The assignee has made sundry payments on account of principal of plaintiff's debt, but he has refused to pay interest, and the bill is filed to compel him to do so. The complainant alleges that the assignee could long since have been in funds sufficient to have met both principal and interest of this debt, if he had not extended a credit upon the Sheriff's

sales, under a large judgment against V. D. V. Jamison, of Orangeburg. The assignee urges as his excuse for doing so, that the credit was extended to get the guaranty of the Bank of the State, holding a junior judgment, and to make the property of Jamison bring a larger amount, which it did by this extension; and the evidence before me goes to prove that if it had been sold for cash, the judgment in favor of the estate would not have been reached. But this inquiry is, in fact, of comparatively small consequence, as the parties are at issue on the question whether the memorandum check, or loan of which it is the evidence, is or is not an interest bearing demand—the plaintiff insisting on interest, and the defendant denying his obligation to pay it.

"I report, further, that the available assets of the assigned estate amount to \$15,359, while the debts are about \$77,391, so that the estate will pay about twenty-five cents on the dollar. The payments will not reach beyond the third class of preferred debts. I annex hereto a copy of the order of preference, marked exhibit B.

"If custom among merchants can establish the relative rights of the parties, I think it was clearly proved that although these memorandum checks do not draw interest for

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short dates, yet if they are suffered to lie over for any great length of time, (one witness said for a year,) it is expected they should draw interest.

"The foregoing is a summary of the testimony filed herewith; it was submitted by me at the trial, and is now presented in this condensed form at the request of the Solicitors in the cause."

Exhibit A.

Charleston, January 17, 1852.

Memorandum. No.

Cashier of the Union Bank of South Carolina: Pay to C. B. Glover, or bearer, four thousand three hundred and twenty-eight $\frac{23}{100}$ dollars.

\$4,328.23.

Glovers & Davis.

Exhibit B.

The deed provides for the expense of drawing the papers and paying commissions for collecting the funds, and then proceeds as follows:

And then in trust, that he, the said Clarence A. Graeser, or his executors, administrators and assigns, do and shall apply the residue of the said trust moneys in and toward the payment and satisfaction of the several debts and sums of money to such of the following persons, for the following causes of indebtedness, in the order following, that is to say:

First. To William E. Evans & Co., for balance due them on purchase of cotton and interest.

Second. Borrowed money, to wit: Thomas N. Gadsden, seven hundred dollars (\$700.00); Charles B. Glover, executor of Vinyard, about five thousand dollars (5,000.00); William E. Martin, five hundred dollars (500.00); Menlove & Davidson, six hundred dollars (\$600.00.)

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*Third. Dr. J. P. Zimmerman, amount of his draft, three thousand dollars, (3,000.00), and interest from maturity until paid.

Fourth. Nicholas A. Peay, balance due him on a draft for five thousand dollars, (5,000.00,) and a note endorsed by him for one thousand dollars, (\$1,000.00,) with interest on same from maturity until paid, deducting balance secured to him by mortgage of negroes from Sanders L. Glover.

Fifth. Lewis C. Glover, as drawer and endorser for Glover & Davis, over and above any amount due by him to that firm, the same to be discounted against his liability.

Sixth. To all persons to whom balance may be due on sales of produce and lumber, made for them on commission.

Seventh. To all general creditors of the firm of Glovers & Davis, whether by note or open account, or as endorsers, or otherwise.

His Honor, the presiding Chancellor, decreed that the complainant was entitled to interest on his claim for money borrowed, and ordered the same to be paid out of the assigned estate.

The defendants appealed on the grounds:

1. Because the deed does not provide for interest, and those who accept it, must look to it as the law of the case.

2. Because the negative evidence of intention not to pay interest which the omission of it in the second ground furnishes, is strengthened by its being provided for in all the other four first classes with this exception.

3. Because, if we pass by the deed, the original contract does not carry interest. Money had and received, to the use of another, does not necessarily imply that interest is to be paid, and when money is payable on demand, there is no interest until demand. *Smith v. Bythewood, Rice*, 245 [33 Am. Dec. 111].

4. Because whatever may have been the character of the original transaction, it would appear from the deed that the preference and the security extended to the class

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who had *loaned money, were intended and received as a full equivalent for interest.

Martin, for appellants.
Simonton, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. There is little in that clause of the assignment in which the plaintiff's claim is provided for to countenance the defendants' position, that the interest on this demand was intended to be excluded.

The memorandum cheque given to the plaintiff on the 17th of January preceding the assignment, for the money borrowed from him, was for the sum of \$4,328.23—made presently due. In the assignment, which was executed, Nov., 1852, it was declared to be in trust for paying and satisfying the demands of claimants "for the following causes of indebtedness," in the order prescribed; and in the second class of claimants, for "borrowed money," is included "Charles B. Glover, executor of Vinyard, about \$5,000." When we recur to the principal of that debt, and find that it but slightly exceeded \$4,000, and compare it with the sum thus roundly provided for, we can hardly suppose that the provision was intended to be restricted to the precise amount of the principal, and that this was not intended, becomes more probable, when we remember that the direction to pay was given, not so much with reference to the amount due to the creditor, or to the form of his security, as to the consideration, or "cause of indebtedness," on which his claim rested. What was due him for money borrowed was to be paid, much or little.

That sum was ascertained by the memorandum cheque, operating as a statement in writing between the parties of the sum due from the one to the other. If for money advanced, or paid, laid out and expended, the party to be charged admit in writing the amount due, or if an account be stated be-

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tween *the parties and the balance struck, there is no doubt interest accrues from the time.

Some reliance is placed on the fact that this was a memorandum cheque, such as it is the custom of tradesmen to take as convenient means for short settlements between themselves, and on which it is not usual to charge interest. No doubt in such daily or weekly settlements, the interest which is trifling is not considered. But if there is unusual or unreasonable delay, there is nothing to prevent them from insisting on the legal incidents of the security given, whether it bear the form of cheque, note or bond. It is neither illegal nor unreasonable that they should do so in such a case.

It is ordered that the decree be affirmed and the appeal dismissed.

DUNKIN and WARDLAW, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *447

*L. REEVE SAMS v. EDGAR FRIPP.

(Charleston. Jan. Term, 1859.)

[*Specific Performance* ⚡32.]

Contract for sale of land construed and defendant decreed to make specific performance.

[Ed. Note.—Cited in *Peay v. Seigler*, 48 S. C. 509, 26 S. E. 885, 59 Am. St. Rep. 731; *Wharton v. Tolbert*, 84 S. C. 200, 65 S. E. 1056; *McSwain v. Atlantic Coast Lumber Corp.*, 96 S. C. 174, 80 S. E. 87.

For other cases, see *Specific Performance*, Cent. Dig. §§ 89-99; Dec. Dig. ⚡32.]

[*Specific Performance* ⚡105.]

Slight delay in filing bill excused by the circumstances.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 325-341; Dec. Dig. ⚡105.]

[*Frauds, Statute of* ⚡115.]

The requirements of the statute of frauds in relation to contracts to convey lands are fulfilled by the signature to the contract of the party to be bound, where the adverse party by bringing his bill, or any writing, affirms the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 246; Dec. Dig. ⚡115.]

Before Wardlaw, Ch. at Beaufort, February, 1858.

Wardlaw, Ch. This is a suit for the specific performance of defendant's contract to sell a tract of land to plaintiff. The parties differ as to the construction of their agreement, substantially as to the sums of money to be paid by plaintiff for his use of the land in the years 1855 and 1856, and as to the time when, if ever, he became purchaser; and further differ as to the procedure of the Court relating to the time and prerequisites for plaintiff's prosecution of relief. The bill was filed April 3, 1857, and the subpoena to answer was served on the defendant eleven days afterwards. On June 18, 1853, the parties signed the following writing: "Be it remembered, that it is agreed between Dr. L. Reeve Sams, on the one part, and Edgar Fripp, on the other, that the latter will sell to the former a portion of his Parsonage tract on St. Helena Island, containing two hundred acres, more or less, as will more fully appear on reference to the plat of the same, for the sum of four thousand dollars; one fourth of which, or more, is to be paid at delivery of titles, and the balance by bond, on or before the first day of January, 1857, with interest annually from date of bond. And it is understood that the place will be delivered on the 1st of January, 1854; and

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that, in the meantime, the *use of the pine barren and other wooded land be discontinued except for the purposes on the place."

On January 3, 1854, the parties signed the following writing: "It is agreed between Edgar Fripp, on the one part, and L. R. Sams, M. D., on the other part, that in consideration of the sum of one hundred and forty dollars, (\$140) to be paid the said E. Fripp, the said Dr. L. R. Sams has the entire right

to use the land or tract commonly called the Parsonage, as far eastward as the public road leading from the Episcopal Church to the Savannah Causeway, for one year, or more, paying the same amount annually. The right to any wood for other purposes than the use of said tract, is excepted. Whenever, at the expiration of any year not extending beyond the last day of the year 1856, the said Dr. L. R. Sams, his heirs, executors, administrators or assigns, require titles for said place and have complied with the above terms, I bind myself, my heirs, executors, administrators and assigns, to make titles deliverable on the payment of four thousand dollars, (\$4,000,) the purchase money, according to terms of sale agreed upon in the year 1853."

Much conference and negotiation concerning their agreement followed between the parties, of which the only evidence before the Court is such of their letters as have been produced, and the testimony of E. Rhett.

On January 4, 1855, Sams writes to Fripp in reply to a note of same date, recited, as informing him that if he continued the lease, Fripp would use the timber between the public roads, and inquiring Sams' decision as to the matter (of purchase); that he, Sams, was exclusively entitled to the timber, under their agreement, while he remained in possession, and proceeds: "besides this, it is fully my intention to purchase the tract and to have got the titles from you last month, but"—for an excuse stated—"that I did not notify you before the conclusion of the year, and I could not visit Charleston for the purpose of bringing up funds, which I intended to do, as you seemed not inclined last year

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to accept anything but cash *in our settlement. It is still my intention to purchase the place."

On January 18, 1855, Sams writes to Fripp that there was no stipulation or understanding, express or implied, that he should call for titles as soon as he had formed the intention to purchase, and that he declined to cancel the agreement, and would endeavor to make arrangements for receiving the titles as soon as circumstances would allow, and in a postscript acknowledges the receipt, while writing, of a note of E. Fripp, of the day before, to which want of time prevented a further reply.

On March 13, 1855, Dr. Sams writes to J. D. Pope, counsel of Fripp, that, although in his view not entitled to demand this positively from his failure to give notice of his intention to purchase before the end of the previous year, he would conclude the purchase if Mr. Fripp would date the conveyance on January 1, 1855, and give some indulgence for the realization of the proceeds of his cotton crop, an account of the sales

of which in Charleston he had received the previous evening.

On March 20, 1855, Mr. Pope replies to Dr. Sams, that Mr. Fripp had authorized him to say, "that whatever he may be willing to do, Mrs. Fripp refuses to join him in titles to one half of the land which was hers before marriage, and to release her inheritance thereto, and also refuses to renounce her dower in the other part or moiety of the land which Mr. Fripp purchased since his marriage, the two parts making the Parsonage tract which you agreed to purchase from Mr. Fripp. Under these circumstances I can say nothing about the purchase money, &c., that you offer to pay," and requests Dr. Sams to address any further communication directly to Mr. Fripp.

In a note of Dr. Sams to Mr. Fripp, dated October 18, 1855, he says: "I write for the purpose of ascertaining whether you intend giving me titles for the Parsonage tract, according to the terms of our agreement, or

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not. Please reply to this at *once, and say definitely whether you will give them or not." On the same day, Mr. Pope writes to Mr. E. Rhett, counsel of Dr. Sams: "Mr. Edgar Fripp instructs me to say, that Dr. L. R. Sams having come to his terms, that is, to abandon the lease, take titles and comply with his part of the agreement in all others respects, he, Mr. Fripp, is now ready (as he has ever been) to fulfil his part of the agreement and execute to Dr. Sams all necessary and proper titles according to law; all papers to bear date 1st of January, 1855." And on the next day, October 19, 1855, Mr. Fripp writes directly to Dr. Sams: "Your letter of the 18th inst. is before me. This will serve to inform you that I am ready to make titles to you according to agreement and according to law in every respect."

On October 24, 1855, Mr. Rhett writes to Mr. Pope in reply to the note of the latter of the 18th, "that Mr. Fripp is in error in speaking of the lease as abandoned by Dr. Sams, and also in understanding Dr. Sams as calling at the time for titles to the Parsonage tract;" that by the agreement of January, 1854, Dr. Sams was entitled to remain lessee until the close of the year 1856, and then call for titles; that the only purpose of Dr. Sams' note of the 18th to Mr. Fripp, was to obtain an answer to the question whether Mr. Fripp intended to give titles to Dr. Sams, as Mr. Pope's note of March 20th apparently repudiated the purpose to convey; and that Dr. Sams was glad to interpret Mr. Fripp's note to him of the 19th, as an assurance that there would be no difficulty as regards the titles when Dr. Sams should call for them at the expiration of the present year, or the next."

On December 6, 1855, Dr. Sams writes to Mr. Fripp, excusing a full reply to some previous note of Mr. Fripp's, again insisting

on his exclusive right to use the timber of the wood land until during the term of his lease he had determined not to purchase, which determination he had not formed, and granting some license to Mr. Fripp to use a road and landing.

In a note of May, 1856, to Dr. Sams, "Mr.

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Fripp declines *receiving rent for the Parsonage tract, as he was informed in January, 1855, in answer to a note relative to the lease, that it was discontinued, or, in other words, the place was to be purchased. He prefers to have one settlement."

On December 16, 1856, Mr. Rhett writes to Mr. Fripp: "I am authorized by Dr. L. Reeve Sams to state to you in this form: That the year 1856 having nearly expired, he is ready to receive and requires of you titles to the Parsonage tract, on St. Helena Island, deliverable on or before the 1st of January next, on which day he will be ready to pay one thousand dollars in cash, and to give you his bond for the balance of the purchase money, (three thousand dollars) payable in three annual instalments of one thousand dollars each, with interest from the date of the bond, payable annually, conformably to your two mutual agreements, in writing, bearing date the 13th June, 1853, and the 3d January, 1854, respectively. Dr. Sams also desires me to inquire in what form you will have the cash payment, whether in specie or bank bills," and concludes by requesting immediate acknowledgment of the letter and an early answer to it.

On December 19, 1856, Mr. Fripp writes to Mr. Rhett that there would be no sale nor execution of titles without payment of the purchase money; that the matter must be finally and fully closed on or before January 1, 1857, and that if Dr. Sams complied with the terms of the agreement or declared his intention to do so, he, Mr. Fripp, would readily say what kind of money he demanded.

On December 29, 1856, Mr. Pope writes to Dr. Sams that Mr. Fripp would either take the place, receive the unpaid rent for 1855 and 1856, at one hundred and forty dollars a year, (half the interest on four thousand dollars, the price of the land,) and pay for the improvements erected by Dr. Sams, whatever might be determined to be their value by three disinterested persons; or, that he would convey the land, and Mrs. Fripp would release her inheritance and dower to which she was entitled in different

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parcels of the land, if *Dr. Sams would pay the purchase money with interest for the year 1855 and 1856, on the first day of January ensuing, or such early day thereafter as might be agreed upon. On the same day, Dr. Sams writes to Mr. Pope, as a full answer to his proposals: "I renew my requisition on Mr. Fripp for good and sufficient titles to the parsonage, to be prepared as of

this date, on the delivery whereof I will pay Mr. Fripp in cash one thousand dollars, besides two hundred and eighty dollars for the rent of the parsonage for 1855 and 1856, and deliver to him my bond for three thousand dollars, payable on the 1st of January, 1857, with interest from date, payable annually. This is all I will do, and all that he has a right to require of me." This last letter was not communicated to Mr. Fripp until some day after the 3d of January following. On that day Mr. Fripp writes to Dr. Sams: "As you have not complied with the conditions of the lease to the parsonage tract, so as to authorize you to demand titles to the same, I write to learn when it may suit your convenience to restore the place to me. As I cannot object, under the circumstances, to receive the two hundred and eighty dollars for the rent, you will please as early as convenient give me an order on your factors, which will be a good receipt for the same." Dr. Sams returned a formal notice at night, stating pressing engagements as a reason for declining to consider the subject.

On January 6, 1857, Mr. Fripp writes to Dr. Sams: "I have learned to-day, for the first time, that you offered to give two hundred and eighty dollars lease money, and also four thousand dollars on the 1st of January, 1857;" insists that his claim for interest on the purchase money for 1855 and 1856 was justified by Dr. Sams' letter of January 4, 1855, and of October 18, 1855, but says that if Dr. Sams will explain his letters, he, Mr. Fripp, will consummate the agreement for sale, "with the understanding that there is no blame to be attached to me for having required lawful interest on the purchase money for the past two years; the entire amount is required, without which no sales. But the contrary if you retain pos-

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*session after February 1st. I shall demand for the present year four hundred dollars rent." On the same day, Dr. Sams replies briefly, that he was busy at the time, and must see Mr. Rhett, which he expected to do on the day after the next, before writing any explanation.

Mr. Edmund Rhett testifies: Mr. Fripp called at my office on January 6, 1857, having very recently received Dr. Sams' note to Mr. Pope, of December 29, 1856, and inquired what I understood to be Dr. Sams' intentions. I said I supposed Dr. Sams intends to comply strictly with the terms of the agreement between you, and, in my judgment, he has carried out the letter of the law. Mr. Fripp then said Dr. Sams and myself have misunderstood each other concerning the lease, and I am in no way responsible for the misunderstanding; but I am now ready to comply with my part of the agreement, provided Dr. Sams will acknowledge in a note to me, or in or through you, that I have been

in the right. He asked me my opinion as to Dr. Sams' making this acknowledgment, and I said I think he will not make it, as it would be contrary to his positions in the correspondence. Mr. Fripp then left me, remarking that he would see me again. I understood this last remark as referring to the point of explanation between Dr. Sams and himself. Mr. Fripp, who is a gentleman of truth and character, has lately stated to me that he made the remark in a previous conversation, and without the reference, I suppose, and I wish him to have the benefit of this before the Court, as a correction of my remembrance. In consequence of my expectation of a further conference with Mr. Fripp, or of my conviction that it was unbecoming in me as a solicitor of one of the parties to defeat by precipitate action the settlement of a matter of etiquette between them, I deferred filing the bill, although Dr. Sams had given me peremptory instructions in January to seek relief in this Court.

On January 12, 1857, Dr. Sams gave to Mr. Fripp a draft on his factors in Charleston for two hundred and eighty dollars, in full payment for the rent of the parsonage

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for 1855 *and 1856, which has been paid. On December 10, 1856, John Fripp offered in writing to buy the parsonage from Edgar Fripp, at the price of four thousand dollars. At the trial, it was admitted for the purposes of the argument, that Dr. Sams had erected houses on the parsonage tract to the value of five hundred dollars. This fact cannot be treated as part performance demonstrating a contract to buy, for Dr. Sams in his letter of January 4, 1855, says: "As the place was very imperfectly settled, you promised, in the event of my not purchasing the place, to allow me for the buildings I might put up. The hurried manner in which our agreement was drawn up, led to its omission," and this averment is conceded to be true by the adverse party. The improvements may have been made by Dr. Sams in the character of lessee.

I have employed more words in stating than I think necessary to be used in adjudging this case.

The first controversy of the parties is as to their agreement for sale and purchase. The contracts of June 18, 1853, and of January 3, 1854, are to be construed in *pari materia*. The former is simply an agreement for sale on certain terms which have not been complied with, and the latter is principally a lease from year to year for three years, with an option in the lessee to become purchaser in fee if he chose to pay a rent of one hundred and forty dollars a year within this term of three years, and four thousand dollars on January 1, 1857. The latter supercedes the former contract, except that it refers to it for ascertainment of the sum of the purchase money and the time of payment.

As the interest on the purchase money is double the rent, it is natural that the proprietor of the soil should insist that the option of his tenant to purchase the fee should be exercised as soon as practicable, and that the tenant should delay his option so long as he was allowed to do so; and these opposite views are manifested throughout their correspondence. Defendant urges in argument, that plaintiff was bound to sever his relation of tenant to landlord as soon as he determined to become owner in fee, and that

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his letter of *January 4, 1855, announced such determination, and obliged him afterwards to confine himself to the rights of a vendee. *Powell v. Malgrave*, 39 L. & E. R. 56-7. This is not the legitimate interpretation of this letter, although defendant's construction may have been naturally adopted by an honest and punctilious man, possessing pride of opinion and regard for his interests. Dr. Sams simply speaks of a past intention to purchase, of which other engagements had prevented him from giving notice before the close of the year 1854, and of a subsisting intention to purchase, without intention as to the time when he should conclude it, and in no respect limiting the term of his option. In his note of January 18, 1855, he justly denies any stipulations on his part to demand conveyance so soon as he had determined to purchase; and this is not then controverted. His offer in his letter of March 13, 1855, to anticipate the time of his option and become vendee, as of January 1, 1855, was rejected and annulled by the communication of March 20, 1855, that Mrs. Fripp would not release her dower and inheritance. His note of October 18, 1855, is fairly explained in Mr. Rhett's note of the 24th of the same month. Mr. Rhett's note of December 16, 1856, demanding titles for defendant in behalf of plaintiff, seems to misinterpret the agreement as to the time of payment of the purchase money; but this mistake is corrected in Dr. Sams' note to Mr. Pope, of December 29, 1856. It is unfortunate that this last note was not at once communicated to Mr. Fripp, and its proposals accepted by him. If there was any technical difficulty as to the time when Dr. Sams' announcement of his purpose to purchase reached Mr. Fripp, and there can be none, as Mr. Pope was Mr. Fripp's agent, this was waived by Mr. Fripp's letter of January 6, 1857. Indeed, thenceforward defendant seems to found himself on a punctilio or a conceit of impeccability.

It is said in behalf of defendant, that plaintiff's payment on January 12, 1857, of the rent of 1855 and 1856, amounts to an abandonment of his option to purchase, and

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acceptance of defendant's offer in the letter of January 6, 1857, to treat the whole agreement as a lease. But in my judgment, the payment of rent, like the matter of improve-

ment, is altogether equivocal. The rent was due, whether plaintiff was simply lessee until the end of 1856, or lessee with the option of becoming purchaser, evinced before that date.

It is further said in defence, that by the agreement of January 3, 1854, it is preliminary to plaintiff's requirement of conveyance that he should pay the rent, and this was not in fact done, and that in good pleading, plaintiff should have alleged in his bill such payment of rent as preparatory to a conveyance to him. On the point of pleading, it may be remarked, that plaintiff had paid the rent before the bill was filed, and in the bill offers to pay the purchase money as of January 1, 1857, and defendant does not demur for incompleteness in this offer: and it may be concluded that there is no important defect in plaintiff's pleading, in form or in substance. It is true that plaintiff was bound to pay the rent before he was absolutely entitled to a conveyance from defendant, but this does not imply that he must pay the rent before a formal requirement of titles. His offer in the letter of December 29, 1856, to pay the rent of two hundred and eighty dollars, and the purchase money of four thousand dollars, on January 1, 1857, is a complete offer to perform the stipulations on his part.

Finally, defendant urges that plaintiff should be barred on account of his tardiness in seeking a remedy in this Court, considering the limitation as to time in the agreement itself, and the explicit notification by defendant to plaintiff on December 19, 1856, that this limitation would be stringently exacted. The following cases were cited and commented on in argument, but I shall not discuss them specially: *Powell v. Malgrave*, 39 L. & E. R., 56; *White v. Bennett*, 7 Rich. Eq. 260; *Prothro v. Smith*, 6 Rich. Eq. 325; *Doar v. Gibbes*, Bail. Eq. 371; *Thompson v. Dulles*, 5 Rich. Eq. 386; *Seton v. Slade*, and the notes, part 2, vol. 2, W. & T. L. C.,

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*19, 20, 27, 30, 32. According to the general doctrine of the Court, time is not usually regarded as of the essence of a contract to sell lands, but it may be rendered essential by the stipulations or notices of parties, particularly when delay is injurious in itself, or beyond a fixed epoch, for the performance of a condition necessary to the completion of the contract. In the present case it was indispensable that plaintiff should avow his option to purchase promptly for remedy, after the refusal of his co-contractor to convey. But the continuance of the negotiation between the parties after January 1, 1857, absolves any rigorous construction of the agreement as to time, and the testimony of Mr. Rhett excuses the slight delay in filing the bill; where the claim of a subsequent purchaser has not supervened and compensation may be made on delay of payment.

It is adjudged that defendant must perform specifically his contract to convey the premises in fee, with warranty, on his being paid the purchase money of four thousand dollars, with interest from January 1, 1857.

And it is ordered that it be referred to the Commissioner of the Court, to inquire and report whether the defendant can convey a good title to the premises, and if he cannot, as to the amount of deduction which should be made from the purchase money; and that the plaintiff, within one month from the confirmation of the Commissioner's report that the defendant can make good title, pay to defendant four thousand dollars, with interest from January 1, 1857; or, if the report should be confirmed allowing a deduction from the price, pay, within one month from the confirmation of such report, the sum of money found to be due to defendant for price of the land, on pain of having the bill dismissed.

The defendant appealed upon the grounds:

1. Because the contract between Sams and Fripp was only a lease, with a right, on the part of Sams, at the end of any year not extending beyond the last of the year 1856, to

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convert it into a contract of sale by the performance of certain stipulated conditions; that the attempt to convert it into a contract of sale was not made until some time in January, 1857—after the right had been lost.

2. Because good faith and the true meaning of the contract required Sams to ask for titles at the end of any year (before the end of 1856) in which he should resolve to buy; and as he had resolved to purchase at the end of 1854, and had paid the rent of that year, he was in a condition to demand titles. The contract was then converted into a contract of sale; it is therefore submitted, that it was too late, in April, 1857, to ask for a specific performance, especially as he had repeatedly denied his obligation to take titles, and insisted that his obligation was to pay the rent only—one half of the interest money.

3. Because when he demanded titles, in 1857, he was then in arrears for two years' rent, and was not even in a condition, had the time not expired, to ask for titles.

4. Because his possession, by his own showing, was always as tenant under a lease, and not as purchaser under a contract to buy; and it is submitted that it was not his right to treat the contract sometimes as a contract of sale and sometimes as a contract of lease, as his interest might dictate.

5. Because Sams never did perform or offer to perform any of the conditions which are made precedent by the said contract to his right to ask for titles at any time before the filing of the bill.

6. Because Sams ought at least to be required to pay interest on four thousand dollars from the 1st of January, 1855, and as the defendant, even in January, 1857, offered

(if he was ready) to make him titles, the complainant ought to pay the costs.

DeTreville, Pope, for appellant.
Rhett, contra.

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*The opinion of the Court was delivered by

WARDLAW, Ch. We approve the result of the Circuit decree and consider it superfluous to add much to the Chancellor's reasoning.

It is loosely asserted in the decree that the agreement of the parties of January 3, 1854, superseded their former contract of June 18, 1853, except as it is referred to for ascertainment of the sum of the purchase money and the time of payment. It would have been more accurate to speak of the former contract as still subsisting, although modified by the latter as to the terms of payment. That this was the meaning of the Chancellor is manifest from his remark that the two instruments are to be construed *in pari materia*.

The objection to the decree which has been principally pressed here, is that the plaintiff was not bound by contract to purchase, and from lack of mutuality the defendant's agreement to sell is without consideration. This objection is not suggested in the answer, nor was it argued on circuit, nor is it explicitly stated in any ground of appeal. It would be difficult to maintain the fact, which is the basis of this argument, that the plaintiff was not, from the beginning, bound by a valid agreement to purchase, but conceding, for the discussion, that he was not bound, until, by his letter, he required titles, and offered to perform all the stipulations on his part to be performed, he was certainly thenceforward bound, and thus consummated his title to the remedy of the Court. If it were granted that before this letter the defendant had the right to retract his offer to sell, still in fact he never did retract it, and in the last of his numerous letters to plaintiff of January 6, 1857, he offers to convey, although he urges that his misconstruction of the agreement was justified by two letters of the plaintiff to him. It has been always held that the requirements of the statute of frauds concerning agreements to convey lands, were fulfilled by the signature to the contract of the party to be bound, where the adverse party by bringing his bill, or any writing, affirms the contract. In truth the

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*whole dispute between the parties is whether for the years 1855 and 1856 rent, at the rate of \$140 a year, or double that sum, as interest on the purchase money, should be paid by plaintiff, and as we concur in the plaintiff's construction of the contract as to this particular, it is ridiculous excess to elaborate the case.

It is ordered and decreed that the appeal

be dismissed and the circuit decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *461

*W. J. BENNETT v. MARTHA I. M. BELL.

(Charleston. Jan. Term, 1859.)

[*Appeal and Error* ⚭832.]

Where a party appeals from a decree and then abandons his appeal, it is no ground for a petition for a re-hearing that the appeal was abandoned, because the Chancellor's notes of the evidence were not forthcoming.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3215; Dec. Dig. ⚭832.]

[*Equity* ⚭437.]

The Court may suspend the execution of a decree where the party, if he were to obey it, would subject himself to a penalty; but where the apprehension of a prosecution is manifestly groundless, the Court will not suspend the execution.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 1053, 1054; Dec. Dig. ⚭437.]

[This case is also cited in *Charleston Rice Milling Co. v. Bennett*, 18 S. C. 255, as to facts.]

Before Dunkin, Ch., at Charleston, July, 1858.

This bill was filed in June, 1853, to compel the defendant to remove certain obstructions from Concord street in the city of Charleston, which bounded plaintiff's land, and which it was alleged was a public street. The cause was heard in June, 1856, before his Honor Chancellor Dargan, who pronounced the following decree:

Dargan, Ch. This cause came on, and was heard on bill, answer and proofs, and it appearing that Concord street, as alleged and described in the bill, was granted to the City Council of Charleston in eighteen hundred and one (1801,) and dedicated by deed as a public street, and that the original defendant, William Bell, in his life-time, had notice of and was bound by the covenant of his grantors, Joseph and Mary W. Johnson, to and with the complainant, for a boundary of his lands on said street, and binding upon them and their assigns, not to obstruct his free use thereof as a public street; and that the defendant, Martha I. M. Bell, the widow, and the grantee of the said William Bell, is in like manner bound.

And it further appearing that the said defendant, Martha I. M. Bell, has, in violation

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of her said obligation, obstructed *and blocked up said street between its intersection of Hasell street on the south, and its northern extremity, being the northern line formerly of Philip Gadsden's land.

In consideration whereof, it is now here adjudged, ordered and decreed, by this Court,

that the said defendant, Martha I. M. Bell, do forthwith cause to be removed her fences, buildings, and every obstacle on or obstructing said street, so as to permit and suffer the complainant, and all other persons, to use the same as a public street, and especially to all free and unobstructed ingress and egress to and from his lands bounded thereon. And that a writ of injunction, directed to the said defendant, Martha I. M. Bell, do issue under the seal of this Court, directing and commanding her and her agents, servants, bailiffs, and tenants, and all persons acting under her license or authority, to remove said fences, buildings, and obstructions, and forever hereafter to abstain from further obstructing said street.

And it is further ordered, that the costs of this suit be paid by the defendant, the executor of William Bell, out of the estate of his testator, William Bell.

From this decree the defendant gave notice of appeal, on ten grounds; but at the sittings of the Court of Appeals, in January, 1857, she abandoned her appeal, and the docket was so marked. Briefs had been prepared and the decree and grounds of appeal printed for the hearing of the cause on appeal.

In March, 1858, the plaintiff obtained a writ of injunction, commanding the defendant to comply with the decree by removing the obstructions.

On the 23d of June, 1858, the defendant filed her petition for a re-hearing, in which she stated as ground for re-hearing that, "your petitioner is informed that her solicitors, as appellant's counsel, were never furnished with a full report of the case by the Chancellor, and that at the call of the case on the Appeal Docket, in consequence

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of the loss of the Chancellor's *notes of evidence in the trial below, her counsel found it impossible to proceed in the case with justice to your petitioner and to themselves: by reason whereof, the appeal taken has never been heard, the equities of your petitioner's cause have never been finally adjudged, and complete justice cannot be dispensed without a full re-hearing of the bills, answer, and proofs."

On the 29th of June, the petition was heard by his Honor Chancellor Dunkin, and on the same day his Honor granted an order that the defendant shew cause why she should not be attached for a contempt in that she has disregarded and disobeyed the mandate of the Court and the writ served upon her.

The defendant shewed cause, and on the 9th of July his Honor ordered, that unless the obstructions be removed, as required by the decree, within three months, the rule be made absolute.

The defendant appealed from the ruling

of his Honor on the petition for a re-hearing, on the grounds:

1. Because the petition set forth good ground of equity.

2. Because his Honor erred in ruling that the entry of "appeal abandoned" on the appeal docket, necessarily concluded the cause and estopped the appellant from pursuing her equity for a re-hearing in the Circuit Court.

3. That if the appellant's counsel were at all in error, it was in docketing the cause without a complete report of the points and evidence taken in the trial below, and that such error was fully corrected by their abandoning the appeal, and by resorting to the Circuit Court on petition for re-hearing.

4. That the manner in which the decree was drawn was calculated to embarrass the counsel for appellant, and was not in accordance with the requisitions of law.

5. Because his Honor erred in ruling that a motion for re-hearing was the proper motion for the Court of Appeals, inasmuch as the ground of the motion, to wit: the

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incompleteness of the Chancellor's report of the cause and the consequent embarrassment of counsel, was matter arising after the decree was filed, and made a new case for equity.

6. That there had been no such default on the part of appellant as should deprive her of her equity for a rehearing at any time before the final enforcement of the decree.

The defendant also appealed from the decision of his Honor on the return to the rule to show cause, on the grounds set forth in her answer to said rule, and also on the following grounds:

1. Because his Honor erred in ruling that the positions assumed in the return were all included in the grounds of appeal from Chancellor Dargan's decree.

2. Because an acquiescence on the part of defendant in the decree as declaratory of her land being bound by the covenant of dedication of Concord street, was perfectly consistent with a subsequent resistance, on her part, to the enforcement of the decree by process of contempt.

Barker, for appellant.

Campbell, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The original decree in this cause was made by Chancellor Dargan in June, 1856. From that decree an appeal was taken on ten distinct grounds. Upon the call of the case, at the sittings of the Appeal Court, in January, 1857, the appeal was abandoned by the solicitors of the appellant, and is so marked on the docket of the Court. Some time after the abandonment of the appeal an application was made to the City Council to pay, or contribute to pay, to the expenses of the litigation which had result-

ed in facilitating the opening or extension of Concord street. The correspondence which then took place, is referred to as exhibit A, of the appellant's petition but is not printed

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with the brief and the Court only knows of it from the casual reading by the counsel of the appellee in the course of his argument from one of the newspapers of the city. It would seem from that correspondence that, while the Council recognized the services rendered to the public in the proceedings, they postponed further action in consequence of a communication from the appellant's counsel which induced the belief of Council that the object had not yet been consummated. Thereupon, in March, 1858, proceedings were taken by the plaintiff to enforce the decree of Chancellor Dargan by suing out a writ of injunction, &c. from the register. This was about to be urged when, on 23d June, 1858, a petition was filed praying for a rehearing of the original cause. The Chancellor declined to grant the prayer of the petition, and this constitutes the first question to be determined.

The general practice on this subject is stated in Carr v. Green, Rich. Eq. Cases, 405, and Simpson v. Downs, 5 Rich. Eq. 421. But the special ground, on which the petitioner relies, is that the original appeal was abandoned because the Chancellor's notes of evidence were not forthcoming. This circumstance may, or may not, have furnished a very good reason for the Court of Appeals at that time to have postponed the hearing, or to have given the appellants such aid as may have seemed proper, but it constitutes no ground whatever for rehearing an appeal which had been formally abandoned by the parties. As well might an unsuccessful litigant in the Law Court of Appeals, after his appeal had been abandoned and so entered on the record, move, a twelve month afterwards, to have his cause reinstated on the docket and a new trial ordered because no report, or an imperfect report, had been made by the presiding Judge who originally heard the cause.

But, out of the ten grounds of appeal taken, six might very well have been heard and determined upon the pleadings alone, and, in reference to the other grounds, the greater

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part of the evidence (as appears from the argument here) was manifestly documentary or from public records which were always accessible to the parties, and which it was their duty, and not that of the presiding Chancellor, to have exhibited before the appellate tribunal. The principal matter pressed in the argument is (not as to the want of evidence of the original dedication by the proprietors, which is altogether documentary and which does not appear to be seriously questioned but) as to the acceptance on the part of the public, represented by the City Council. The Court is, of course, unable to

determine what evidence may have satisfied the mind of the Chancellor upon this point, nor is it at this time and on this application a proper subject of inquiry for the reasons already stated. This Court is of opinion that the petition presented no sufficient grounds for a rehearing, and was properly dismissed.

But it was submitted that although the Court would, in no manner, disparage the judgment pronounced by Chancellor Dargan in June, 1856, yet if, in enforcing the orders following thereon, insurmountable obstacles were presented, or the defendant, in yielding obedience to those orders, would violate the laws of the land, and encounter the perils of a prosecution, this Court had the authority, and should exercise it, of suspending the execution of those orders. Undoubtedly cases may arise, and have existed, in which the Court has suspended the execution of its own decrees, or a succeeding Chancellor has suspended the execution of an order made by his predecessor. It is a power to be exercised with great delicacy, but the authority properly exists, and whether justifiable or not must depend on the circumstances, or exigency, of the particular case. Of the grounds assumed for such interference in this case the Court deems it necessary only to notice particularly the objection that by the Act of Assembly 21st Dec., 1799, (7 Stat. 115) a penalty of forty dollars per week is imposed for throwing open, to the use of the public, enclosed

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spaces within *the corporate limits of Charleston, without the consent of the City Council, and it is urged that to obey the mandate of the Court in this case would subject the defendant to a prosecution under this Act.

The Act of 1799 was avowedly passed for the purpose of aiding the City Council of Charleston in the enforcement of their police regulations. The preamble recites the grievance to be prevented, and that "the corporation of Charleston can impose no penalty which would be sufficient to prevent persons from acting in opposition to the regulations" therein prescribed. It is then declared, substantially, that, before any street, lane, court or alley shall be opened, a plan shall be submitted and approved by the City Council, &c.—and provides a penalty of forty dollars for every week the street shall remain open contrary to, or in violation of the provisions of the Act. Concord street up to Hasell street has long since been established, and has been lighted, paved, &c., under the authority and at the expense of the corporation, &c. The dedication of the premises now in controversy being a continuation of Concord street beyond Hasell street was made in 1801, and the plan of the proposed street was placed upon the public records of the country. Without reference to any previous proceedings, on the part of the city authorities, it is matter of

record that, prior to the filing of this bill in June, 1853, the City Council had caused a prosecution to be instituted against the defendants' testator for a nuisance in obstructing this part of Concord street as a public thoroughfare. The Court has no official information as to the cause of the failure of the City Council in that prosecution. But when those proceedings are considered in connection with the correspondence subsequent to the decree of June, 1856, and which was put in evidence by the petitioner, the Court is satisfied that any apprehensions of the defendant of a prosecution under the Act of 1799, either at the instance of the City Council, or of any one else, may be safely

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dismissed, and that *the order of Chancellor Dargan for removing the obstructions, &c., may be obeyed by the defendant without peril of the penalties imposed by that Act.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

10 Rich. Eq. *469

*H. L. LLOYD and G. W. KING, Executrix, and Executor of Wm. Lloyd, v. H. H.

LLOYD and Others.

(Charleston. Jan. Term, 1859.)

[Wills \hookrightarrow 832.]

The testator directed "that all his just and lawful debts, and all lawful charges against his estate, be fully paid," and then devised and bequeathed "all the rest and residue of his property, real and personal," to his executors, in trust, &c. He afterwards acquired real estate which descended to his heirs at law: *Held*, that the case could not be distinguished in principle from *Henry v. Graham*, 9 Rich. Eq. 100, and that the personal estate bequeathed was liable for payment of debts in exoneration of the real estate descended.

[Ed. Note.—Cited in *Verdier v. Verdier*, 8 Rich. 135; *Farmer v. Spell*, 11 Rich. Eq. 550; *Richardson v. Inglesby*, 13 Rich. Eq. 99; *Laurens v. Read*, 14 Rich. Eq. 268.

For other cases, see *Wills*, Cent. Dig. § 2151; Dec. Dig. \hookrightarrow 832.]

Before Dunkin, Ch., at Charleston, February, 1858.

This case came before the Court on exceptions to the Master's report, which is as follows:

"The decretal order of Chancellor Dargan, of the 16th Jan., 1857, directed me to take the account of the executor and executrix, with the estate of their testator; to take the account of rents and profits between the heirs and distributees of the testator, and the defendants Alonzo J. White, Wm. B. Smith and John D. Ford of the real estate, in which they were jointly interested, and the account between them generally; also to enquire and report the real and per-

sonal estate of the testator; distinguishing between that portion of the real estate which passes under the will, and that which does not; to marshal the assets and to inquire into and report on the debts of the testator, whether by mortgage or otherwise; and whether the estate of which he died intestate ought to be disincumbered by his personal estate for the benefit of his heirs at law or distributees; with leave to report any

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special *matter; also to call in the creditors of the testator by public advertisement, to present their demands forthwith.

"By the decrees of Chancellor Dunkin, of the 16th and 17th February, 1857, the several returns of the commissioners in partition of the real estate were confirmed, and the Master was directed to sell the real estate specified in the writs of partition, and to retain the shares belonging to the estate of William Lloyd, deceased, subject to the further order of the Court.

"I respectfully report that I have taken the account of the executor and executrix with the estate of their testator, and find the items duly vouched, showing a balance of \$274.99 to the 15th September, 1857, in favor of the estate.

"The account of the rents of the real estate, held jointly by the testator with Alonzo J. White, Wm. B. Smith and John D. Ford, has been adjusted satisfactorily to the parties. I further report that the testator died intestate as to all his real estate, excepting a vacant lot in America street and the house and lot in Pinckney street, owned jointly with A. J. White. I further report that I called in the creditors of William Lloyd by advertisement in the newspapers, to present their claims forthwith, and the schedule (B.) annexed will show which of them have presented their claims to me and established the same. Among the debts is one for \$8,500, with interest, due George W. King, the substituted trustee of Mrs. Hannah Louisa Lloyd, under a deed of H. W. Ravenel, and others, to D. G. Joye, dated 20th February, 1851, in which a house and lot at the corner of East Bay and Inspection streets, was conveyed to Daniel G. Joye for the consideration of \$8,000, in trust, for the sole use of Mrs. Lloyd for life, and at her death to such of her children and in such proportions as she by deed or will should appoint or declare. The said house and lot was afterwards, viz: on the 15th June, 1852, sold to Mrs. M. J. Morris for \$8,500, received by Mr. Lloyd, and for this amount his estate is liable, with interest from his death.

"I further report that the remaining per-

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sonal estate of the *testator has been valued by competent witnesses at \$12,632.78, as per schedule annexed, part of which is of doubtful value.

"With a view to a proper marshalling of

the assets, I beg leave to report that, by the will of the testator, executed on the 11th June, 1853, after directing that all his just debts should be paid, he devises and bequeaths all the rest and residue of his estate, real and personal, to his executrix and executors, in trust for the sole and separate use of his wife during her life or widowhood, with special limitations over; and the testator departed this life on the 10th August, 1856; that all his real estate, with the exception of a moiety of a lot, held jointly with Mr. A. J. White, and a vacant lot in America street, was purchased by him after the date of his will, and is distributable under the Intestates' Act.

"That both the personal and real estate were heavily laden with debt at the testator's decease, and that the personal estate is wholly inadequate for the payment of the debts.

"It appears to me that the whole of the rest and residue of the estate, is specifically devised and bequeathed; that the land acquired after the making of the will should first be applied to the payment of the debts, afterwards, the personal estate specifically bequeathed, and last the real estate specifically devised as before stated—but the question is respectfully submitted to the judgment of the Court.

"I further report that the house and lot at the corner of Mazyck and Queen streets, was acquired after the date of the will, and I recommend that the same when sold be applied in the same manner as the rest of the real estate descended. I further report that, under the several orders I sold the real estate to the several purchasers named in schedule D. annexed, for the prices therein mentioned, all of whom have complied with the terms of their purchases and have received titles from me. The schedule will exhibit the particulars of the costs and net sales among the parties entitled.

"And lastly, I respectfully report schedule E., showing the result of the net sales of the

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real estate and the value of the *lot not yet sold, as amounting to \$38,853.58, from which after deducting the debts mentioned in said schedule, there will remain a balance of seven thousand seven hundred and forty-eight dollars, to reimburse the personalty for the debts paid thereout by the executor.

"From which it results that the following will constitute the estate devised and bequeathed to Mrs. Hannah L. Lloyd during her life or widowhood, viz:

The above sum from the real estate to replace personalty already applied to debts	\$ 7,748 15
Personalty in schedule C.....	12,631 78
Balance of cash as per executor's account	274 99
Half house and lot corner East Bay and Pinckney streets	660 57
Vacant lot in America street.....	600 00
	<hr/>
	\$21,915 49

Trust property under the deed of H. W. Ravenel and others, to D. G. Joye of 20th February, 1851..... \$ 9,541 25

The complainants excepted to the report on the ground:

That the Master should have ruled that the debts of the testator are to be paid out of his personal estate in exoneration of the descended realty, instead of ruling the contrary.

Dunkin, Ch. Upon hearing the Master's report, my impressions were in favor of the exception. But I had occasion to consider this subject very fully in the case of *Brown v. James*, 3 Strob. Eq. 24; and, although there are some verbal differences in the wills, I am of opinion that the construction must be the same. The manifest object of the testator, William Lloyd, was to give his whole estate to his executors for the benefit of his family, in the mode therein prescribed. The provision for the payment of his debts was simply superfluous. If he had devised and

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bequeathed to them his whole *estate, "subject, however, to the payment of his debts," the effect would be the same, and the qualification, (as a qualification) equally nugatory. In *Brown v. James*, the testator bequeathed to the object of his bounty, all his personal property and attempted a specification, of what it consisted, concluding with an, &c.! Although it was expressly premised in the will that the disposition therein made was "after the payment of his just debts and funeral expenses," yet the legacy was held to be specific, so far as to subject real estate descended to the payment of debts, before resorting to the personalty thus bequeathed. (a.)

But, as remarked by Chancellor Harper, in *Warley v. Warley*, Bail. Eq. 397, every devise of real estate is specific. The testator in this will has devised the estate, real and personal. As to the realty the devise is necessarily specific, and, as a resort for the payment of debts, it must be postponed to real estates descended. For the purposes of this inquiry, the same character must attach to the personalty disposed of in the same clause. In the absence of any express direction by the testator, the principle of law in this country is that the property, of which the testator has made no testamentary disposition, shall be applied to the payment of debts in

(a) The following extract from the will contains every thing necessary to a complete understanding of the case:

"First, I will and direct that all my just and lawful debts, and all lawful charges against my estate, be fully paid.

"Second, I give, devise and bequeath all the rest and residue of my property and estate, real and personal, to my executrix and executors hereinafter named, and to such of them only as shall qualify as such on this my will, and to the survivors or survivor of them, and the heirs, executors and administrators of such survivor forever, to his, her, or their only use and behoof forever. In trust, to and for the sole and separate use and benefit of my beloved wife, Hannah Louisa Lloyd, during her life or widowhood," with limitations over.

priority to that of which he has so disposed. Then, in the language of the Court in *Brown v. James*, has the testator so charged the estate devised and bequeathed in this case as to exempt the estate primarily liable according to the mode prescribed by law for the marshalling of assets? It is not perceived

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that *any other charge was created, or intended to be created, than that which the law implies.

It is ordered and decreed that the exception be over-ruled, and that the report of the Master stand as the judgment of the Court.

The complainants appealed on the grounds.

That the exception to the Master's report should have been sustained on the ground therein taken, and his Honor, the Chancellor, it is respectfully submitted, should have decreed accordingly.

Yeadon, for appellant.

McBeth & Ford, contra.

The opinion of the Court was delivered by

DUNKIN, C. This Court is of opinion that the case cannot be distinguished in principle from *Henry v. Graham*, 9 Rich. Eq. 100.

It is ordered and decreed that the decree of the Circuit Court be reversed; that the exception to the Master's report be sustained, and that the accounts be reformed accordingly.

JOHNSTON and WARDLAW, CC., concurred.

Decree reversed.

10 Rich. Eq. *475

*JOHN BROWN and Others v. A. McB. PEEPLES, Adm'or.

(Charleston. Jan. Term. 1859.)

[Judgment \hookrightarrow 853.]

A statute of Georgia providing that if no entry be made by the proper officer, on an execution, for seven years, the judgment shall be null and void—in an action in this State on the judgment, satisfaction will be presumed if the proper entries have not been made.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1568; Dec. Dig. \hookrightarrow 853.]

[Courts \hookrightarrow 95.]

The construction given to a statute by the Courts of the State which enacted it, is binding upon other Courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 322, 323; Dec. Dig. \hookrightarrow 95.]

Before Wardlaw, Ch., at Beaufort, February, 1858.

Wardlaw, Ch. This suit was instituted by plaintiffs, February 19, 1856, to obtain satisfaction of a judgment in the Inferior Court of Wayne County, Georgia, from equitable assets, which have lately come into the hands of the representative of one of the debtors.

On March 2, 1835, William Lane was appointed guardian of Margaret Smith and

Bryant Smith, then infant children of Charles Smith, lately deceased, and on the same day he, with Rebecca Smith and Cornelius Geiger, as his sureties, entered into a joint, and several bond to the Judges of the Court of Ordinary of Wayne County, and their successors in office, in the penalty of eight hundred dollars, with condition that he well, and truly demean himself as guardian according to law. The ward Bryant soon afterwards died, and the guardian Lane in his return of January 3, 1837, charged himself as owing to the surviving ward Margaret, the sum of \$443.62½. On May 2, 1838, in said Court of Ordinary for Wayne, the plaintiff, John Brown, "having given bond and security in terms of the law," was ap-

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pointed guardian of said *Margaret in place of said Lane. In the course of the same month, Brown as guardian, filed a petition to the Justices of the Inferior Court, setting forth the foregoing facts, and that William Hornsby had taken Rebecca Smith to wife, "which makes him liable in his wife's stead, as far as assets in his hands," and that Lane had refused payment on demand, wherefore the petition prayed that process might issue to compel Lane and his sureties to appear and answer the premises in said Inferior Court. Such process was issued May 29, 1838, and returned by the Sheriff "served a copy on Cornelius Geiger and others, November 23, 1838." A verdict was found and judgment entered up in favor of the petitioner against Lane, Geiger and Hornsby, on December 30, 1839, for \$443.62½, with interest from January 3, 1837, and \$12.50 for costs, and a fi. fa. in execution was lodged, January 4, 1840. On the fi. fa. are the following endorsements: "Levied on five hundred acres of land in Wayne county, household and kitchen furniture, one lot of land, No. 156, in Wayne county, 28th December, 1842, James Causey, S. W. C., sold for \$8, May 7, 1823. Received on the within execution from the hands of William Lane, eight dollars, this 22d September, 1845, James C. Smith. No property to be found this 9th April, A. D., 1852, Thos. Beckham, S. W. C., Ga."

William Lane died in 1845 or '7; Cornelius Geiger died September, 1851, in Florida, and William Hornsby died in September, 1855. All of them were reputed to be insolvent at their deaths respectively, and for some years before; but since Geiger's death, defendant Peeples, as the administrator of his estate, has received a considerable fund from the estate of one Mary Ann Roberts, of which Geiger was a distributee.

Defendant has paid a portion of this fund to the distributees of his intestate, but in a suit in this Court by them against him, he was ordered to invest \$1,200 by May 26, 1856, or pay interest thereon from that day, to provide the means for satisfying plaintiffs' claim if it should be established. Plaintiffs at

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first proceeded for redress in the Com*mon Pleas, but abandoned their suit there, and now seek the aid of this Court.

Defendants contest the original validity of the Georgia judgment; insist that the judgment, if valid, is not properly exemplified for judicial notice here; that it is barred by the statute of limitations, or by lapse of time, fortified by the imperfect account given of the disposal of the levy, and by other circumstances; and that this Court has no jurisdiction of the cause.

The judgment is certainly very informal according to the notions of procedure prevailing in South Carolina. It is not in the name of the Judges of the Court of Ordinary who are the obligees of the bond, but in the name of John Brown, who shows no legal title to the bond. This, however, is, at most, an irregularity, which, while the judgment is unvacated by the Court which rendered it, must be pretermitted in any other tribunal where the matter is considered. Every State may prescribe for itself rules and doctrines for the transfer of obligations and the conduct of causes, and in this case, a Court in Georgia, having the parties before it, and competent to consider all the questions between them, recognized Brown's right to sue. *Wadsworth v. Letson*, 2 Speers, 277; *Arnold v. Frasier*, 5 Stroob. 33.

A defect in the exemplification was suggested, but not urged in argument. The Act of Congress provides, that "the records and judicial proceedings of the Courts of any State shall be proved and admitted in any other Court within the United States by the attestation of the Clerk and the Seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or Presiding Magistrate, as the case may be, that the attestation is in due form." The attestation in the present instance, by the Clerk, satisfies the requisitions of the Act, and the objection is confined to the certificate of the judge. The judgment was rendered in the Inferior Court of Wayne County, and the certificate is by the Judge of the Superior

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Courts of the Eastern District of Geor*gia. By the clear intendment of the Act, the certificate of judicial proceedings should be by a Judge of that Court in which they were had. Such is not the case here; nor does it even appear that Wayne county is within the jurisdiction of the Judge certifying. At the hearing, it was agreed that, reserving the right of the plaintiffs to use the evidence which was taken, defendant might avail himself of any advantage which would be attainable by him on demurrer, and as the exemplification is an exhibit of the bill, I suppose he may object to the sufficiency of the exemplification.

My impression is, that the judgment is not properly certified to the Court here, but I con-

sider it unsafe to dismiss the bill for informality in an instrument of evidence which might probably have been corrected, if notice of objection had been given, especially as the point was not argued.

Our statute of limitations prescribes no bar of foreign judgment; and it is settled by the cases of *Hinton v. Townes*, 1 Hill 439, and *Napier v. Gidiere*, Speers, Eq. 215 [40 Am. Dec. 613], that in the absence of express bar, the judgments of the Courts of record in our sister States are to be treated as records, and exempt from the bar applicable to simple contracts. It appears by *Prince's Digest*, which was in evidence that the Inferior Court of Georgia is a Court of Record. In Georgia, the statute of limitations bars actions on the judgments of another State, not brought within five years after judgment rendered, and in *McElmoyle v. Cohen*, 13 Peters 312 [10 L. Ed. 177], the Supreme Court of the United States held the bar to be applicable to a judgment obtained in South Carolina. I suppose that without express mention of judgments, in our State, actions on judgments of Courts not of record in our sister States, as on our judgments of magistrates, must be prosecuted within four years; and if it were res-integra, it would be a grave question whether the Federal Constitution and the Act of Congress in pursuance of it, as to the effect to be given in all the Courts of the United States to a judgment in any State, have created an exemption from this doctrine; but I repeat, the question is settled.

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*Considering the Wayne judgment as a judgment of record, the lapse of time has been insufficient to create the presumption of satisfaction. It was said in this connection, that a statute of Georgia, *Prince's Dig.* 458, Sec. 165, declares that a judgment shall be void when no execution is issued upon it for seven years, and that the reasons of the enactment are applicable to renewals of executions. The present case is not within the terms of avoidance in the statute, for an execution was promptly issued on the judgment; and there is neither reason or authority for extending the enactment so as to nullify what would be good at common law, and under our own procedure and legislation. A similar statute of Alabama was considered in the case, *Carlton v. Felder*, 6 Rich. Eq. 58. Defendant further urges, that conceding the lapse to be in itself inadequate to preclude the plaintiffs, yet, as more than sixteen years expired after judgment before plaintiffs filed their bill, the lapse, in connection with the suspicious circumstances about the levy and sale, renders the claim stale and inequitable. A levy raises the presumption of satisfaction of an execution, when there is no satisfactory evidence of the disposal of the levy. Here, two tracts of land, and furniture of house and kitchen, are seized for the satisfaction of the plaintiff, and the only account given as to the disposal of the property is the

return of the Sheriff, four months afterwards, "sale for \$8," without giving any of the particulars of sale, not even the name of the purchaser. This leaves room for unfavorable conjecture. It may be that there was collusion between Lane and Brown and Smith, to cheat Lane's sureties, but this is not very likely, as the sureties were then regarded as insolvent. It may be, that the plaintiffs took the property at its nominal price in full satisfaction of the judgment; but this is a matter susceptible of proof, which defendant was bound to make. We have the same proof of the sale, as that of the levy—by indorsement on the execution. It may be that Lane's title was defective, and that his interest brought a fair price. We should not presume fraud

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where, *if it existed, defendant was bound to establish it by evidence.

The jurisdiction of the Court was impugned. Defendant urged that plaintiffs should have obtained judgment at law, and exhausted their legal remedy before coming into this Court. Plaintiffs reply, that they had no remedy at law, for that the survivor only of those bound by the Georgia judgment could be sued, and Hornsby survived Geiger. It is not clear, at least it was not shown by authority, that this limitation of the legal remedy to survivors, applicable to joint bonds, obtained as to judgments, especially when all the defendants in judgment are dead. But plaintiffs present another view, which is more satisfactory. The only estate of Geiger, out of which plaintiffs can obtain satisfaction, is the sum reserved in the hands of the administrator by the order of this Court, made with special reference to this claim. If the plaintiffs had, at needless expense, got judgment at law, they must have applied to this Court for satisfaction, and in avoidance of expense and circuitry of action, they were entitled primarily to apply for relief here.

The amount due on the Georgia judgment is, principal.....	\$ 443 62½
Interest at 8 per cent. from Jan. 3, 1837, to Feb. 3, 1858.....	748 25
Costs—original \$12 50; on Fi. Fa. \$0 62½	13 12½
	<hr/> \$1,205 00
Deduct payments	16
	<hr/> \$1,189 00
with interest on \$443 62½ from February 3, 1858.	

The Commissioner, misled by an endorsement on the execution not justified by the judgment, makes the sum larger, although allowing interest on the payments too small to extinguish interest accrued, which seems to be unauthorized. The sum due considerably

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exceeds the penalty of the bond *on which judgment is founded, but in an action on a judgment, obtained on a penal bond, interest may be recovered beyond the penalty. *McClure v. Dunkin*, 1 East, 436; *Bonsall v. Taylor*, 1 McC. 503; *Smith v. Vanderhorst*, 1 McCord, 328 [10 Am. Dec. 674].

Some of the questions in this cause are doubtful and embarrassing, and an appeal would be proper. It is ordered and decreed that the defendant, from the estate of Cornelius Geiger in his hands, pay to the plaintiffs, James C. Smith and wife, the sum of \$1,189.00, with interest on \$443.62½ from Feb. 3, 1858, and the costs.

The defendant appealed on the grounds:

1. Because the Court of Equity has no jurisdiction of the cause; the plaintiffs having a full and adequate remedy at law.

2. Because the judgment which the bill seeks to enforce is void against this defendant.

3. Because the said judgment is barred by the statute of limitations.

4. Because the said judgment is rendered null and void by an Act of the State of Georgia.

5. Because the said judgment is barred by the lapse of time, and the attendant circumstances, which raise a presumption of payment.

6. Because the evidence of the complainants exhibits badges of fraud, which forbid the interposition of a Court of Equity in their behalf.

Fickling, for appellants.

Hudson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The judgment, which the plaintiffs seek to render available, was en-

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tered against the defendants intestate *in the Inferior Court of Wayne County, Georgia, on 30th December, 1839, and execution lodged 4th January, 1840—a levy was made 28th December, 1842, which was exhausted 7th May, 1843, by sale, for the sum of eight dollars. No further action was taken on the execution until 9th April, 1852, when the Sheriff indorsed thereon "no property to be found." In the meantime, to wit, on 22d September, 1845, James C. Smith (one of the plaintiffs) indorsed on the execution a receipt in the following words: "Received on the within execution, from the hands of William Lane, eight dollars, this 22d September, 1845, (Signed) James C. Smith." In *Wardlaw v. Gray*, Dud. Eq. 85, it was ruled that a creditor could not prevent the bar of the statute of limitations by indorsing upon his demand a payment of a very considerable part of it. In the view, however, taken by the Court this becomes not very important.

By an Act of Assembly, of the State of Georgia, passed in 1822, and amended by the Act of 1823, it is declared, that "all judgments, on which no execution shall be sued out, or on which execution, if sued out, no return shall be made by the proper officer

for executing and returning the same within seven years from the date of the judgment, shall be void and of no avail." These statutes came under the consideration of the Supreme Court of the State of Georgia in the case of *Booth v. Williams*, 2 Kelly, 250, and it was there determined that, according to the proper construction of these statutes, a return must be made by the proper officer on such execution every seven years, "not" (in the language of the Court) "within seven years from the date of the judgment, but seven years from the date of the last entry," otherwise it will be presumed to be satisfied. After the elaborate consideration of the subject, in *Johnston v. S. W. R. R. Bank*, 3 Strob. Eq. 300, it is deemed only necessary to say (in the words of Chief Justice Marshall) that "we receive the construction given by the Courts of a State as the true sense of the law, and feel ourselves no more at liberty

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to depart from that construction *than to depart from the words of the statute." No entry was made on this execution by the proper officer from 7th May, 1843, till 9th April, 1852, a period of nearly nine years, and the judgment must therefore be considered as satisfied. (a)

It is ordered and decreed that the decree of the Circuit Court be reversed, and that the bill be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Decree reversed.

(a) In South Carolina there is no statute fixing a period within which actions of debt on judgment shall be brought; and presumption of satisfaction from mere lapse of time does not arise until the full common law period of twenty years has elapsed. Now whatever may be the language of the Georgia statute, it would seem plain that it can only be regarded as a statute of limitations, or a statute altering the common law in relation to the presumption of satisfaction arising from the lapse of time—the validity of the judgment as a contract of record, or as evidence of indebtedness, imposing an obligation to pay, is not affected by it. As a statute of limitations it is well settled that it can have no operation beyond the limits of Georgia; *Story*, Conf. of Laws, § 576, and it would seem that as a law fixing a short period for presuming satisfaction, it must stand upon the same footing. *Story* Conf. of Laws, § 582. Suppose instead of declaring that seven years should be the period for presuming satisfaction, it had declared that the common law period was too short, and had fixed sixty years as the time; would it have been anything more than a rule for the Georgia Courts? Laws affecting the validity and binding obligation of contracts follow them into other countries, but it is not so with statutes of limitation, and it may well be questioned whether a law altering the period for raising presumptions, or establishing other rules of evidence, can have any effect beyond the limits of the power which enacted it. This point does not appear to have been considered by the Court.—R.

10 Rich. Eq. *484

*HARRIET L. GIBBES and MARY H. GIBBES v. ANNA M. HOLMES, MARY THAYER and Others.

(Charleston. Jan. Term. 1859.)

[*Mortgages* ⇨476.]

Case sent to the Court of Errors, and then, after argument in that Court, withdrawn.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1390; Dec. Dig. ⇨476.]

[*Wills* ⇨560.]

A devise by the mortgagee of the mortgaged premises, carries with it the mortgage and all the securities for its payment.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1219; Dec. Dig. ⇨560.]

[*Mortgages* ⇨213.]

To a bill by the devisee of the mortgage against the representatives of the mortgagor, the executor of the mortgagee is a necessary party; and the personal representative of the mortgagor is also a necessary party.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 488; Dec. Dig. ⇨213.]

[*Parties* ⇨95.]

Plaintiffs' right being prima facie good, but their bill being defective for want of proper parties:—*Held*, that the Circuit Chancellor erred in dismissing plaintiffs' bill, and leave given them to amend on payment of costs.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 160-166; Dec. Dig. ⇨95.]

[*Equity* ⇨383.]

The defence being that the bond, mortgage to secure the payment thereof, and judgment on the bond, must be presumed paid or satisfied from lapse of time, Ordered, that an action at law be brought on the bond to determine the question of payment or satisfaction, and that the pleadings be made up and question decided as if the action had been commenced on the day the bill was filed.

[Ed. Note.—Cited in *Shaw v. Cunningham*, 9 S. C. 273.]

For other cases, see *Equity*, Cent. Dig. § 787; Dec. Dig. ⇨383.]

[This case is also cited in *Nichols v. Briggs*, 18 S. C. 483, as to application of statutes of limitations.]

Before Dargan, Ch., at Charleston, February, 1858.

Sarah Ruth Simons died on October 9th, 1852, leaving a last will and testament bearing date May 21st, 1850, by which she devised as follows:

"The house and lot No. 77 Tradd street, formerly the property of my friend and relation, C. S. Thayer, which I have held under a mortgage and judgment since the year one thousand eight hundred and thirty, I give and bequeath to the three daughters of my said deceased friend, Caroline S. Gibbes, Anna Maria Holmes, and Mary Thayer, during their lives, or during their widowhood or unmarried state, while they shall stand in need

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of support or maintenance there*from. But if either of them should marry, or die, or by the good Providence of God have an accession of property, and not stand longer in need of a maintenance or support from the above property, to the above Caroline S.

Gibbes, being still a widow, and at her death to her two daughters, Harriet L. Gibbes, and Mary H. Gibbes; or in case of the death of either of the said daughters, to the surviving daughter. The taxes, repairs, and insurance, have been paid by those who have had the use and income of the said property, and is therefore left free from any incumbrance whatever."

The bill was filed August 10, 1857, by Harriet L. Gibbes and Mary H. Gibbes, against Anna M. Holmes and Mary Thayer, to recover possession of the house and lot No. 77 Tradd street. The plaintiffs alleged, for reasons set forth in their bill, that the title of their deviser, Mrs. Simons, was merely equitable; that the defendants had received an accession of fortune which rendered them independent, and they had removed from the house No. 77 Tradd street, and could no longer claim the exclusive enjoyment of it; and that the plaintiffs' mother, Caroline S. Gibbes, had assigned her interest to them. The other important facts of the case are stated in the circuit decree which is as follows:

Dargan, Ch. Amidst the obscurity and twilight which the lapse of years has shed around this case, there are some of the facts, and those very material, that stand out with great clearness, about which no doubt is entertained. It is certain that Mrs. Caroline Thayer was indebted to Andrew E. Thayer, by bond dated 15th June, 1826, in the penal sum of \$4,991.66, conditioned for the payment of \$2,495.83 in five equal annual instalments; that to secure the payment of the said bond, Mrs. Caroline S. Thayer executed a mortgage, bearing the same date, of the house and lot No. 77 Tradd street, the subject matter of this litigation; that afterwards, on 13th February, 1830, a judgment was rendered on this bond for the penalty thereof, there being then due \$2,263.38, besides \$24.50 for the costs of the suit; that a

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fieri facias on the said judgment was lodged with the Sheriff on the 13th February, 1830; that on the 6th November, 1830, Mrs. Sarah Ruth Simons paid to Andrew E. Thayer the balance then due on said judgment, namely, \$1,715, and took his receipt for that sum with a promise expressed therein that he would execute and deliver to her an assignment of the judgment, and also of the said mortgage; and that he did afterwards, on the 15th November, 1830, by his Attorneys, J. B. Thompson and J. Clarke, execute and deliver to the said Sarah Ruth Simons an assignment of the said mortgage. All these are facts that are not disputed.

Equally certain are the following facts: That between Mrs. Thayer and Mrs. Simons there subsisted intimate relations of friendship and consanguinity; that Mrs. Simons was wealthy, while Mrs. Thayer was circumscribed in her pecuniary affairs; that the lat-

ter was unable to pay this debt without much inconvenience; that Mrs. Simons, from motives of friendship and affection, came forward for the relief of her friend from the pressure of this debt, and thus became the purchaser and assignee of the judgment and mortgage, with the understanding that as to the payment of the same to Mrs. Simons, Mrs. Thayer was to have an indefinite indulgence. This compact was religiously observed by Mrs. Simons. Mrs. Thayer enjoyed the premises to the day of her death, and afterwards they continued to be occupied and enjoyed by two of her daughters to whom she had devised them.

Thus, it will be perceived, that in its inception, this transaction between the two ladies wore the simplest form imaginable. It was precisely as if Mrs. Thayer had executed the bond and mortgage to Mrs. Simons. It was the common case of the mortgagor retaining the possession of the mortgaged property.

We must next inquire if there are any subsequent facts that altered or disturbed these simple relations of mortgagor and mortgagee.

The position assumed in the answer, that

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Mrs. Simons *made a gift of this debt to her debtor, Mrs. Thayer, is scarcely deserving of a passing notice. There is nothing in the evidence or the history of the transaction that affords it the semblance of support. Such an idea never got afloat until after the death of Mrs. Simons, and then it only floated in the imagination of those whose interest it was to sustain such a position. Certainly there is no evidence to that effect.

The defendants have pleaded the statute of limitations. It is a misconception, I think, to suppose that the statute of limitations has any application to this case. If it is meant to apply as a bar to the debt, it cannot prevail. If a mortgage be given to secure a simple contract debt, when the debt is barred, the mortgage is discharged. Anything that satisfies or destroys the debt discharges the mortgage. But this debt was secured by a bond and the debt afterwards passed into the form of a judgment; and neither of these forms of indebtedness is subject to the plea of the statute of limitations. If the plea of the statute of limitations is intended to apply to the land, that is also a misconception. The statute does not run in favor of the mortgagor against the mortgagee. In the beginning, the possession of the mortgagor is permissive. The character of the possession cannot be changed and made adverse without notice to the mortgagee. They stand to each other in the relation of trustee and cestui que trust. A third party, who is a purchaser without notice, may hold adversely to both, and ten years' possession by such a party may defeat the title of both mortgagor and mortgagee. But as between these two, nothing can discharge the mortgage but the payment of the debt or its effectual discharge in some other way.

But a more serious ground of defence is, that which assumes that the debt must be presumed to be satisfied from the lapse of time. If this presumption prevails, the mortgage is as completely discharged as if the debt had been satisfied by actual payment. Where the statute of limitations applies, it is *presumptio juris et de jure*. It cannot be rebutted. A debtor may admit that the debt

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has not been paid, and in the *same breath insist upon the protection and bar of the statute. But a presumption of satisfaction, arising from the lapse of time may be rebutted. The simple lapse of twenty years, without any auxiliary circumstances on either side, is sufficient to create a presumption of payment. A much shorter period with corroborative circumstances in aid of the presumption, will have that effect, while more than twenty years will not raise the presumption if there be rebutting circumstances to satisfy the mind that the debt has not been paid.

In this case more than twenty years have elapsed since the last express recognition of the existence of this debt on the part of Mrs. Thayer. But in my judgment the circumstances are sufficient to rebut the presumption of payment arising from this cause. The rebutting circumstances are these: Mrs. Thayer was poor, and not likely to have paid the debt unless pressed, while Mrs. Simons was rich, and was not likely to press her needy relative and friend. The very purpose with which Mrs. Simons became the purchaser and assignee of the debt and mortgage, was that Mrs. Thayer might be indulged, and it is not reasonable or consistent that she should forthwith have coerced her to pay the debt. From the evidence of Mrs. Caroline S. Gibbs, it appears that Mrs. Thayer was aware that Mrs. Simons had paid the debt and had taken an assignment of the mortgage, and that she acknowledged herself highly indebted to Mrs. S. for this act of kindness. She spoke of Mrs. S. as the owner of the house, and in the repairs and leases of the premises, she always consulted with and acted with the advice of Mrs. Simons. I think the presumption of payment arising from the lapse of time, is very satisfactorily rebutted.

I am of the opinion, therefore, that at the time of Mrs. Simons' death, the judgment was still outstanding and unsatisfied, and the mortgage of force. It was a chose in action, secured by a lien upon the house and lot No. 77 Tradd street by virtue of the mortgage. Mrs. Simons never had such an interest in the lot as would give a title to her devisees

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under *her will. In England, where the mortgagee is vested with the legal estate, it seems to be clearly settled that he can transfer the title to his devisee. Even general words, devising all his real estate, &c., will convey the legal estate vested in the testator as mortgagee, unless there be restrictive

words showing that such was not his intention. But in this State, where our Act has destroyed the legal estate of the mortgagee, and adopting the equity doctrine, has declared that the mortgagor is the legal owner of the land, and the mortgagee only a creditor, with a lien on the land for the security of his debt, I apprehend that no one would imagine that the principle of the English decisions would apply to a case in our Courts; for, of course, the testator could only devise such interest in land as he possessed at the time, and having nothing but a lien on the land, (nothing more than a judgment creditor has,) he could not devise that by his will. He might bequeath the debt, secured by the mortgage, and the lien would accompany it.

Whether, in this case, the words of the codicil of Mrs. Simons would be sufficient to pass to her devisees this debt with the mortgage as a security, I am not so well assured; Mrs. Simons, inops consilii when she made this codicil, was firmly persuaded that she owned the fee in the Tradd street lot, discharged from all right on the part of Mrs. Thayer's heirs or devisees to redeem; and being so impressed, she proceeded to dispose of it as if she owned it absolutely.

The following is her language: "The house and lot No. 77 Tradd street, formerly the property of my friend and relative C. S. Thayer, which I have held under a mortgage and judgment since the year 1830, I give and bequeath to the three daughters of my said deceased friend, Caroline S. Gibbes, Anna Maria Holmes and Mary Thayer, during their lives, &c." The testatrix does not affect to give the debt secured by the mortgage and judgment, but devises the house and lot specifically. Whether this is sufficient (in another proceeding) to give to

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the devisees named in the codicil the *money due on said judgment and secured by the mortgage, when it shall have been collected, I have not considered, and express no opinion. But in either view of the case, I think the executor or personal representative of the testatrix a necessary party in any judicial proceeding which has for its object the enforced payment of the debt by a foreclosure of the mortgage or otherwise. If Mrs. Simons had clearly and unequivocally bequeathed the judgment debt and the mortgage as a chose in action, or a chattel interest, still the personal representative of the testatrix would be a necessary party in a suit for the foreclosure of the mortgage. I know not how the choses in action of a testator or intestate can be recovered, except by an action in the name of the executor or administrator.

As an English writer has expressed it, "So long as the money and lands in mortgage retain their respective character impressed upon them in equity, that is, so long as the

debt remains the principal, and the land the pledge, so long will the mortgage be personal assets, and, accordingly, if the mortgage be in fee, and the mortgagee dies, his heir or devisee will be a trustee for the executor." This supposes a case where the title or legal estate in the mortgagee descends to his heir at law or vests in his devisees by his will. It is still assets, and the heir or devisee is trustee for the executor. And again the same writer says: "The law is now clear, that whatever may be the form of the mortgage, it will be part of the personal assets of the mortgagee, and consequently on his death, will, unless he direct to the contrary, belong to his personal representatives." If the mortgagee die intestate, the mortgage debt is assets in the hands of the administrator, to be administered as the law directs. If he bequeaths it specifically, it still must go into the hands of the executor, where it will be subject, in the first instance, to the payment of debts, and what remains of the proceeds, be it all or a part, must be paid by the executor to the legatee. Like every other chattel interest, it must first pass to the legal representatives.

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"I hold, that in a suit for foreclosure, the personal representative of the mortgagee is a necessary party; and if the mortgage be assigned, the personal representative of the assignee, by a parity of reasoning, is also a necessary party. In this case it is said that no one named as executor has qualified, nor has there been any administration. But this is nothing to the point. The legatee cannot sue. There must be an administration, and if the executor will not qualify, nothing can be easier than to take out letters of administration cum testamento annexo.

It is ordered and decreed that this bill be dismissed.

The Complainants appealed on the grounds:

1. That the devise of the house to Anna Maria Holmes, Mary Thayer, and Caroline S. Gibbes, with remainder to complainants in fee, is a good devise of all the interest of the testatrix, Mrs. Simons, in the house. But she was a mortgagee, and the mortgagor out of possession, and the remainder limited to complainants has vested in possession, by which it is clear that they are entitled to maintain this suit in the character of mortgagees.

2. That the case does not fall within the Act of 1791, because the mortgagor is out of possession, and the question is to be determined upon the relations existing between the equitable mortgagee and parties claiming as heirs or devisees of the mortgagor, independent of that Act.

3. That it is not a question whether the personal representative of the mortgagor is a necessary party to a bill of foreclosure, but whether the assignee of a mortgage may

maintain a bill for foreclosure without joining the assignor as a party.

4. That there is no need to amend, because the executor of Mrs. Simons consented to the legacy; and the legacy, even considering it independent of the mortgage, as a mere gift of money, is a specific legacy, and the consent of the executor vests the property in the legatee.

5. That even if the bill was defective, in

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not making Mrs. *Simons' executor a party, the defect is of form only, and should not have led to the dismissal of the bill, but an order for leave to amend.

Petigru, Pettigrew, for appellants.
Flagg, Yeadon, contra.

After argument in the Equity Court of Appeals that Court made the following order:

WARDLAW, Ch. This Court recognizing fully the maxim, *equitas sequitur legem*, which indeed has become a statutory regulation by the Act of 1836, reorganizing the Courts of the State, finds embarrassment in determining whether the case of Stover v. Duren, 3 Strob. 448, and others, which may have followed it, were intended to propound new doctrine as to presumptions of fact, and desires conference with the Law Court on this question.

It is ordered that this case be sent to the Court of Errors for the determination of the following question.

Whether or not under the pleadings and evidence in this case, including the answers, the bond of Caroline Thayer to Andrew E. Thayer, dated June 15, 1826, and the mortgage of the same date, and the judgment rendered on the bond February 13, 1830, should be presumed to be satisfied, or in any way extinguished or discharged at the time of filing the bill August 10, 1857?

It is further ordered, that a message be sent to the Law Court inquiring on what day it would suit their convenience to meet us for the adjudication of this question.

JOHNSTON and DUNKIN, CC., concurred.

After argument in the Court of Errors, the case was withdrawn from that Court, and now the opinion of the Equity Court of Appeals was delivered by

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*JOHNSTON, Ch. The question, whether the bond and judgment mentioned in the pleadings were subsisting and valid obligations, at the filing of the bill, was referred to the Court of Errors. But after argument and conference, it was deemed advisable to withdraw it. The whole case is, therefore, now before this Court, and we are to make such disposition of it as in our judgment is most proper.

One portion of the appeal raises the en-

quiry whether the Chancellor was right in holding that the personal representative of Mrs. Simons, the owner of the mortgage, should have been made a party. In our opinion the devise of the mortgaged premises carried with it, in equity, a right to the securities, consisting of the bond, judgment and mortgage, by which the title, legal or equitable, to the thing devised, is to be sustained; and that the executor of the deviser is a necessary party, inasmuch as his assent is requisite to the passing these securities to the devisee. He is, also, a proper party to the question in the case, whether the mortgage and the securities on which it depends, were paid off and extinguished, or partially satisfied, before they came to the hands of the devisee.

We, therefore, approve the Chancellor's opinion on this point; but we are not of opinion that, for the omission of this party, the bill should have been dismissed. In a case like this, where the plaintiff's right is, *prima facie* good, the bill should have been retained, and leave given to amend, on proper terms.

We are also of opinion that the personal representative of Mrs. Thayer, the mortgagor, should be brought before the Court, through whom, as a proper organ, to insist upon and establish any payments she, in her life time, or he, after her death, may have made. If there be, in fact, no such representative, the plaintiffs may proceed as they may be advised, in causing letters of administration to be granted, and then making the party.

With respect to the question whether the

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bond and judgment were extinguished or still subsisting obligations at the filing of the bill, this Court prefers that those questions be determined at law, inasmuch as the instruments on which they arise are legal instruments, and the questions themselves purely legal questions; and it will direct an action at law, in which the defendants shall, and are hereby required to admit service of the writ as of the date of the filing of this bill, and to make up the pleadings, without objection, with reference to that time. This course is necessary to present the question existing in this case, truly to the law Court.

It is therefore ordered that the decree, so far as it dismisses the bill, be set aside; and that the plaintiffs, on the payment into Court, within three months from this date, of the costs which have heretofore accrued in this case, (and unless this payment is made, the defendants to be at liberty to move that the bill be dismissed,) be at liberty to amend their bill so as to make a party plaintiff of the personal representative of Mrs. Sarah R. Simons, and a party defendant of the personal representative of Mrs. Caroline S. Thayer; and that they have leave fur-

ther to amend their bill by introducing into the prayer thereof a prayer for such further particular relief as they may be advised, and for general relief—the existing defendants being at liberty to answer said amendments, and the new defendant to answer the original bill and amendments.

And let the cause in the meantime be remanded to the Circuit Court, and when the pleadings aforesaid are made up, let the action at law as aforesaid, be instituted in Charleston District—the pleadings therein made up and set down in that Court for hearing. Any further proceeding in this cause, in the meantime, to be the subject of motion in the Circuit Court in Equity.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

10 Rich. Eq. *495

*EMMA E. SEABROOK v. WILLIAM SEABROOK and Others.

(Charleston. Jan. Term, 1859.)

[Wills ⚡506.]

The testator in one clause of his will devised and bequeathed property to his wife and declared "that the provision herein made by me for my said wife, shall be in lieu, and bar, and in full satisfaction of and for, all her dower and thirds of, or in all or any part of my goods and chattels, lands, tenements and hereditaments, and whatsoever else she may in any manner claim and demand of, in, or out of, any of my estate, real and personal," and by a subsequent clause he devised lands to his son for life, with remainder to his issue, and in default of issue, he declared that the said lands should "revert to his estate," and he then devised the "lands so reverting unto my own right heirs forever." The son afterwards died without issue; *Held*, that the heirs of the testator took the reversion, not under the will, but by descent; and that the testator's widow was not excluded by the will from taking her share of the reversion as an heir of testator.

[Ed. Note.—Cited in *Beaty v. Richardson*, 56 S. C. 188, 34 S. E. 73, 46 L. R. A. 517.

For other cases, see Wills, Cent. Dig. § 1092; Dec. Dig. ⚡506.]

[Wills ⚡506.]

Where there is a devise to the testator's "heirs" they do not take under the will, but by descent.

[Ed. Note.—Cited in *Swann v. Poag*, 4 S. C. 18; *Blount v. Walker*, 31 S. C. 28, 9 S. E. 804; *Dunham v. Carson*, 42 S. C. 390, 20 S. E. 197.

For other cases, see Wills, Cent. Dig. § 1090; Dec. Dig. ⚡506.]

[Wills ⚡506.]

The testator's widow is included under the term "right heirs" used in his will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. ⚡506.]

[Wills ⚡782.]

A clause in the testator's will declaring that the property therein devised and bequeathed to his wife, shall be taken in lieu and bar, and full satisfaction of her dower and thirds, and every other interest whatsoever, that she might be entitled to in his estate, does not ex-

clude her from her share of property as to which the testator died intestate. (a)

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2018-2033; Dec. Dig. ⚡782.]

Before Dargan, Ch., at Charleston, February, 1858.

Dargan, Ch. The plaintiff is the widow of William Seabrook, late of Edisto Island, and the defendants are the devisees and heirs at law of the said William Seabrook, and per-

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*sons claiming by or under them. Among other dispositions of property in favor of his wife, (the plaintiff,) the testator gave and devised to her as follows:—"And I further

(a) This extraordinary decision is certainly in conflict, as stated in the dissenting opinion, with wise maxims of the common law, and, as it is further intimated, is not so clearly right but that its logic may be assailed and its authority questioned. Though, it is said, that the result would be the same whether the testator be held to have died testate or intestate, as to

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the reversion given to his "own right heirs forever," yet the decision proceeds upon the ground, that as to that reversion, he properly died intestate, and it is held to be a necessary and inevitable consequence of such a conclusion that the intestate reversion is distributable, under the law, among all the heirs; and authorities, said to be conclusive upon these several points, are cited. Let us, with all respect for the confessedly high authority of the Court which decided the case, examine these points in the light afforded by the logic of the Court, the principles referred to, and the authorities cited.

It will not be disputed, and no authority need be cited to sustain the position, that the whole will must be construed together; and that when a testator says, in one clause of his will, "I devise and bequeath such and such property to my wife in full of her share of my estate, and to be taken in lieu and bar of any interest whatever that she might otherwise be entitled to claim in my estate or any part thereof," and by a subsequent clause devises a reversion to his "own right heirs forever," it is precisely the same as if he had said, "I devise the reversion to my own right heirs forever, except my wife, who is hereby excluded from all interest therein." If such had been the language of William Seabrook's will, it could hardly be maintained that the devise was invalid. *Simpson v. Hutton*, *Pickering v. Stamford*, and *Hall v. Hall*, merely affirm that words of exclusion, similar in effect to those used by this testator, would not exclude an heir from his or her share of property as to which the testator had undesignatedly died intestate, and they decide nothing more. *Goodtitle v. Pugh* decides that where an ancestor has but one son, who is his only heir, his devise "to his right heirs forever, my son excepted, it being my will he shall have no part of my estate," is senseless and void and no devise at all. *Gordon v. Blackman*, and the other authorities cited (except the case from North Carolina, which will be adverted to hereafter) have, with deference it is submitted, little if any thing to do with the point under consideration. Then as to general principles: It is conceded, as a principle of law, that where there is a devise to the testator's heirs, without limitation, qualification, or exclusion of any one, they take not under the will, but by descent, and it may now be considered so fairly settled as to have become a rule of property, that the term "heirs" simply and without more, means such persons as are entitled to take under the

give, devise, and bequeath unto my said wife,

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for and during her natural *life, the use and occupation of my said mansion house and residence, and of so much of my lands attached to the said mansion, as laid down in the survey of Major John Wilson, as she, my

statute of distributions; but it must at the same time be conceded, on the other hand, that these general rules are liable to be controlled and modified by the context of the will itself, which is always the law of the case. Goodtitle v. Pugh, shows that a devise to the testator's "heirs," except his son, who was his only heir, is no devise at all, and that the property passes by descent, and the principle of that decision would seem clearly to apply, where there is a gift to the testator's "heirs" followed by words excluding them all. For instance, if a man having a wife and three children, A, B, and C, who were his only heirs, were to devise his estate to his "right heirs," without using words showing whom he meant by the term "right heirs," and then were to add "except my wife and children, it being my will they shall have no part of

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my *estate," the devise would be simply absurd and void for want of persons to whom the term "heirs" could apply. And Gordon v. Blackman shows (and what else does it show) that if one having such a family, were simply to say, "I exclude my heirs from all share of my estate, it being my will that my wife and children shall have no part thereof," such words of exclusion would have no effect at all, for the unanswerable reason that there is no other person who, under the law, can take. But if such a testator were to devise his estate to his "right heirs, except my eldest son A, it being my will he shall have no part of my estate," it would be difficult to maintain that such a devise was not good, for it would be too plain that by "right heirs" the testator meant his wife and two children, B and C. And with the difference that he excluded his wife and not his eldest son, such seems, in effect, to have been William Seabrook's will, so far as it relates to the reversion; provided that in the previous clause providing for his wife, the word "herein" be held to apply to that clause alone, and not to the whole will. It is intimated, in the opinion of the Court, that such a construction would be unnatural, but with deference it is submitted that no other can be given to it. The testator clearly intended to dispose of his whole estate, and to leave nothing for distribution under the law of intestacy, and when he used the very general and comprehensive terms of exclusion which he did use, it is manifest he was contemplating his estate as a whole, and guarding against the possibility of his wife's taking any portion of it, except that which he specifically gave her, either by misconstruction of his language, lapse, or other accident. The construction would be different if the testator had given to his wife property in any other clause of his will. But he did not do so, unless it be held that by the term "right heirs," he meant to include his wife. Such, it is true, would now (the meaning of the word "heirs" being settled—the word being a technical one, and the rule being to construe technical words in a technical sense) be the construction which the Court would put upon the word "heirs," in the absence of any thing in the will indicating a different meaning. But in this case we have the clause of exclusion which indicates a different intention; we have also the important circumstance that the devise, in which the word "heirs" is used, is of a contingent reversion which might not fall in for distribution until the heirs of the testator were very different persons from those who were his heirs at the time of his death, and we have the context of

said wife, can plant with the slaves herein

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bequeathed to *her; and on her death, the said mansion house, and so much of the land thereto attached as she may have used and occupied shall revert to my estate," &c.

In former proceedings instituted for the

the will itself, which exhibits an anxious desire on the part of the testator to keep the title of his lands in his own issue or descendants as long as possible. And, with deference it is submitted, that in construing the word "heirs," where a wife claims to be included within its meaning, but slight circumstances should be held to exclude her. In 1836, when this testator made his will, it is very questionable whether any man in the State, even the best lawyer in it, in drawing such an instrument, would suppose that "heirs" included the wife. The legal meaning of the term has but recently been settled, and even now not one person in five hundred, in conversation or writing, ever

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uses the *word in its technical sense. When devising his estate to his "heirs" he no more has his wife in his mind, than he thinks of his neighbor's wife when he addresses to him the not unusual enquiry as to the number of "heirs" he may be blessed with. The word "heirs" having been held, in its technical signification, to include a wife—and properly to include her—judges have no alternative but to hold her entitled under a devise to "heirs" where there is nothing in the will indicating an intention to exclude her, even though, in so holding, they almost always decide contrary to the real intention; but it is submitted, it is so unusual for testators to include wives within the meaning of the term, that, in construing wills, it is always safest to exclude them where there is but the slightest indication of such an intention.

But does it necessarily follow, if the testator be held to have died intestate as to the reversion, that his wife was entitled to her thirds. William Seabrook left a wife and ten children, who were his heirs at law. If he had simply devised his estate to his right heirs, except his wife, whom he excluded from all share thereof, it has already been intimated that it would have been a good devise to the ten children. If he had made no devise at all, but had simply declared that his wife should have no share of his estate, according to the case from North Carolina the effect would have been the same; and why should it not be so? The law of distributions was intended to provide for cases where a man died without making a will; but it never was intended to provide that his will should not prevail. If a testator having three heirs, A, B and C, were to say, "I exclude A from all share of my estate and give it to B and C, equally to be divided between them," that would be a good will beyond question. So, if he were to devise his estate to his heirs, except A, that we have already maintained would be good. If he were to say "I exclude A from all share of my estate and leave it to descend to my other heirs under the law of distributions," why should not that be a valid will. And if he were simply to say, "I exclude A from all share of my estate," the intention would be precisely the same; and yet it is said that intention could not prevail. And why? Because it is said there are two distinct systems—one for cases of testacy and the other for cases of intestacy—there can be no half way measure—the property must go under the will or it must go under the law—each heir takes his share in severalty and you can no more deprive A of his several share without giving it to another, than you can deprive A, B and C of the whole estate without a valid devise to some one else. This is plausible, ingenious and sounds pretty, but its force

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division and settlement of the estate of the testator, the tract of land on which was his mansion house, was set apart and assigned to the plaintiff for her share under the clause which has been quoted, and to her son, Robert Chisolm Seabrook, one of the devisees of the will. But no partition was made between them. They possessed, and used the whole tract in common, and harmoniously, until the death of Robert, which has recently occurred. Robert's share of said land is now to be divided by sale or otherwise, among the persons entitled to the same, and it becomes necessary that the plaintiff's share in the land should be divided and separated from that which was Robert's. One of the objects of the present bill is to effect such division and separation. A commission has issued, and the Commissioners have made their return to the Court at

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the present term. The defendants have accepted to the return; and the first question for the Court to decide is on that exception.

The Commissioners have assigned to the plaintiff three hundred and fifty acres of the testator's land near to the mansion house, and circumjacent. There is a navigable creek that flows by on one side of the tract, on which there is a steamboat landing not very distant from the house. This landing is essential to the convenient use of the owners and occupants of the plantation. It is on that part of the tract which has been assigned to the plaintiff, but in testator's life, and during the life of Robert, it was used for the whole plantation, as well that part which the Commissioners have assigned to the estate of Robert, as that which they have assigned to the plaintiff. There is on the part that has been assigned to the estate of Robert, a half-tide landing, which is

is not felt. The law casts the inheritance upon A only when no other provision is made by the will. But, it is said, unless the property is expressly given to some one else, no other provision is made; and it is assumed, that there is so great an antagonism between the law of testacy and that of intestacy, that the two cannot harmonize so as to permit a testator to exclude an heir and leave his property to descend, under the law, to his other heirs, with all the incidents that attach in cases of distribution.

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That such an antagonism exists in the nature of things, is not perceived. Human reason, and the law boasts itself to be the perfection of reason, would seem not to exclude a testator from the exercise of such a right, and it is not to be found, expressly declared, in the *lex scripta*. The simple and sensible proposition of the North Carolina case seems more consonant with the law, which leaves every one free to point out who shall, and who shall not, succeed to his estate, than the artificial logic by which the contrary doctrine is sustained.

The most extraordinary part of the decision is that which declares, that a testator cannot by any gift he may make and any words of exclusion he may use bar an heir from taking his or her share of the testator's intestate property. For instance, if a testator were to give, as in

inconvenient. There are roads, or ways, by which the landing near the mansion house may and has been conveniently used for that portion of the tract which has been assigned to Robert's estate. The question made is, whether the main steamboat landing is included in the land given by the will to the plaintiff?

There is nothing expressly said in the will about the landing. The words are, "so much of my lands attached to the said mansion house as laid down in the survey of Major John Wilson, as she, my said wife, can plant with the slaves herein bequeathed to her." This is the whole language of the will bearing upon this question. She can not take it as planting land, though there is no way in which her three hundred and fifty acres of planting land can be conveniently laid off and meted out, that would not include the landing. I think she is entitled to take it as an appurtenance, necessary to the enjoyment of her estate, and so used by the testator under whom she claims. And on the same reasoning and facts, I think that the said steamboat landing near the mansion house is an appurtenance to the part of the tract that has been assigned to the estate of Robert C. Seabrook, it having been used in

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common for the whole plantation in the life of the testator, and since. The return of the Commissioners must be set aside so far as it gives the said steamboat landing to the plaintiff as her exclusive property. The decree of the Court is, that she have the said landing as an appurtenance to the tract of land which has been set apart to her under the testator's will, to be used in common with the owners of the other part of the tract in which the testator's mansion house is situated, and which has been assigned to the estate of Robert C. Seabrook.

the case before the Court, a large estate to his wife to be taken in bar and full satisfaction of her thirds or other distributive share of his estate, real and personal, and then were purposely to leave the rest of his estate to go to his heirs at law and distributees, the wife may take the provision made for her by the will and demand her distributive share also. The cases which come nearest sustaining this part of the decision are *Sympton v. Hutton*, *Pickering v. Stamford*, and *Hall v. Hall*; but upon examination they will all be found to proceed upon intention. They do not hold that a testator cannot exclude, but they merely hold that in each of the cases before the Court he did not exclude. At any rate such seems clearly to have been the ground of decision in *Hall v. Hall*. The question in that case was whether the wife was excluded from taking her share of the testator's lands. On the circuit, Chancellor DeSaussure put the decision expressly on the ground of intention; (2 McC. Ch. 299) and, for considerations stated, the Court of Appeals, putting the decision on the same ground, concluded "that the testator did not intend to exclude his widow from a participation in any after-acquired property." (2 McC. Ch. 307) his intention being only to exclude her from taking any further share of the property he owned at the time his will was made.—R.

There is another question presented by the pleadings, which must be considered and decided. This is a question of construction.

The testator gave to his son, Robert Chisolm Seabrook, on his attaining the age of 21 years, real estate for life, with a contingent remainder to his children, or issue, that should be living at his death, and in default of such children, or issue, the testator declared, that the property so given to his son, should "revert to his estate," and he says, "I give, devise, and bequeath the share or shares of the said lands so reverting unto my own right heirs forever." Not following the diffuse phraseology of the will, I have aimed to state the devise to Robert Chisolm Seabrook according to its legal effect. (b)

Robert C. Seabrook lived to attain the age of 21 years. The devise to him thereby became vested, *Seabrook v. Seabrook*, McM. Eq. 201. He died on the ——— day of November, A. D. 1852, without issue, and unmarried; and the question now is, as to the disposition of the property which he left, and which he derived under his father's will. The plaintiff claims one-third of the estate, to which, in my judgment, she is entitled in any view which may be taken of the case.

I will in the first place suppose, that the testator's devise of the reversion to his own right heirs is a valid testamentary disposition. The testator's right heirs are his heirs

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general; *those persons, in fact, upon whom his estate would, in a case of intestacy, be cast, by operation of law. I am satisfied with Chancellor Dunkin's definition of the word heir, and with his opinions upon this subject, as expressed in his decree in *Seabrook v. Seabrook*, McM. Eq. 206, 209. He says, "the Court is unable to find any better definition of an heir than the person in whom real estate vests by operation of law on the death of one who was last seized. This law varies in different countries—in the same country at different periods—and in the same country in reference to different estates. By the Common Law, the father, or grand-father would be excluded. In England, the estate in general descends to the eldest son to the exclusion of daughters, and other sons. By the law of South Carolina, a more equitable distribution, both of real and personal estate, is provided. In order to ascertain who is the heir, it is necessary only to enquire, to whom, by the law of the land, would the estate pass, in case of intestacy." In the Court of Appeals, Chancellor Harper reserved his opinion on this point, but the doctrine does not seem to have met with dissent or doubt from any other member of the Court. And in the subsequent cases of *Rochell v. Tompkins*, 1 Strob. Eq. 114, and *Hey-*

ward v. Heyward, 7 Rich. Eq. 289, the question was decided the same way, and the principle seems to be as well settled as it can be by the solemn decisions of the Court, so that, when the testator, William Seabrook, gives the reversion to his own right heirs, his wife, the plaintiff, is included.

If the plaintiff is entitled to participate in the distribution of the reversion, as one of the heirs of the testator under the devise to them, in what proportion does she take? In *Templeton v. Walker*, 3 Rich. Eq. 543 [55 Am. Dec. 646], *Collier v. Collier*, 3 Rich. Eq. 555 [55 Am. Dec. 653], it was adjudged, that whenever by the terms of description in a grant or a will, it becomes necessary to resort to the statute of distributions to ascertain who are the objects of the donor's or testator's bounty—resort must also be had to the statute to ascertain the proportions in which the

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donees, *or devisees are to take, unless a different rule of distribution is prescribed by the instrument under which the parties claim. *Rochell v. Tompkins*, 1 Strob. Eq. 114, and *Heyward v. Heyward*, Jan. T., (Charleston,) 1855, are to the same effect. If the plaintiff is entitled to come in for a share of this reversionary estate under the devise of the testator to his own right heirs, she is entitled to one-third part thereof.

But it is said, that the will precludes her from taking any thing but that which is directly given to her in the first clause of the will. In the concluding part of that clause, the testator thus expresses himself:—"And I will and direct that the provision herein made by me for my said wife, shall be in lieu, and bar, and in full satisfaction of, and for all her dower, and thirds of, or in all or any part of my goods and chattels, lands, tenements and hereditaments, and whatsoever else she may in any manner claim, and demand of, in or out of any of my estate, real and personal." It must be remembered, we are at present discussing that view of the case, which would give to the plaintiff an interest in the reversion by the devise to the testator's right heirs. And it would be an absurd construction to suppose, that the testator meant by an expression in the first clause of his will to exclude his wife from taking that which he gave her in a separate clause. It would be a contradictory and unreasonable interpretation.

But a better view of the case in my judgment, is to regard the limitation over by way of executory devise to the testator's right heirs, as nugatory and void. He devised the estate to the same persons who would be entitled to take by operation of law. This is equivalent to the testator's saying, "I give the estate to the persons who will be entitled to it by operation of law in a case of intestacy." What additional strength does this impart to the perfect title which the law gives under the circumstances? By this language the tes-

(b) For a full understanding of the case see *Seabrook v. Seabrook*, McM. Eq. 201, and for a copy of the will, the note at the end of the case.

tator declares, that he dies intestate, and leaves his estate to be divided according to the provisions of the statute of distributions; and to the statute, the parties claiming

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will be referred. It is undoubted *law, that where a testator gives by his will the same estate to the same persons who would be entitled to take that estate by operation of law in case of an intestacy, the devise or legacy will be void, and the right of the party or parties entitled will be referred to the law of distributions and descents. If there be any variation between the dispositions which the will, and which the law makes in such a case, either in regard to the persons who are to take, or the quantity of the estate, the title will be referred to the will. If the testator, in this instance, had given this reversionary estate to his right heirs with the exception of his wife, or any one, or more of his children, then, the other heirs would have taken under the executory devise. And the same result would have followed, and for the same reasons, if he had given the estate to such persons as would have been his heirs at common law. The description would have embraced a class of persons easily ascertained, and they would have been different from those who would be entitled by the Law of South Carolina. But this testator has given the estate to the identical persons, who would be entitled to take under the statute of distributions. The devise over to his right heirs is, therefore, void, and the testator died intestate, as to his reversionary interest in the estate given to his son, Robert C. Seabrook. It follows that the plaintiff, as widow, is entitled to one-third; unless she is barred, as is argued, by the provisions of the will.

It is urged that the concluding passage of the first clause of the will which I have already quoted is a bar to any claim by the widow in her husband's intestate estate. By what logic this position is sustained, it is difficult to perceive. There can not be a testacy, and an intestacy in regard to the self same property. There is no intermediate state. A man cannot by his will declare how his intestate estate shall be disposed of. That very declaration, if valid, makes the property cease to be intestate. He cannot effectively declare, that his heirs, or some one or more of his heirs shall not have his estate, unless he makes a valid disposition of

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it to some other person, *or for some lawful object or purpose. If the will disposes of the estate, that prevails; if the will does not dispose of it, the law steps in, and divides it according to its established and unvarying rules. This is all simple, plain, and well settled. *Youngblood v. Norton*, 1 Strob. Eq. 128; *Crossby v. Smith*, 3 Rich. Eq. 249; *Pickering v. Stamford*, 3 Ves. 355, lb. 491. The estate is to be divided as in cases of in-

testacy, and the plaintiff, as widow, is entitled to one-third part thereof.

There is one other question which I am to decide. This does not affect the plaintiff's claim. Are the persons who were the heirs of Wm. Seabrook at his death, or the persons who would come within that description at the happening of the contingency upon which the estate reverted, entitled? The Act of 1791 furnishes rules for the distribution of estates in fee simple, which the intestate was possessed of, entitled to, or interested in, in his or her own right, and such real estate is given by the Act directly on the death of the intestate, to the persons designated according to the different classifications. The peculiar phraseology of the Act has been considered as furnishing a different rule of distribution as to the persons who are to take in a case like this, from that which would prevail according to the English canons of descent. Accordingly, it has been decided in *Hicks v. Pegues*, 4 Rich. Eq. 413, as it had been previously decided in *Bulst v. Dawes*, 4 Rich. Eq. 415, note, (a circuit decree,) that where the testator, Malachi Bedgegood, had given real and personal estate to his wife, Catharine Bedgegood in fee, but if she should die without leaving issue living at her death, over to William Vernon in fee, and William Vernon had died in the lifetime of Catharine Bedgegood, who afterwards died without leaving issue, the estate in expectancy or remainder to William Vernon, both as to the real and personal property, passed at his death to his heirs then living. That case cannot be distinguished in principle from this, in which William Seabrook died in-

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*tate as to an estate in reversion. And this is the judgment of the Court. It is ordered, and decreed, that a partition of the said land be made among the parties to this suit according to the principles of this decree.

It is further ordered and decreed, that an account be taken of the rents and profits, the costs to be paid out of the estate to be divided.

The defendants, William E. Mikel, George W. and Mary Ann Seabrook, and Mr. and Mrs. Legare, appealed upon the grounds:

1. That the word "heir" is the correlative of ancestor, and includes essentially consanguinity in its meaning—"He to whom lands and tenements, by the act of God and right of blood, do descend of some estate of inheritance."

2. That the limitation, after the death of Robert C. Seabrook, is not a vested, but a contingent limitation—not to the testator himself, but to those persons who might be his heirs when the contingency should happen.

3. That the context of the will proves that the testator did not mean that his wife should take as one of his heirs, because he has used words of exclusion, and has de-

clared his wish to limit the land in the line of his blood as long as the law will permit.

4. "That the provision made by the testator for Mrs. Elizabeth E. Seabrook, his widow, did exclude her from taking any part of the estate which might descend to, or be cast upon her by operation of law."

5. That if the limitation over of the share of Robert C. Seabrook, after his death, "be nugatory and void," nevertheless the testator did not die intestate as to said share, but the same passed with his other residuary estate to his children, under the will, or under the codicil.

6. That the rule, by which the widow could be entitled to any part of this share,

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notwithstanding the excluding clause *of the devise to her being dependent upon the testator's having made no disposition of it, cannot apply to defeat the residuary clauses of the will and codicil.

Campbell, Petigru, DeTreville, for appellants.

Memminger, Jervey and Wilkinson, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. At the last sittings of this Court, as I understand, the two Chancellors who were for confirming the decree, concurred in an order for a re-argument of the cause, in order to ascertain whether a majority of the whole Court might not be of the same opinion. This was, as they conceived, due to the importance of the cause, and to the fact that there was in the present decree a slight departure from the judgment rendered here many years ago in the case of *Seabrook v. Seabrook*, McM. Eq. 201.

The difference between this decree and that was upon a single point. That case ruled that the widow of the testator was excluded from the reversion which fell in upon the death of Joseph E. Seabrook. This decree maintains, on the contrary, that she is not excluded from a share in the reversion which accrued to the testator's estate on the death of another of his sons, Robert Chisolm Seabrook.

As I concurred in the decree in the former case, and now concur in this decree, it is very proper that I should assign the reasons which have led to a change of my opinion.

I certainly would be unworthy of the position I hold, if when I am satisfied I was wrong, and a fit occasion offers itself to retract my error, without injury to the rights of parties, I should for mere consistency's sake, or from mere pride of opinion, pertinaciously adhere to the error.

Inasmuch as the decree in the former case is neither pleaded as a conclusive interpretation of the will, nor is there any such ground taken in the appeal; nor has it been

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insisted on *in argument by counsel, whose duty it was to refer the Court to authorities,

I have not conceived it my duty to consider that decree as a bar.

It was held in the former decree, and is held in this, that the words of the testator by which he disposes of the reversion to his heirs, do not amount to a testamentary disposition, or convert the character of the subject from intestate, into testate property. He who directs his property to be distributed as the law would have distributed it, might as well hold his tongue, for he, in effect, merely wills to die intestate.

The Chancellor who delivered the decree in the former case, held, as has often been held since, that the widow came under the description of an heir; and had it been necessary to resort to the will, instead of the statute of distributions for her right, would have sustained it. His only difficulty was that the testator had, as he conceived, barred her of the reversion.

The former decision is that she is barred; this decree is that she is not; and the governing question in the case is, is she barred or not barred?

My opinion is, that she is not barred. There is this to be said; that when the former case was heard, we had fewer decisions upon the point in our own Courts than we now have: and were left more to the English and foreign cases than we now are. We had enough then, however, had it not been overlooked, to have led to a different result.

The case of *Sympton v. Hutton*, more correctly stated by the Master of the Rolls, in *Pickering v. Stamford*, 3 Ves. 335, than elsewhere, was to this effect: Thomas Addison, reciting in his will that his daughter, Jane, had married without his consent, gave her certain provisions out of his estate, real and personal, declaring them in full satisfaction of her child's part of whatever more she might have expected from him, or out of his personal estate. He then devised to his wife; and gave her furniture and other things, declaring them in full of her dower, thirds, and any other claim at law, or in

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*equity, or by any local custom, to any other part of his estate, real or personal. The residue he then gave to his other daughter; who died in his lifetime, leaving one child. By a codicil he subsequently gave a power over this residue to his wife: which she ineffectually executed; and the testator was declared to have died intestate as to it. Lord Thurlow held that the bars were ineffectual both as to the widow and the daughter Jane, and that the residue should be distributed as intestate, under the statute of distributions, one third to the widow, one third to Jane, and the remaining third to the child of the daughter, whose death had occasioned the lapse.

Then we had the case of *Pickering v. Stamford* (2 Ves. Jun. 272, 581; 3 Ves. 332, 401) itself. The testator gave certain parts of his real and personal estates to his wife, declar-

ing this provision a bar, full satisfaction and recompense of all dower or thirds which she could have or claim out of his real and personal estates, or either, or any part of them. After other provisions, he gave the residue to his executors, for their own use, in the first instance, but afterwards by codicil directed them to dispose of it in charities; and part was accordingly applied in the founding of a school. Part of the residue had been loaned out on mortgage and other real securities; and it having been decided that the bequest of such portions to charitable uses was void under the statutes of Mortmain, the next of kin brought their bill for an account, as if the property were intestate. The account was ordered. In a contest between the widow and the next of kin, it was decided that the widow was barred of any right in the subject. But upon a petition for a rehearing, the same judge, upon examination of the case of *Sympton v. Hutton*, reversed his decision, and let her in.

We had then the case of *Goodtitle v. Pugh*, 2 Bro. Parl. Cas. 454, (Tomlin's edition); 2 Meriv. 348. It is sometimes quoted in such a manner as to render it difficult to find it. It is in 3 Brown's Parliamentary Cases, 454, Tomlin's edition, but not in the other edi-

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tions of Brown. It is also particularly *stated by Sir Wm. Grant, in *Cholmondeley v. Clinton*, (2 Merival, 348,) under the style of *Doe ex dem. Baily v. Pugh*.

The testator, Calvert Benn, declares as to his personal estate: "My son shall have no power to handle any of my money, or have any thing to do with any of my goods and chattels of any kind;" and otherwise disposes of his personality. Then as to his real estate, he thus directs: "As to my real estate, after the death of my wife, I give and devise to the eldest son of my son, begotten, or to be begotten, all my estate in London and Middlesex, for his life," &c., to "the second, all my estates in the County of Hertford, for his life," &c., "and so on, in the same manner, to all the sons my son may have. If but one son, then all the real estates to him for life. And for want of heirs in him, to the right heirs of me, Calvert Benn, the testator, forever, my son excepted, it being my will he shall have no part of my estate, real or personal."

Soon after the testator died, leaving, besides his son, his widow and three daughters, and no other issue.

Wm. Benn, the son, conveyed to Pugh, and died, never having had issue, and the action was by the daughters, the widow being dead, against his alienee.

These facts being found by special verdict, the Court of Kings Bench gave judgment for the plaintiffs.

The case came before the House of Lords and was argued, and Lord Thurlow propounded a question for the opinion of the

Judges: "whether any person, and who, took any, and what estate, under the will mentioned in the special verdict, by way of devise and purchase." And the unanimous opinion of the Judges being that no person so took by devise and purchase, it was adjudged that the judgment of the King's Bench be reversed.

We had also our own case of *Hall v. Hall*, (2 McC. Eq. 269.) Ainsley Hall, the testator, after making provision, among others, for his wife, out of his real and personal estate, desired by the twenty-seventh clause, "that the

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provision made by *his will for his wife, should be taken in lieu and bar of all claim of dower, inheritance, or any other claim on her part."

He afterwards purchased real estate; as to which he died intestate; leaving his widow, a brother, and children of a brother, surviving him.

In a contest which arose in this case between the widow, and these other distributees, it was contended by the latter, that she was excluded from her share in this intestate real estate. But the Court unhesitatingly held that she was not barred or excluded.

Now these cases constitute very strong authority for the present decree, and in opposition to the former decree.

I know that it was urged against the bar in *Pickering v. Stamford*, and in *Hall v. Hall*, that a bar which might be good in other circumstances, should not be allowed when the intestacy is undesigned, or occurs by unforeseen events, and the argument affected the mind of the Court. It was an appeal to the supposed intention of the testator, that in the particular events that have occurred, he would not have declared the bar. But there is less in such an argument than at first view seems to exist. There are but two systems under which the property of deceased persons can fall; the law of testacy, and the law of intestacy. As, on the one hand, a will, properly drawn, will take in and dispose of property not in the contemplation of the testator, or even unknown to him, and, not improbably, in many cases, contrary to what his particular intention would have been had he contemplated the property when he drew his will:—why, on the other hand, should property rendered intestate, by accident, be diverted from the code under which it falls, or be modified under its operation, by conjecturing, that under the circumstances, the testator would have so dealt with it? Besides, it is to be observed, that in all cases of partial testacy, the subjects omitted in the will, are not to be regarded always as strictly intestate, as respects the intention of the

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testator, in the same sense as they *might be where there is a total intestacy. We have an example of this doctrine as respects advancements in *Snelgrove v. Snelgrove*, (4 Des.

274.) A man may provide for matters of primary importance in his view, hesitating about carrying his will further, or designedly leaving out other matters; or he may provide for future contingencies as far as he thinks he can look into the future; and if his provisions miscarry, no other man can tell, what, in that contingency he would have done, unless he tells in his will; a supposition of his ability to do which, is by the way, absurd in itself; since if he had foreseen the contingency it would have been no contingency to him. As to things unforeseen there can in the nature of things be no intention.

But in this case of *Hall v. Hall* the testator knew, or must be presumed to have known the law; and that his after-acquired land could not pass under his will; and there was nothing accidental in the case.

And as to *Goodtitle v. Pugh*, there is no intimation in this case that surprise or accident had any influence on the decision. It was apparent on the will, that the father designed to cut off the son. The Court determining in its own mind that this could not be done while the estate was not given to others, enquires was such a gift made, and upon being certified no such gift had been made, determines in his favor. The principle of the decision was the estate must go under the will or under the law—one or the other—there was no half-way measure.

But in addition to these cases we have many others, decisions made here since the former decree of 1841; decisions which have fixed the principle in our jurisprudence so deeply that it would uproot the law of property to depart from them; from deference to this case and former judgment in it.

We have *Gordon v. Blackman*, (1 Rich. Eq. 61,) in which the testator attempted to cut off all his kindred, but in vain, as the Court declared, unless he gave away the property for some lawful purpose.

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*And we have *Youngblood v. Norton*, (1 Strob. Eq. 122,) in which the principle is announced, that so far as a man neglects to make a will, the law of intestacy must prevail; and so strongly was this principle applied, that it was held he could not even regulate the value of advancements except by testament. The same doctrine had governed in *Young v. Lorick*, and *Shephard v. Shephard*, [2 Rich. Eq. 142, 46 Am. Dec. 41,] cited in that case.

We have, also, *Crossby v. Smith*, (3 Rich. Eq. 244,) where the testator attempted the extraordinary measure of giving to his children, and then declaring that their children should not inherit from them; but the Court put down the attempt, not as foolish, but as unlawful.

I could quote other cases, but surely it is unnecessary.

An analogous principle prevails in cases of lapse. See *Cook v. Silly*, 3 Atk. 573.

But, against all this, we are referred to an opinion delivered in the case of *Hoyle v. Stowe*, (1 Dev. Rep. 323, N. C.) The Ch. J. in that case says: "It is equally true, that the mere exclusion of the heir by the words of the will, however express or direct, will not be efficacious to destroy the succession. There must be a disposition to some other person, capable of taking, because in the very nature of inheritances, the heir takes whatever is not given away. Manifestly, however, this rule can apply only where there is a single heir." "When there is a class of heirs the exclusion of one leaves others who may take," &c.

But in these observations, it is forgotten that when there is a plurality of heirs, they do not take jointly but severally, each his own share, or proportion; and, in principle, the share of one can no more be taken from him, though only a part, and not the whole of the estate, without giving that share to others, than the whole can be taken from a single heir without the same condition.

But the principle of the cases in England, such as *Pickering v. Stamford*, and *Simpson v. Hutton*, and other cases, is also overlooked. These are cases of intestate personality, it

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*is true, but the personality was distributable among a plurality of persons, and in different proportions, just as our estates, whether real or personal, are distributable by statute; and yet we do not find that the attempted bar of one threw the share of that one to the others. The observation of the Ch. J. is also pointedly opposed by *Hall v. Hall*.

Hitherto I have considered the disposition of this reversion in the light of intestacy. But, before quitting this aspect of the case let me remark, by the way, that the argument at the bar that dower and thirds of real estate are always convertible, and when dower is barred, thirds is also barred, is not precisely true. The subject of intestacy here is a reversion, in which there is no dower, (2 Leigh 29, *Blow v. Maynard*,) yet will it be contended that such an interest admits of no thirds? But I return to the observation I intended to make, before this digression. I will now consider the will as operating on this reversion. If it does the wife takes among the other heirs mentioned, as a designated person, and if she does, the declaration in the prior clause that what I have herein given her shall be a bar, can only apply to the provision in the latter clause upon the supposition that by herein the testator meant the provision made for the widow in the clause containing the bar, and not the provision made for her in the will—a very unnatural construction—which holds out the testator as intentionally in advance, barring the gift he intended, at the time, to make in a subsequent part of the instrument.

That portion of the decree which relates to

the right of way, was decided at the last argument.

It is ordered that the residue of the decree be affirmed, and the appeal dismissed.

WARDLAW, Ch., concurred.

DUNKIN, Ch., dissente.

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*The decree of the Circuit Court commences with the statement that "the plaintiff is the widow of William Seabrook, late of Edisto Island, and the defendants are devisees and heirs at law of the said William Seabrook, and persons claiming by or under them." The Chancellor then proceeds to consider the two important clauses recited in the decree and the rights of the testator's widow under those provisions. Some twenty years since the proper construction of William Seabrook's will in reference to these rights had been subjected to the adjudication of this Court in a suit between (substantially) the same parties as those now before it. To the decree made in that cause, which is reported *McMul. Eq. 201*, the Chancellor particularly adverts, and while recognizing and approving some of the principles therein announced, he arrives at a different conclusion as to the construction of the testator's will. He ruled that in the event, which had happened, the widow of the testator (the plaintiff in this cause) was entitled to one third of that portion of the testator's estate which had been devised to her son. In the original cause it had been adjudged that on the happening of events which, we all agree, were essentially the same, the testator's widow took no interest in the property embraced in this devise. That inquiry had been a leading question in the cause. From the decision of the Circuit Court, unfavorable to the claim of the widow, an appeal was taken by Mrs. Elizabeth E. Seabrook, and by her alone. The cause was elaborately argued, and the Circuit decree upon this subject was sustained by the unanimous judgment of the Court of Appeals concurring in the opinion of Chancellor Harper, who was the organ of the Court. This decision was pronounced in May, 1841, and from that time was regarded as (if not the law of the land) the law of William Seabrook's will. Few persons may have had the curiosity to look into the reasons of the decree, and of those few, some may have shaken their heads at the logic of the Chancellor, while all yield acquiescence to the judgment of the Court. The parties—the community—have no concern but with

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the matter adjudicated. That ascertained, it is regarded as the rule of property. All the reasons of *res judicata*, the acknowledged policy of *stare decisis*, forbid interference in such cases. It is the interest of society that there should be an end of litigation. The land may be blest with wise judges, or it may

be otherwise. But no servitude is so intolerable as under a system *ubi lex aut vaga aut incerta est*. Thirty-five years ago a revolution in the judiciary organization took place in consequence of discordant decisions. Upon the same clause of William Willson's will, one purchaser from his devisee was held to have a good title, while another was dispossessed of his plantation. Nothing can be more powerful and convincing than the language of Judge Nott upon this subject, in *Carr v. Porter*, 1 *McC. Eq. 71*. The wholesome doctrine thus approved by such luminaries as Mansfield, Kenyon and Nott, and recognized by Mr. Fearne, illustrates the importance, for the sake of the stability of property, of adhering to an abstract rule of construction. But the decree of 1839-'41, is an authoritative judgment, giving construction to the will itself. When, in *Carr v. Green*, [2 *McCord, 75*,] the defendant was ejected from his land, while his neighbor, Porter, claiming under precisely the same clause, was held to have a perfect title, it may have abated the discontent of Green that his rights had been adjudicated in a different tribunal. Here the parties are virtually the same; the tribunal is the same, and the same question arises under the same clauses of the testator's will.

This appeal has been twice argued. At the former hearing I was of opinion that the Court should adhere to a construction already given by a competent tribunal. A re-argument was ordered, not because a majority of the Court were unprepared to decide the cause, but from an unwillingness to overrule the decision of 1841 without the advantage of a full Court. My opinion remains unshaken that the Court should adhere to the determination of 1841. If that judgment, declaring Mrs. Seabrook not entitled, be now

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repudiated in consequence of the infirmity in the argument, that the words of exclusion applied to property, as to which the testator died intestate, it is a mistake to suppose that this quiets controversy, or that enterprize will expire with this generation. When a question shall arise as to the share of another child, it may, with great plausibility, be contended that the true view yet remains to be taken—that the judgment of 1841 should be maintained, and that the vice in the argument now made is in not probing to the root the infirmity in the reasoning of the former decree—that the devise over was not to the heirs of the testator, but to those who should be his heirs at the happening of the contingency. By this construction a valid contingent limitation was created to those heirs from which the widow would be confessedly excluded by the first clause of the will, and not a case of intestacy, in which she might be entitled to participate. After the decision now pronounced, who shall say that this inquiry would not be open?

And who will have the intrepidity to predict at what time, and under what circumstances, the construction of these clauses of William Seabrook's will shall be definitively established?

Appeal dismissed.

10 Rich. Eq. *518

*C. C. WIGHTMAN v. J. W. GRAY.

(Charleston. Jan. Term, 1859.)

[*Equity* ⚡396.]

Where an order directs the Master to pay out the assets of an estate in his hands, reserving a sufficient amount to pay certain claims, the Master discharges his duty if the assets retained are sufficient at the time. He is not liable to the parties if from subsequent causes they should become bad.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 860; Dec. Dig. ⚡396.]

[*Equity* ⚡395; *Guardian and Ward* ⚡33.]

Where choses belonging to suitors are in the hands of the Master, it is the duty of the parties, and not of the Master, to have proceedings instituted for their collection; and where a minor is the party interested, it is the duty of his guardian to see to their collection.

[Ed. Note.—Cited in *Bulow v. Witte*, 3 S. C. 325.]

For other cases, see *Equity*, Cent. Dig. §§ 854-856; Dec. Dig. ⚡395; *Guardian and Ward*, Cent. Dig. §§ 142-161; Dec. Dig. ⚡33.]

[*Equity* ⚡395.]

If a Master institutes proceedings for the collection of choses, without the order of the Court, he acts as the private agent of the parties.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 854-856; Dec. Dig. ⚡395.]

[*Mortgages* ⚡559.]

In taking a decree, in 1840, for foreclosure of a mortgage, it was not negligence to omit to take a decree for the balance due after exhausting the proceeds of the mortgage—the practice of taking such decrees having then but recently commenced.

[Ed. Note.—Cited in *Trapier v. Waldo*, 16 S. C. 287; *Anderson v. Pilgram*, 30 S. C. 502, 9 S. E. 584, 4 L. R. A. 205, 14 Am. St. Rep. 917.]

For other cases, see *Mortgages*, Cent. Dig. §§ 1592, 1600-1603, 1605-1608; Dec. Dig. ⚡559.]

Before Dunkin, Ch., at Charleston, June, 1858.

The facts upon which this case was heard and decided, are contained in the following report of the Master, made at June sittings, 1854:

On the 7th June, 1838, it was ordered and decreed, "that the Commissioner retain in his hands a sufficient amount of the personal assets, and if they be insufficient, then a sufficient amount of the real assets, to cover any claims against the estate of Major W. Wightman, whether for debts or legacies, or any other claims against the estate, and pay over and deliver the remainder to the defendants, Valk and wife."

On the 19th January, 1838, the executor of William Wightman delivered to Mr. Gray,

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among other assets, a bond of *William Burrill, for \$932, secured by a mortgage of three lots on Vernon street, which was among other assets retained by the said Master to pay the claims and legacies referred to in the order of the 7th June, 1838.

Two legacies were bequeathed by the will of William Wightman—one to the children of William Wightman, which has been paid in full, and the other to the children of John T. Wightman, upon which there is now due a balance of \$676.67, as appears by the account of Mr. Gray, in evidence in this matter.

To pay this balance the bond of William Burrill was retained by the Master, and the questions raised by the actors in these proceedings have reference to this bond.

It is urged by Mr. John T. Wightman, (who is guardian of his children, entitled to the balance due upon the unpaid legacy above referred to):

First. That the Master should have paid the legacy in full to the children of John T. Wightman, before anything was paid to the defendant, Valk.

Second. That the Master, by his delay in collecting the bond of Burrill, has caused injury to these infant legatees, and made himself liable for the balance now due to them.

The following evidence has been submitted on the part of Mr. Wightman, as the guardian of his children.

William Burrill died, leaving a will, dated 8th March, 1838, proved 27th March, 1838, by which he left his entire estate to his wife, Eleanor, and his three children, Mary Jane, Henry, and Elizabeth. The real estate was directed to be sold when Elizabeth should arrive at full age, and the proceeds equally divided between his wife and children, share and share alike; the wife's to be in lieu of dower.

R. W. Seymour and William Caldwell were appointed executors, but never qualified. Administration, with the will annexed, was granted on the 10th June, 1839, to Alexander Hamilton; penalty of administration bond, \$7000. Sureties, J. St. Amand and James

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Divver. The administrator rendered no account until 17th August, 1846, when he filed one account from 1839 to 1846, inclusive, showing a balance against administrator of \$350.46.

The inventory and appraisement of the estate of Burrill shews the following property:

Lot of land corner Bull and Smith streets, appraisement	\$2,300 00
Three water lots on Gadsden's wharf, (Vernon street,)	900 00
The following slaves:	
Lucy, \$120; Sam, \$750; Tena and child, \$700	1,870 00
Furniture	90 00
	\$5,160 00

On 14th January, 1840, Mr. Gray, by his solicitor filed a bill against Alexander Hamilton, administrator, and the widow and children of Burrill, to foreclose the mortgage on the three water lots on Gadsden's wharf, and obtained a decree for foreclosure and sale. No money decree was given.

On the 23d November, 1850, Mr. Gray obtained a judgment against Alexander Hamilton, administrator, for \$976.62, being balance due on bond and mortgage of the water lots after the sale for foreclosure.

In November, 1852, the heirs and devisees of Burrill sold

A part of the lot in Bull and Smith streets, for	\$2,400 00
And on 3d December, 1852, conveyed the rest of the lots to Geo. H. Ingraham, for	1,800 00
This sum	\$4,200 00
With balance due by administrator.....	350 46
Gives	\$4,550 46

Which, it is urged, should have been resorted to for the payment of the comparatively small balance due upon the bond of Burrill held by the Master.

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*It is, however, admitted on the part of Mr. Wightman, that Master Gray, after obtaining judgment against the estate of Burrill, made efforts to induce the Sheriff to levy on the lots previously sold; but the heirs and devisees resisting the levy, on the ground that they had been in possession the statutory time, both Sheriff Shingler and Sheriff Yates declined to enforce the execution.

Mr. John T. Wightman, who was examined, by consent, deposes, that he has applied to Mr. Gray for payment of the amount due to his wards, and has received sundry sums on account, as shewn by the book kept by Mr. Gray. He says that Mr. Gray never offered to pay him in bonds, and if he had, does not know that he would have taken them.

Alexander Hamilton, also examined on behalf of the defendant, deposes, that, as administrator of Burrill, he was notified by Mr. Gray that he had a bond demand against the estate, secured by a mortgage, and offered to apply to the Court, on behalf of witness, for the sale of the lots mortgaged. At the sale, Mr. Hamilton, by consent of Mr. Gray, bid in one of the lots to prevent its being sacrificed. Subsequently, Hamilton sold this lot to one Beckman, but there was some difficulty in obtaining titles, and Beckman did not settle for the lots. Hamilton says he called on Mr. Gray after the sale to Beckman, offered to settle the balance of the debt due by the estate of Burrill, after deducting the price at which this lot was sold to Beckman. Mr. Gray declined to settle, as he did not know what the balance was, it being uncertain what would be realized from the sale of the lot. Hamilton did not offer to pay the whole of the debt

due by the estate, but only the balance remaining after deducting the amount for which the lot was sold to Beckman. He has not offered to pay Mr. Gray since 1840. I refer to the testimony of Mr. Hamilton, appended hereto, for his further statements in this matter.

Jacob R. Valk and wife were decreed to be entitled only to the remainder of the estate of William Wightman, after providing for the debt and legacies of the testator. It

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appears, *however, considerable sums and assets were turned over and paid by the Master to Valk, although the legacy to the children of John T. Wightman was not fully paid. On the part of the Master, it is urged that he was justified in so doing, the assets retained by him being considered, at the time of the payment on account to Valk, amply sufficient to discharge the legacies and other claims against the estate.

It further appears that the administrator of Burrill is insolvent, and the balance due by the estate of Burrill to the estate of Wightman will be lost, unless it can be recovered from the heirs of Burrill, by levy on the lands derived from their father or otherwise, or by suit against the sureties of Hamilton's administration bond.

Mr. Gray states that since his return to the rule, he has reason to believe that the estate of St. Amand, one of Hamilton's sureties, is not insolvent, as stated in the return.

On the part of Mr. Gray, evidence has been adduced to show that the mortgage of William Burrill was foreclosed in this Court, by decree, dated January, 1840; that the sales by Master Laurens, under this decree, left a deficiency to pay the bond, which was afterwards sued against Burrill's administrator, and a judgment obtained, but nothing has as yet been realized on the judgment, and that the bond is now in the hands of the solicitors of Mr. Gray for suit against the heirs at law of William Burrill.

The first sale by Mr. Laurens, under the above decree, was on the 27th February, 1840, when Hamilton bid in one of the lots for \$300. This lot was resold by Mr. Laurens on the 14th January, 1847, for \$230. The net proceeds of this last sale, \$188.32, was received by Mr. Gray.

In explanation of the difficulty in making titles to Beckman, the record of the Court in the case of William Wightman v. Francis G. DeLiesseline, has been given in evidence, from which it appears that a decree of foreclosure was entered at the January Term, 1827, in favor of the complainant, William Wightman, and directing sale of the three

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lots in Vernon *street by the Master, unless the debt due by the defendant was paid within twelve months.

It seems, however, that the decree was not enforced as to the sale, but the complainant,

William Wightman, took possession of the mortgaged premises, and they were afterwards sold by his executors, as part of his estate, to Burrill. This defect appearing in the title, Beckman refused to comply.

In explanation of the bond of Burrill being retained by the Master, it would seem that by acquiescence of Mr. Wightman, it remained with Mr. Gray for collection. It is admitted that Mr. Wightman never demanded the bond of Mr. Gray, and that Mr. Gray never offered to deliver it to Wightman.

All the children of John T. Wightman, except one, (Charles, who will be of age in a few months,) have been settled with for their portion of the legacy left to them by William Wightman. The whole balance reported due belongs to this minor.

The money owing on the bond of Burrill would, if realized, be more than sufficient to pay this balance. The surplus would be payable to Valk and wife.

Mr. Gray gives in evidence the Master's report of funds in 1839, to shew that the payment to Valk and wife, and others, was regularly reported to the Court.

The circuit decree is as follows:

Dunkin, Ch. The facts of this case are set forth so clearly, and with so much succinctness in the pleadings and the report of the Master, that the statement cannot be advantageously abridged.

It appears to the Court that the Commissioner complied strictly with the order 7th January, 1838, in paying over to Valk and wife the surplus, after retaining what appeared to be a sufficient proportion of the assets to satisfy the debts and legacies. But the transfer to Valk and wife was in June, 1838, and in the Commissioner's annual report on estates in his hands for January,

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1839, and which was ordered to be filed for the information of the parties, this transfer, or payment, to Valk and wife is set forth, and no objection taken by any of the parties.

The Court is of opinion that the plaintiff's guardian was not bound to receive any of the bonds in payment of his ward's legacy, nor does the Court think that the Commissioner had any authority, without the previous order of the Court, to transfer bonds to one suitor for collection, when other suitors were interested in the fund.

The only inquiry of any doubt or difficulty is as to the official conduct of the defendant, in reference to the debt of William Burrill. His bond for \$922, secured by a mortgage of real estate, was among the assets received by the defendant from the executors of the estate of William Wightman, deceased, on 19th January, 1838. William Burrill died in March of the same year, possessed of some real and personal estate, as set forth in the evidence, and leaving a will. The executors declined to qualify, and no one administered until 10th June, 1839. It is not proposed to

recapitulate the testimony in reference to the litigation for the recovery of this demand; undoubtedly there were causes both of delay and difficulty. But the Court is clearly of opinion, that if the proceedings had been directed and prosecuted under the auspices of able counsel, employed and stimulated by a vigilant client, the debt would have been long since paid. And if the plaintiff (who is only recently of age) shall ultimately lose any part of his legacy, it is for the want of such exertions and appliances.

It seems not to be sufficiently borne in mind that the Commissioner is merely the minister of the Court. He should do no act but by authority of the Court, expressed or implied. The carriage of the cause, both before and after the decree, is with the parties and their solicitors. In *Napier v. Gidiere*, 3 Strob. Eq. 192, after intimating that suits to enforce securities in the custody of the Court should have the order of the Court, it is stated to be

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"the safer practice where several parties are interested, and the application is by one of them, to direct the officer holding the security to bring suit, upon being indemnified as to costs and expenses; and to bring the proceeds of the suit into Court for its further order." It is one of the leading purposes of the law requiring annual reports on estates, from Masters and Commissioners, to keep parties advised, so that they may take such orders as may be proper and requisite. A Commissioner may, and should, if the exigency require it, institute proceedings on a money bond in his hands, relying on the subsequent sanction of the Court. But the regular and proper course is for the parties interested to obtain, through their solicitors, the necessary orders, and to have the proceedings instituted and conducted at the expense of those parties claiming the fund. The rule and the reason of it are properly suggested in *Napier v. Gidiere*. The Commissioner, as such, has no funds to fee counsel. As a general rule, it would be very inexpedient to vest him with any such authority over the funds in his hands, unless under a special order, procured at the instance of the parties interested in the fund.

The decree for the administration of William Wightman's estate, and payment of the debts and legacies, was made by Chancellor Harper in June, 1837. In January previous, the plaintiff had applied for the appointment of his father, John T. Wightman, as his guardian. The master reported that his estate consisted of a legacy of two thousand dollars, under the will of William Wightman, deceased. On 19th January, 1837, on motion of Messrs. Peronneau, Mazyck and Finley, the report was confirmed, and the guardian duly appointed. As early as 27th March, 1838, the guardian received payments from the Commissioner on account of his ward's legacy under the decree. During every suc-

ceeding year until 1850, payments were made in greater, or less sums, according to the state of the collections. John T. Wightman was guardian for five of his children, each

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of whom was entitled to the same *sum. All have been fully paid except the plaintiff, for whom a balance is claimed of six hundred and fifty-four dollars, with interest from 28th August, 1850. It is very manifest, not only from the answer of the defendant, but from the account filed with his answer, (to which the guardian himself in his evidence refers,) that the situation of the assets was open to the regular supervision of the guardian. It was his duty, as well as that of all others interested in the assets, to keep a watchful eye over their collection—to employ counsel if need required, and to take care that the necessary orders were made and carried into effect for rendering the funds available. The Court will not say that the defendant acted officiously in procuring the decree of foreclosure in 1840, without the previous direction of the Court, for instituting the proceeding; but it would have been safer, and more regular to have required the parties to pursue the course intimated in *Napier v. Gidiere*. The defendant in his answer, states that the suit for foreclosure was instituted at the suggestion, or invitation of the administrator of Burrill. The guardian of the plaintiff should have looked after the matter. He was in funds for his wards. If counsel were to be engaged or stimulated in their exertions, it was his duty to see that they were employed and their services remunerated. Without a special order it was not the duty of the defendant. Many of the remarks in *Boyce v. Bailey*, 5 Rich. Eq. 263, are applicable to every case where an estate, at the instance of those interested, has been committed, or surrendered to the control and disposition of the Court. Every party interested in the fund, "is entitled to move for any order to speed the cause, or carry the decree into successful execution." It might well be expected that those thus entitled, would be most diligent in stimulating the action of the Court. "If proceedings under the decree are unreasonably protracted or suspended, the delay is not more chargeable upon one than another of those who were entitled to expedite them, &c." But least of all, should

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*the minister of the Court be held responsible, "for suspension or delay" where the action of the Court had not been invoked to authorize and direct the proceedings of the officer.

From recent inquiries, it appears that, by proper exertions, enough may, perhaps, yet be collected to satisfy the balance due to the plaintiff. But it is of general importance, that the relative rights and obligations of the parties in the cause, and the officers of the Court, should be properly understood.

It is ordered and decreed that the bill be dismissed.

The plaintiff appealed on the grounds:

1. Because the order of 7th January, 1838, required the Commissioner, as a condition precedent to paying over the funds to Valk and wife, that he should reserve a sufficient amount for the legacy to the plaintiff, and he has rendered himself liable by not performing the condition.

2. Because, even after such payment to Valk and wife, there would have been a sufficient balance if the Commissioner had used the diligence in collecting the assets, required of an officer of the Court in like circumstances.

3. Because the Commissioner instituted proceedings to collect the fund, thereby assuming the management of the business, and to that extent taking it out of the guardian's hands, and he is, therefore, estopped from the benefit of the views expressed by the Court in that behalf.

4. Because, having so assumed the management of the funds and instituted suit in Equity on Burrill's mortgage, he deprived the guardian of power to proceed to foreclose the same; and by neglecting to enter a money decree, he has caused the loss of the fund.

Martin, for appellant.

Brown & Porter, Mitchell, contra.

The opinion of the Court was delivered by

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*WARDLAW, Ch. This Court is satisfied with the conclusion and general reasoning of the Chancellor, and contents itself with making some observations on the grounds of appeal.

The first ground of appeal is, "because the order of January 7, 1838, required the Commissioner, as a condition precedent to paying over the funds to Valk and wife, that he should reserve a sufficient amount for the legacy to the plaintiff, and he has rendered himself liable by not performing the condition." The order referred to is in the following terms: "In this case the assets, both real and personal, have been ordered to be paid and delivered into the hands of the Commissioner to abide the final decree. Since that order, it hath been declared that the defendant, Sarah Valk, is entitled to the residue of the real estate; and it is but reasonable that she and her husband, Jacob R. Valk, should have the possession of so much thereof as may not be required to meet claims in the cause. It is therefore ordered and decreed, that the Commissioner retain in his hands a sufficient amount of the personal assets, and if they be insufficient, that he retain a sufficient amount of the real assets to cover any claim against the estate of Major William Wightman, whether for debts or legacies, or any other claim against the estate; and that he pay over and de-

liver the remainder of the proceeds of the real estate or real assets, to the defendants, Jacob R. Valk and Sarah, his wife, in right of his said wife, whether the same be in bonds or cash." This order was expressly for the benefit of Valk and wife, to let them into immediate possession of the residue of the real assets of testator, without waiting for the realization or reduction into money of these assets; the Court intending to provide for claims of prior right, yet delegating to the judgment of the Commissioner the reservation of assets sufficient for the satisfaction of these prior claims. It would be a most harsh construction of this order to hold, that the Court designed to make the judgment of the Commissioner in reserving a sufficient amount for the satisfaction of debts and legacies dependent on the actual

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event of the sufficiency of the reserved assets. This would make the subordinate officer of the Court an insurer of the ultimate realization of the assets reserved, or compel him for his own security to retain, in defeat of the advantage intended for Valk and wife, all the real assets until he actually received moneys enough for satisfaction of the debts and legacies. In execution of the order, the Commissioner retained cash \$9,104.46, and real assets to the amount of \$24,704 for the payment of the debts and legacies, (the personal assets being insufficient) and all of these debts and legacies seem to have been discharged, except a balance of \$654, with interest from August 28, 1850, due to the plaintiff. This balance, too, would have been satisfied, if one of the bonds reserved, that of William Burrill for \$932, had been collected; and there seems no room for doubt that this bond was good at the time, and might have been reduced to money, if due and judicious diligence had been used. There is really then no ground for supposing that the Commissioner acted injudiciously in the reservation of assets, and it is not suggested that he acted with intentional unfaithfulness. The guardian of plaintiff was a party to the suit in which this order of January 7, 1838, was made, and was bound to advise himself of its legal effect, and also to take notice of the master's report concerning the execution of the order. If he was dissatisfied with the order, or its mode of execution, especially as to the payment to Valk and wife, and the sufficiency of the reservation of funds for the legacy to his children, it was his duty then to complain to the Court on pain of being afterwards estopped. This ground is untenable.

The second ground of appeal, conceding the sufficiency of the assets reserved, affirms that the Commissioner did not use the diligence required of an officer of the Court in collecting these assets. This is the substantial question in the case, and is that which is most fully considered by the Chancellor. It

involves the subsidiary question, whose duty it was, that of the Commissioner or of the guardian, to prosecute the remedy on Bur-

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rill's bond, the only matter of contro*versy. In the Circuit decree, while the burden of the argument is that the guardian, and not the Master, was bound to supervise the collection of the bond, the opinion is expressed that the guardian was not bound to receive any of the bonds in payment of his ward's legacy; but it is manifest from the collocation of the remark and from the whole train of reasoning, that the Chancellor did not intend to assert as a general proposition that a guardian is not under obligation to receive the estate of his ward in the form of investment, to which it is reduced by the decretal orders of the Court. He intended to say that the guardian was not bound to surrender any claim he might have against the Master for unfaithfulness in reserving sufficient bonds for the payment of the legacy, and that as this bond was *prima facie* larger than the share in arrear to his ward, the guardian was not bound to make himself the agent of other suitors for the collection of the surplus of the bond. As is said in *Long v. Cason*, 4 Rich. Eq. 66, "a guardian has plenary right to receive moneys coming to his ward, and to prosecute, compound and acquit any debt or liability accruing to his ward," where he acts faithfully and without collusion; and it is his duty to manage the choses of the infant according to the condition in which he finds them at his appointment, when this condition is lawfully produced by the action of an ancestor or other person, or of a competent Court. The Master here was not ordered by the Court to proceed to the collection of the bond, and whatever he did in that respect must be treated as done as the private agent of the guardian. The guardian did not demand the bonds from the Master, and says in his testimony (which was taken by consent) that he does not know that he would have taken bonds if they had been offered by the Master. As is said in *Thompson v. Wagner*, 3 Des. 94, it was his duty to collect the money when due or put the bond in suit, and to obtain the bond for this purpose. This case and *McCauley v. Heriot*, Riley Eq. Ca. 19, in addition to the cases cited by the Chancellor, amply sustain his conclusion on this point.

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*In relation to the third ground of appeal and the former portion of the fourth, it may be remarked that if the Master assumed the management of this fund and instituted proceedings at law for collection of the bond and in equity for the foreclosure of the mortgage, his interference was supererogatory, not required by any order of the Court, and in no respect superseding the power and duty of the guardian to supervise and direct the management of the fund. The necessary legal in-

ference is that the action of the Master was directed by the guardian as his principal in a private agency; but the Master is pursued for negligence as an officer of the Court. It seems to be in vain to give caution to many persons that the action of the Court never professes to bind parties to suits beyond the legitimate interpretation of its orders and decrees, and not at all to conclude the titles of third persons who are not parties. In blind credulity they will conclude that wherever the Court or its ministerial officers touch any matter, a successful result is insured. Some purchasers at sales ordered by the Court, suppose that its orders are in rem, concluding the world, parties or not; and some parties to suits suppose that wherever the Court interferes at all, it undertakes to manage propitiously the whole results of the cause, including the duties of a constable. Sound policy requires that such superstition should be punished by pecuniary loss to its votaries, rather than that the proper power and action of the Court should be misunderstood and misinterpreted.

The latter portion of the fourth ground of appeal imputes special negligence to the Master, because in the bill of foreclosure instituted by him, he did not seek and procure a coterminous decree for all the money Burrill owed on his bond. Passing by the consideration which has been sufficiently discussed, that it was the primary duty of the guardian to institute and control such proceeding, and granting that the Master was responsible for the conduct of the cause, it would be most harsh to convict him of negli-

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gence for *not taking at the time a money decree on a bill of foreclosure. The decree of foreclosure was rendered in January, 1840. Before that time a single instance in 1837 is brought to our attention of a money decree accompanying a decree of foreclosure, in a case not taken to the Court of Appeals nor reported. Before the Act of December, 1840, providing that money decrees should create a lien as to third persons, without express notice, only from the time of enrolment, and while the doctrine prevailed that filing the decree was equivalent to enrolment, it was very unusual to pray for or to take a money decree in bills for foreclosure. Afterwards the practice has grown up gradually of taking in this Court the double remedy of a decree for the debt as well as for foreclosure of the real security; but the practice even now, although judicious and approved, where the security may be insufficient, is far from being universal, and is confessedly a departure from the procedure of the English Chancery. There the mortgagee may proceed at the same time on all his remedies at law and in equity, at law in ejectment, (his title here is much modified by our Act of 1791) or actions on his bond and other collateral securities, and by

bill in equity for foreclosure. On bills for foreclosure in the usual course, it is referred to the Master to ascertain the amount of the debt, and it is ordered that if the mortgagor pay the debt secured by a day to be fixed by the Master, the mortgagee must re-convey, and in default of payment, that the mortgagor be debarred and foreclosed from his equity of redemption. The time for redemption is frequently enlarged on motion, (in *Edwards v. Cunliffe*, 1 *Mad.* 287, four times after a third peremptory day of payment,) and even if there be default at the ultimate time fixed, a final order of foreclosure is regarded as necessary. There now, as formerly here, the practice was to leave the mortgagee for further remedy, if the land mortgaged was inadequate for his satisfaction, to his remedy at law on the bond of the mortgagor. Sea-

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ton's Forms, 137, et seq.; *Coote on Mort.* 492, 497. We cannot conclude, under the circumstances, that there was culpable negligence in not taking a money decree.

It is ordered and decreed that the appeal be dismissed and that the Circuit decree be affirmed.

JOHNSTON and DUNKIN, CC., concurred.
Appeal dismissed.

10 Rich. Eq. *534

*LANGDON CHEVES, Executor, v.
CHARLES F. HASKELL and
Others.

(Charleston. Jan. Term, 1859.)

[*Wills* ⇨ *GSS.*]

The testator devised and bequeathed his plantation, and other lands, with the slaves on the plantation and other slaves, to trustees, in trust to pay to his son, H., out of the profits, the sum of \$3,500, annually, until the year 1860, and to pay the remainder of the profits to testator's daughters; and then from and after the year 1860, in trust for the sole use of H. and his heirs forever. By a subsequent clause, the testator bequeathed to H. \$5,000 out of the profits of the year 1860; and by the last clause, he devised and bequeathed the residue and remainder of his estate, real and personal, or in action, to his daughters. The devise and legacies to H. having lapsed by his death before the testator: *held*, that the lands devised to H. descended to testator's heirs, and that the personalty bequeathed to him, including not only the slaves but also the annual sums of money, passed to testator's daughters.

[*Ed. Note.*—For other cases, see *Wills*, Cent. Dig. § 1648; Dec. Dig. ⇨ *GSS.*]

[*Wills* ⇨ *S49.*]

Where a devise and legacy lapse, the land goes to the heir, and the personalty to the residuary legatee, if there be one.

[*Ed. Note.*—Cited in *Laurens v. Read*, 14 *Rich. Eq.* 267; *Lopez v. Lopez*, 23 *S. C.* 269.

For other cases, see *Wills*, Cent. Dig. §§ 2165, 2166; Dec. Dig. ⇨ *S49.*]

Before Dunkin, Ch., at Charleston, June, 1858.

The plaintiff, as the executor of the late Hon. Langdon Cheves, filed this bill, praying that the trusts of the testator's will may be declared, and his estate settled under the direction of the Court. The testator died on the 27th June, 1857, leaving a last will and testament as follows:

"In the name of God, Amen. I, Langdon Cheves, of South Carolina, do make, publish, and declare this to be my last Will and Testament, in manner and form following, that is to say: Imprimis: I give, devise and bequeath unto my sons, Langdon Cheves and Charles M. Cheves, my plantation on Ogeechee River, called by me South Field, in the State of Georgia, also the piece of land ad-

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joining thereto, which I *bought of Arthur Heyward; also the piece of land I bought of ——— Dorsey; and also a tract of land in Bryan County, which I bought of ——— Butler; also all the slaves now on the said plantation, and which may be thereon at the time of my death; also my cook, John, and his wife, Juliann, and their children, now born, or which may be born during my lifetime; also my house-servant, Sam, to them, the said Langdon Cheves and Charles M. Cheves, their heirs, executors and assigns; in trust out of the income and profits thereof to pay yearly, and every year, unto my son, Robert Hayne Cheves, the sum of three thousand five hundred dollars, until the year one thousand eight hundred and sixty, inclusive; and in the meantime to keep up in number and quality, by purchase, if necessary, the slaves which shall be thereon at my death, and to keep the buildings and machines thereon at my death in good repair, and to pay the remainder of the proceeds and profits of the said plantation and slaves to my daughters, Sophia, the wife of Charles T. Haskell, Louisa, the wife of David J. McCord, and Anna, the wife of T. Pinckney Huger, and their issue equally, share and share alike, as tenants in common, and not as joint tenants, the same to enure and be settled to the same uses and limitations as the property heretofore settled on my said daughters respectively, at the time of their respective marriages. And from and after the year one thousand eight hundred and sixty, then in trust to and for the sole use, benefit and behoof of my said son, Robert Hayne Cheves, his heirs, executors, administrators and assigns, forever, free from, and discharged of, all further trusts and limitations.

"Item. I give to my daughter, Louisa, my house-servant, Priscilla; also, my house and the land whereon it stands in the Sand-Hills near Columbia, with my library, carriage and horses, and the household and kitchen furniture, to hold to my said daughter, her heirs, executors, administrators and assigns, to enure and be settled to the same uses and

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limitations as the property heretofore set-

tled on my said daughter, Louisa, at the time of her marriage.

"Item. I give and devise unto my sons, Langdon Cheves and Charles M. Cheves, the piece of land on Whitmarsh Island in the State of Georgia, containing fifty acres, to them, their heirs and assigns, equally to be divided between them as tenants in common.

"Item. I give and devise my farm on Charleston Neck, usually called the Oaks, to my issue left living at my death, to be equally divided, share and share alike, the issue of any deceased child taking the share to which the parent, if alive, would have been entitled to; to them, their heirs, and assigns forever, as tenants in common, and not as joint tenants; the share of my daughters to enure and be settled to the uses and limitations contained in their marriage settlements, respectively.

"Item. I give and bequeath to my daughters, respectively, all slaves given heretofore to them conditionally since their marriages; to enure and to be settled to the uses and limitations contained in their marriage settlements, respectively.

"Item. I release and discharge my sons and daughters from any claims by bond, or otherwise, which I may have upon them at my death.

"Item. It is my Will, that if my sons and daughters, respectively, or their representatives, shall make any claims on, or on account of the estate or legacies derived by me under the will or deed of appointment of Mrs. Ann Lovell, deceased, that then and in this case, my devise or gift herein given to them, respectively, shall be null and void.

"Item. I give to my son, Robert Hayne Cheves, the sum of five thousand dollars, out of the profits of the year one thousand eight hundred and sixty, to provide for the expenses of the year one thousand eight hundred and sixty-one.

"Item. I give my wine, of which there is but a small quantity, to my sons, to be equally divided among them.

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*"Item. As to the rest, residue and remainder of my estate, real and personal, or in action, I give, devise and bequeath the same unto my daughters and their issue; the same to enure and to be settled to the uses and limitations contained in their respective marriage settlements. Lastly, I nominate and appoint my sons, Langdon Cheves and Charles M. Cheves, executors of this, my last Will and Testament, hereby revoking all former wills and codicils by me heretofore made.

"In witness whereof, I have hereunto set my hand and seal, this sixth day of November, Anno Domini one thousand eight hundred and fifty-four.

Langdon Cheves. [L. S.]

"Signed, sealed, published and delivered, by the testator as and for his last Will and

Testament, in our presence, who in his presence, and in the presence of each other, have hereunto set our hands as witnesses thereto.

S. Meighan.

H. C. Thompson.

G. M. Thompson."

Robert Hayne Cheves died on the 14th August, 1856, and the questions made by the pleadings related to the devise and legacies to him, which had lapsed.

The circuit decree is as follows:

Dunkin, Ch. The facts of the case are few and simple, and the questions for adjudication are clearly and sufficiently stated in the pleadings.

In consequence of the death of Robert Hayne Cheves in the lifetime of the testator, the devises and bequests in his behalf became ineffectual. In reference to the real estate, the Court is not aware that any diversity of decision, or of opinion, has existed since the cases of *Wright v. Hall*, and *Roe v. Fludd*, cited by Mr. JARMAN, 1 Jarm. Wills, 589. As to land the will may be said to speak, as of its date. The testator can dispose of no lands to which he was not actually entitled

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at the time *of making his will. Under the most comprehensive terms of gift, a devisee is not permitted to claim lands acquired by the testator subsequently to the date of his will. Every devise of real estate is consequently in its nature specific. The claim of the residuary devisee, must be referred to the date of the will. He is entitled only to that which is not expressed by the will to be given. In the language of Sir John Leach, in *Jones v. Mitchell*, 1 Sim. and Stu. 290, he can take nothing but what is at that time intended for him. The devise to Hayne having lapsed, and the residuary devisee not being entitled, the land descended to the heirs at law of the testator. The disposition of the personalty bequeathed to Hayne, is not equally clear, although the general rule is very well established. It has been long settled, says Sir William Grant in *Cambridge v. Rous*, 8 Ves. 190, "that a residuary bequest of personal estate (for it is otherwise as to real) carries not only everything not disposed of, but everything that in the event turns out not to be disposed of, not in consequence of any direct or expressed intention; for it may be argued in all cases, that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him; no, for he does not contemplate the case; the residuary legatee is to take only what is left; but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee. In case of lapse of real estate, the heir at law takes: but in the

case of personal property, the residuary legatee is preferred either to the next of kin or the executor." Fifteen years later, the same principle was re-affirmed by the same eminent judge in *Leake v. Robinson*, 2 Mer. 363. The testator, by a general residuary bequest, has manifested an intention not to die intestate, as to any part of his estate. The construction is adopted to prevent an intestacy. In this way this general intention of the tes-

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tator is carried into effect, *although his particular purpose may have been frustrated by the act of God, or by the illegality of the bequest. It is not supposed that the testator contemplated the particular event. "No man supposes his legacies will lapse, or will not take place. It is the case with all lapsed legacies." The authorities have been thus fully stated, not because the general doctrine was called in question, but rather to exhibit the principle upon which it proceeds. As this principle is deducted from a presumed intention in favor of the residuary legatee, the presumption may be rebutted by the positive declarations of the will, or by manifest implication from other provisions of the instrument. Thus, in the *Attorney General v. Johnstone*, Amb. 577, Lord Camden recognizes the general rule, but says, in order to entitle the residuary legatee to take every thing that does not pass by the will, he must be a general legatee. If the testator has circumscribed and confined the residue, then the residuary legatee, instead of being a general legatee, becomes a specific legatee. If the testator had said, none of the legacies shall, on any account, fall into the residue, it would have excluded the residuary legatees from taking the lapsed legacies. Such was not the case before him. But the testator gave £100 to the Gast houses of Hamburg, if there remained enough of his personal estate to satisfy it, but if not, that sum was not to be paid; but he directed that the small remainder of his personal estate should be left to his executor to dispose of in favor of the charity schools of Hamburg. There were other expressions, indicating that he regarded the donation to the charity schools a trifle. Lord Camden says: "The testator clearly meant that the charity schools should take no more than a small pittance, if any such pittance should be left." The residuary devise was declared to be specific and contingent, and not to carry a lapsed legacy amounting to £20,000. So, too, in *Duvers v. Dewes*, 3 P. Wm's., 40, (before Lord Macclesfield) the testator, Lord Dover, among other things, declares, by way of proviso, that he will dispose of his furniture in Cheveley by

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a codicil, and then *bequeaths all his personal estate, not disposed of or reserved to be disposed of, by his codicil, to his wife, the Lady Dover. Testator died without having made a codicil; and it was held that he died intestate as to the Cheveley furniture.

The residuary gift in the will of Judge Cheves, is in terms the most ample and comprehensive. Looking only to the language of the bequest, the Court would infer that the testator contemplated a benefit of no inconsiderable value. The residuary estate, real and personal, is given to his daughters and their issue; and it is provided that it should "be settled to the uses and limitations contained in their respective marriage settlements." While the terms of the residuary bequest itself are thus full, the Court has been unable to perceive elsewhere in the instrument any evidence of intention to restrict the gift or repel the general presumption which arises in cases of lapse in favor of the residuary legatee. Some cases were brought to the notice of the Court, which were supposed to be analogous, and which would authorize the implication of a restrictive intention. All these cases may be referred to the exceptional class of which Sir William Grant speaks in his judgment in *Leake v. Robinson*: "I have always understood," says he, "that with regard to personal estate, every thing which is ill given by the will does fall into the residue. It may in words have been before given, but if not effectually given, it is, legally speaking, undisposed of, and consequently included in the denomination of residue. It is immaterial how it happens that any part of the property is undisposed of, whether by the death of a legatee or by the remoteness and consequent illegality of the bequest. Either way, it is residue, and it must be a very peculiar case, indeed, in which there can at once be a residuary clause and a partial intestacy, unless some part of the residue itself be ill given." Thus in *Skrymsher v. Northcote*, 1 Swan. 566, Sir Thomas Plumer says: "Residue means all of which no effectual disposition is made by the will, other than the residuary clause; but when the disposition of the residue itself

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fails, to the extent to *which it fails, the will is inoperative." *Lloyd v. Lloyd*, (also cited 4 Beav. 231,) was reluctantly decided by Lord Langdale, on the authority of *Skrymsher v. Northcote*, recognizing the distinction between a legacy, and a legacy given out of a share of the residue. Upon the same distinction Sir James Wigram decided, *Green v. Pertwee*, 5 Hare 244, although apart from this distinction the Vice Chancellor thought the testator had there clearly manifested his intention to create a special residue.

In a previous clause of his will, the testator gave his daughters the surplus of the profits of the Ogeechee estate until the year 1860; and, after that period, the estate was to vest absolutely in Hayne. The legacy to Hayne having lapsed by his decease in the lifetime of the testator, the general principle prevails, although it happened that the residuary legatee had an interest in the property, even if no lapse had taken place. As between

the daughters and Hayne, the testator intended and provided that they should have no interest beyond the profits of the estate until 1860. But when that particular purpose was defeated, and the daughters were also residuary legatees, it is presumed that he did not intend to die intestate as to any part of his estate; and also that he knew the law that all personalty, not well given to the particular legatee, passes into the residue. The Court concludes, then, that the personalty given to Robert Hayne Cheves passes to the residuary legatees.

In reference to the bequest of the income until 1860, it must be regarded as personalty, and if it were necessary, it might, with much force, be maintained that it was a gift to the daughters, subject only to the charge in favor of Hayne. But as the daughters are also residuary legatees, they are entitled to the income, in any view that may be taken.

Looking only to the will as affected by the general principles of law, such would be the

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construction of the Court; and *under these circumstances no authority is perceived for the admission of parol evidence of the testator's declarations as to his intention, either in aid or modification of the construction. Nor would it be safe for the Court to deduce any conclusion from the will of 1848, a copy of which forms part of the pleadings. It is true that in that instrument, in devising lands and slaves to his sons, he provides for a lapse by the death of either in his lifetime, without leaving issue alive at testator's death; and he adopts the principle of the Statute of 1 Victoria, chap. 26, (2 Jarm. App., 762,) as the law of his will in reference to such lapsed devises and bequests. Other provisions of that will are materially different from those of 1854, and the sons, as well as daughters, are made residuary devisees and legatees. When it is said that, in the will of 1848, the testator not only indicated his desire that the real and personal property given to his sons should, in case of lapse, take the same direction, but also that the sons and daughters should alike participate, it is replied with equal force, that the change in the residuary clause of the will of 1854 is direct and express, and the only effect of the argument would be to enlarge their interests as residuary legatees. Independent of any direct provision of the will, both parties suggested the inexpediency of allowing the real and personal estate to take a different direction. On the one hand, it was said that as the land certainly passed to the heir, the slaves were not intended to be separated from it. On the other hand, it was urged that the right of the heir to the land (if recognized) was founded on a narrow and artificial reason, and should yield to the advancement of the age, as witnessed in the provisions of the recent English Statute. All these arguments, ab inconvenienti, or of pol-

ley, are properly addressed to another department of the government. This Court has no authority to do more than to declare the law as it is found. The judgment of the Court is, that the real estate included in the devise to Robert Hayne Cheves, descended,

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on the testator's death, to *his heirs at law, and that the personalty bequeathed to him passes, under the last disposing clause of the testator's will, to his residuary legatees.

The answer of John Richardson Cheves, suggests that his deceased brother, Robert Hayne Cheves, "stood in the legal relation of a creditor to his father," and "claims (hypothetically) the benefit of an account of what is due to Robert Hayne Cheves." The personal representative of the latter is no party in these proceedings, and no opinion can therefore be intimated, nor was, probably, expected.

Parties are at liberty to apply, at the foot of this decree, for such orders as may be deemed necessary. Costs to be paid out of the assets of the estate in the hands of the executor.

The executor appealed and submitted to the Court as reasons for modifying the decree—

1. That the rule which prevails in case of as ineffectual devise of land is more consonant to reason than that which attaches to legacies, which fail to have effect on account of the death of the legatee before the testator.

2. That the presumption that the testator meant to include in the residuary bequest the estate devised to his youngest son, in case of his decease in his lifetime, is effectually repelled by the circumstances.

3. That the will itself repels the idea that the real estate was to go one way and the personal another.

4. That the legacy which is to be raised out of the land for the benefit of the youngest son, by the settled rules of construction, sinks into the land when the legacy fails by lapse.

5. That the gifts to the daughters of a portion of the income, is inconsistent with the idea of their taking the whole, and should merge in the estate they take by intestacy, especially if the construction adopted by the Court should prevail.

Petigru, for appellant.

McGowan, for residuary legatees.

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*First.—The will as to personal property speaks at the death of the testator, and the residuary legatee takes, not only what was undisposed of by the expressions of the will, but that which becomes undisposed of at the death by disappointment of the intentions of the will. This rule is perfectly well settled both in England and America. *Jones v. Mitchell*, 1 Sim. and Stu. 290; *Cambridge v. Rous*, 8 Ves. 12; *Brown v. Higgs*, 15 Ves.

700; 1 Jarman on Wills, 587; *Vanchek v. Dutch Church*, 6 Page 600; 1 John Ch. 498; *Breithaupt v. Bausket*, 1 Rich. Eq. 465; *Martin v. Thomson*, 1 Strob. Eq. 370; *Godard v. Wagner*, 2 Strob. Eq. 1; *Lessly v. Collier*, 3 Rich. Eq. 125.

This rule is the same, whether the testator knew of the lapse or not. The principle is that the will as it stands provides for the case, and needs no new provision. *Durour v. Matteux*, 1 Ves. Sen. 321; *Kennell v. Abbott*, 4 Ves. 802; *Hatcher v. Robertson*, 4 Strob. Eq. 119.

The testator's ignorance of the event, upon which the lapse takes place, makes not the slightest difference. Nor does it alter the case, that the personal property is coupled with realty, and given by the same clause. *Leake v. Robenson*, 2 Mer. 363. It is no new thing in the English law, that one rule should apply to personalty and another to the realty, although given in the same clause. Thus it is in reference to limitations over. *Forth v. Chapman*, 1 P. W. 665; *Mazyek v. Vanderhorst*, 1 Bail Eq. 48.

Second.—Assuming that a different rule applies to the realty, and that in case of lapse, that goes to the heir, it is denied that this rule is better established than the one which attaches to personalty or "is more consonant to reason."

1. The rule as to the personalty grows out of the very nature and character of wills, which are ambulatory and take effect at the death. A devise of land is made an exception, for it is considered not so much in the nature of a testament as of a conveyance.

2. The rule as to the personalty is pre-

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sumed to be according *to the intention of the testator. Personalty lapsed passes under the will and realty against it—the one by the intention of the testator, the other by the force of law.

3. The rule as to the realty tends to abridge the testamentary power, whilst the other rule upholds it in all its integrity.

4. The reasons for the rule in England—growing out of feudal tenures and a landed aristocracy, do not exist here, especially since the abolition of the law of primogeniture.

5. In this country one class of personal property—negroes—is as valuable and possibly more valued than land. The same rules of distribution apply to both, and both are made liable for debts. It is impossible to give a satisfactory reason for making land an exception from all other property in this country.

6. Personal property has been gradually rising in the scale of importance, and in the same proportion the artificial rules in reference to land have been gradually relaxing, and identifying themselves with the more liberal and sensible rules in reference to personalty. From the Norman conquest un-

til the passing of the statute of wills 32 and 34 Henry 8th, there existed no testamentary power over land. Until the passing of the statute 1st Victoria land acquired after the execution of a will, would not pass under it; but now precisely the same rule applies to land as to personalty.

7. England abandoned her own arbitrary distinction in the statute of 1st Victoria, and we have very lately done the same thing—until the Act of the last Legislature we were more English than the English themselves. Their statute 1st Victoria provides XXIV Section, "That every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." Section XXV. "And be it further enacted, That unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or

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intended to be comprised in any devise *in such will contained, which shall fail or be void by reason of the death of the devisee in the life-time of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will." 2 Jarman on Wills, 541.

Such is the English law, and such ought to be our law. Perhaps the Act of the last session will come to this, but it would have been better if it had contained a section like the 25th of 1st Victoria. We think then we have a right to say that the rule as now established "is more consonant to reason." At least that is the judgment of England and South Carolina.

Third.—This rule, then, being well established, whether the lapse was known to the testator or not, and notwithstanding the personalty and realty were given as one estate and under the same clause; the only other question which can be made is, whether the will itself or the circumstances limit the residuum so as to make it a particular instead of a general residuum.

As to this question the onus is upon the heirs at law. We think we have established the principle. They must establish the exception. We maintain the negative.

1. The terms of this residuary clause are very full and ample, "rest, residue and remainder of my estate, real and personal, or in action," without the usual words, "not hereinbefore given." The testator must have contemplated a benefit of no inconsiderable value. The residuary estate is given to his daughters, "to be settled to the uses and limitations contained in their respective marriage settlements."

2. The will seems to dispose of every thing specifically—previous gifts are con-

firmed. The wine is given to be divided among the sons. No accounts were to be brought against the estate under the pain of forfeiture. It is difficult to perceive any thing in this will of a restrictive character, or what the residuary clause was inserted for, unless it was to meet just the case which has arisen.

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*3. Old will rather helps us. It does indicate that Judge Cheves was familiar with the law of lapse, and had thought of its application to his will; and that having this practical application before his eyes, he expressly limited this provision to his daughters. He probably intended that in the event which has happened, his daughters should take the land as well as the personalty.

4. We cannot perceive a scintilla, either in the will itself or in the circumstances, tending to restrict this residuum, or bring this case into the class of exceptions.

"Any thing I have forgot," held not to cover subsequently acquired property. *Pray & Pickett v. Barber*, 1 Hill, Ch. 95, *Blund v. Lamb*, 2 Jacob and Walk, 399.

"I do hereby leave all the rest of my property that is not above mentioned, such as horses, cattle, &c.," money on hand passed. *Stucky v. Stucky*, 1 Hill, Ch. 308.

If it be manifest from the contents of the will, that the residuary bequest was of a particular fund or description of property, or other certain residuum, nothing else will pass. *Garrett v. Garrett*, 1 Stro. 96.

Should my niece outlive my son, then all my property, both real and personal, &c., held a general residuum. *Dougherty v. Dougherty*, 2 Stro. 63.

All the rest of monies, &c. *Buist v. Dawes*, 3 Rich. 281.

All the property which I possess and have not bequeathed, be sold, &c., a reversionary interest did not pass. *Glover v. Harris*, 4 Rich. 25.

This last case is a good example of a restricted residuum. The property not before bequeathed was ordered to be sold. The negroes were bequeathed, but the reversionary interest in them was not. If there had been nothing else in the case, it would have been extremely doubtful whether the word bequeathed would have saved the reversionary interest from the operation of the residuary clause. But the property—the residuary property—was ordered to be sold at the testator's death, and as a life estate was

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given in the negroes bequeathed, *it is clear that the residuum was restricted to such property as could be sold at his death.

Fourth.—The annual provision for Hayne until 1861, also lapsed by his death before his father, and goes to the daughters, under the will. The daughters are entitled to this provision in any view that can be taken,

either by direct bequest to them or under the residuary clause.

1. They—the daughters—are certainly entitled to all the “remainder” of the income over the \$3,500, annually. The property is willed to trustees (who are living) for the use of the daughters, in direct terms, so far as the “remainder” is concerned. As to this they are equitable, but direct legatees.

2. Under the bequest of the “remainder,” they are, by the accident of Hayne’s death, entitled to the whole as legatees. For after the failure of the provision for Hayne, it is all “remainder.” The failure of Hayne’s bequest only enlarges their share.

3. The land and negroes are undoubtedly well given until 1861. The daughters are the beneficiaries until that time, and they are, besides, the residuary legatees. Here the old and vexed question between the devisee and heir at law cannot arise as to the income. The heir at law can have no interest even in the land until 1861. There is no lapse of any interest prior to that time. It is not the devise of Hayne that is charged, (if it is a charge at all) but it is the estate of the trustees, or, in effect, the estate of the daughters. “If an estate be devised, charged with legacies, which fail, no matter how, the devisee shall have the benefit of them.” Roper on Legacies, 340.

This would be the result if the provision for Hayne was in fact a charge. But it is not, in any sense, a charge upon land. It is simply a direction to pay the proceeds of land and negroes—being in the shape of money—to a named person. The land is not to be sold to raise the money, but the land and negroes by their joint operation, are to produce it. It is as much a charge on the negroes as on the land.

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*Doubtless their services in producing it, must be more valuable than the use of the land. Money is personalty, and it was given as money, and having lapsed, must go to the daughters either as direct or residuary legatees. “Where realty and personalty is directed to be equally divided among three individuals, and one of them dies in the life time of the testator, the share of such one so deceased, sinks into the residuum.” 1 Jarman, 294. *Frazier v. Frazier*, 2 Leigh. 642. *Nelson v. Moore*, 1 Ired. Eq. 31.

The cases of *Dougherty v. Dougherty*, 2 Strob. Eq. 63, and *Brailsford v. Heywood*, 2 DeS., 18, both refer to intermediate rents and profits. In the latter case there was a devise of real and personal estate for wife during life, and at her death to the testator’s youngest child, who should attain twenty-one. The wife died and there was an interval before any child attained to twenty-one—the rents and profits in the interval went with the

estate. The other case named was also in reference to rents and profits, and both were given to the residuary legatee.

We will not argue the question whether the land ought not also to pass to the residuary legatees. We suppose hereafter there will be no doubt about that question, but in this case we are content with the decree, and hope the appeal will be dismissed.

The opinion of the Court was delivered by

JOHNSTON, Ch. It is not deemed necessary to make any observations, except on the fourth ground of appeal.

It may be admitted as a general principle, that in the absence of other testamentary disposition, a legacy directed to be raised out of the rents and profits of land, sinks in favor of the heir into the land when the legacy lapses by the death of the legatee.

The legacy to which this ground was intended to apply, has been explained, in argument, to mean the legacy of part of the income of the plantation and slaves (not in-

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come of *land, by the by, but of a mixed property,) to Robert Hayne Cheves, anterior to the year 1860. By the first clause of the will the trustees are directed to pay the sum of \$3,500 to this legatee yearly, until 1860, inclusive, and in the meantime to keep up, by purchase if necessary, the number of slaves which might be on the place at testator’s death, and keep up the machines; and then to pay the remainder of the proceeds and profits of the plantation and slaves, to testator’s daughters Mrs. Haskell, Mrs. McCord and Mrs. Huger, and their issue, according to the terms of their marriage settlements. In the opinion of the Court this is a good bequest to the daughters of the profits of the land, subject only to so much as might have been employed for the other purposes indicated in the clause; and that the death of Robert Hayne Cheves, by which his legacy lapsed, only removed an incumbrance out of the way of the daughters.

By a subsequent clause the testator gave to the same son \$5,000, out of the profits of 1860, to provide for the expenses of the year 1861. Then he gave the rest, residue and remainder to his estate, real and personal, or in action, to the same daughters and their issue, upon the same terms. This legacy, it is conceived, lapsed into and passed under the residuary clause, as might also have been affirmed of the annuity of \$3,500, had there not been a provision in the will for the residue of that special fund.

It is ordered that the appeal be dismissed, and the decree, affirmed.

DUNKIN and WARDLAW, CC., concurred.
Appeal dismissed.

CASES IN EQUITY.

ARGUED AND DETERMINED IN THE

COURT OF ERRORS

AT COLUMBIA, SOUTH CAROLINA—MAY TERM, 1858

JUDGES AND CHANCELLORS PRESENT.

HON. JOHN B. O'NEALL,

" BENJ. F. DUNKIN,

" D. L. WARDLAW,

" G. W. DARGAN,

HON. F. H. WARDLAW,

" J. N. WHITNER,

" T. W. GLOVER,

" R. MUNRO.

10 Rich. Eq. *551

*ANDERSON BOWERS and Others v. NATHANIEL BOWERS and Others.

(Columbia. May Term, 1858.)

[*Marriage* ⚭54.]

A marriage between uncle and niece is, at least, so far valid, that the wife may, after the death of the husband, claim her distributive share of his estate.

[Ed. Note.—Cited in *State v. Smith*, 101 S. C. 295, 85 S. E. 959.

For other cases, see *Marriage*, Cent. Dig. § 98; Dec. Dig. ⚭54.]

[*Marriage* ⚭10.]

Marriage, in this State is a merely civil contract; and as such is, it seems, unaffected by the canonical incapacity arising from proximity of blood.

[Ed. Note.—Cited in *Davis v. Whitlock*, 90 S. C. 237, 240, 73 S. E. 171, Ann. Cas. 1913D, 538.

For other cases, see *Marriage*, Cent. Dig. § 28; Dec. Dig. ⚭10.]

[*Marriage* ⚭60.]

No Court, in this State, has the power, by direct proceeding for that purpose, to declare a marriage void; but any Court has the power, where the question comes up incidentally, to determine the validity of a marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 125-128, 130-135; Dec. Dig. ⚭60.]

Before Dunkin, Ch., at Lancaster, June, 1857.

Edward Bowers died in the month of December in the year 1835, intestate. Shortly before his death a marriage ceremony was celebrated, in the town of Camden, between him and Elizabeth Jemima Graham, his niece, a brother's daughter.

In the bill filed in this case, by certain of his children, by a former marriage, for par-

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tion of a considerable estate left by *him, the ground was taken, that this marriage between him and his niece was illegal and void, by reason of their too close relationship, and that the latter was entitled to no part of his estate.

The circuit decree is as follows:

Dunkin, Ch. Upon hearing the bill, and answers, and the argument of counsel; It is ordered, on motion of J. B. Kershaw, defendants' solicitor, that the report of the Commissioner on the accounts of Anderson Bowers, administrator, the advancements to the children of the intestate, Edward Bowers, and the settlement upon Jemima Turner be confirmed with the recommendations of the Commissioner.

Also ordered, that the administrator do pay out of the corpus of the estate in his hands the costs of this suit, and that he do pay over to the defendant, Elizabeth Jemima Robertson, late Bowers, one-third of the balance of the estate in his hands as administrator.

Also ordered, that the said administrator do pay over to the parties entitled, reserving the share of Jemima Turner, the remaining two-thirds of the balance of the estate in his hands, after payment of costs, first deducting therefrom such reasonable counsel fee as he may have paid his counsel for his services in this case.

It is also ordered, that the Commissioner do proceed to collect the securities in his hands, given for the purchase of the real estate of Edward Bowers, deceased, when they shall have become due, and pay over the

same, one-third to the said Elizabeth Jemima Robertson, late Bowers, and the remaining two-thirds to the children of the said Edward Bowers, deceased, except the share of Jemima Turner, which he shall retain until the further order of the Court.

The plaintiffs appealed on the ground:

Because the said Elizabeth Jemima, being a brother's daughter, was not the lawful

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wife of the said Edward Bowers, *deceased, and at his death became entitled to no part of his estate.

Moore, for appellants.

1. The Canon Law, relating to marriage, forms a part of the Common Law. (1 Bl. Com. Ch. Ed. 79.) Poynter on Mar. and Div. (Law Lib.) p. 56.

2. A marriage between uncle and niece, by the Canon Law, is void ab initio. Leviticus Ch. 18, v. 12, 13, 14. Poynter on Mar. and Div. (Law Lib.) p. 34. Canon 99th in appendix to do. No. 2, p. 120. Shelford on Mar. and Div. (Law Lib.) p. 127.

3. The Canon Law relating to marriage expressly recognized as the law in this State, by the adoption of the Statute 32, Henry 8 Ch. 38. 2 Stat. 475.

4. The Ecclesiastical Courts in England, were primarily, to be called on to decide questions touching the validity of marriages, and in such cases invariably decided a marriage prohibited by the Canon and Levitical Laws to be void—to be a nullity; the Courts of Law and Equity, in this State, occupy the same position, in regard to such questions, in that they are the Courts primarily to be called on to decide them, and are therefore bound to decide a marriage prohibited by the Canon and Levitical Law to be null and void whenever the question is legitimately raised before them.

5. A marriage prohibited by the Canon Law was regarded by the Temporal Courts, in England, as merely voidable and not absolutely void unless sentence of nullity had been actually declared in the lifetime of the parties, but the distinction between a void and a voidable marriage was founded upon, merely a rule of practice, by which these Courts insisted upon having laid before them as indispensable evidence of the latter being void, the sentence of an Ecclesiastical Court pronounced in the lifetime of the parties declaring it to be so; the principle of law be-

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ing that it was void and the rule of *practice requiring the adduction of the sentence, in evidence only, but as conclusive evidence in proof that it was void. Shelford on Mar. and Div. (Law Lib.) pp. 276, 266, 267, 269.

The opinion of the Court was delivered by

DUNKIN, Ch. It is not questioned that the circuit decree of the Court of Equity is in conformity with the unanimous judgment

of the Law Court of Appeals in *The State v. Barefoot*, 2 Rich. 209. Barefoot was indicted for bigamy, and the conviction was sustained upon the determination of the Court that the marriage of the defendant, with his aunt, was valid, by the laws of South Carolina. The avowed object of the appeal is to obtain the review and reversal of that judgment.

Marriage in the State of South Carolina, has always been regarded as a merely civil contract. For any civil disability it may be treated as void by any judicial tribunal of the State. But the Court of Equity has no more authority over the subject than a Court of Law, and any attempt to exercise any greater or more extensive authority would be a simple act of usurpation. In *Mattison v. Mattison*, 1 Strob. Eq. 387 [47 Am. Dec. 541], it was determined unanimously by the Court of Errors that in a suit between the parties to the marriage seeking to have the same declared void, the Court of Equity had no jurisdiction. But in a suit between third persons, arising in the Court of Law, the validity of the same marriage, impeached on account of an alleged civil disability, was fully examined, discussed and determined. The same power is familiarly exercised by the Court of Equity, as is illustrated by the case of *Foster v. Means*, Speers, Eq. 569 [42 Am. Dec. 332]. All these inquiries relate, however, to some civil disability or other infirmity of that character in the alleged contract. But the incapacity in respect of proximity of relationship is a canonical, and not a civil, disability. Neither the Court of Chancery in England, nor any of the Law Courts had cognizance of canonical disabilities. When Parliament thought proper to interfere, and, by

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the Stat. 5 and *6, Will. iv, c. 54, declared that all marriages, thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, should be absolutely void, then the objection came within the cognizance of the Courts of Common Law. 2 Steph. Com. 284. So when the Legislature of South Carolina shall have prescribed within what degrees of relationship marriages shall be invalid, the law will be understood by the citizen, and enforced by the Courts. But by this appeal the Court is invoked to recognize a principle which would not only declare void a marriage between uncle and niece, and of course bastardize their issue, but a marriage between a man and his wife's sister falls within the same category, and, if the canonical mode of computation of the Levitical degrees be adopted, a marriage between first cousins is equally prohibited. See note to 2 Steph. 284. On the other hand, extreme cases of unnatural alliances may be supposed at which the moral sense would be offended, but hitherto public sentiment, if not private morality, has repressed all such evils. It is far better to leave to the Legislature the appropriate duty of defining and prohibiting

such evils rather than arm the Court of Chancery with ecclesiastical powers on a subject of great delicacy and pervading interest.

But the proposition of the appellants could not be successfully maintained in any Court of Great Britain, ecclesiastical, or civil. Marriages within the Levitical degrees are not void, but only voidable. And, even in Doctors' Commons, you are not permitted to violate the sanctity of the tomb, and impeach for alleged canonical disability the validity of a nuptial contract which death has already dissolved. "Not only" (says a learned commentator) "are marriages, under these circumstances of disability, esteemed valid, until there be actual sentence of separation, but they are permanently valid, unless such sentence be given during the life of the parties. (For, after the death of either of them, the Courts of Common Law will not suffer the

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spiritual courts to declare such marriages *to have been void.") 2 Steph. Com. 280. Bury's case 5, Rep. 98.

In the temporal Courts such marriages are held valid for all civil purposes unless sentence of nullity be obtained in the lifetime of the parties. Shelf. Mar. and Div. 482. A marriage within the prohibited degrees, not avoided during the lifetime of both parties, confers the civil rights of marriage, such as the right of dower—right of administration, &c. Shelf. p. 179. And the author refers to Co. Litt. 33 b., where it is said "that if a marriage be voidable in respect of consanguinity, affinity, &c., whereby the marriage might have been dissolved, yet if the husband die before any divorce, then for that it cannot now be avoided; this wife, de facto shall be endowed, for this is legitimus matrimonium quoad dotem."

So, in this case, it appeared that Edward Bowers, the husband, was dead, and the circuit decree properly adjudged to his widow, Elizabeth Jemima, one-third of his estate under the statute of distributions.

It is ordered and decreed that the appeal be dismissed.

O'NEALL, WARDELLAW, GLOVER and MUNRO, JJ., concurred.

Appeal dismissed.

10 Rich. Eq. *557

*JANE J. MCKNIGHT v. JAMES BRADLEY.
JAMES BRADLEY v. JANE J. MCKNIGHT.

(Columbia. May Term, 1858.)

[Principal and Surety ⇨177.]

A borrowed money and gave her note for the amount with B, as her surety. She then deposited the money with B, with directions to purchase certain judgments against C, and take, for her, assignments from the plaintiffs. B purchased the judgments and took the assignments in his own name for the benefit of A, who then was, or soon after, became insolvent:

Held, that equity would not compel B to surrender his legal title to the judgments for the benefit of A, and to be disposed of as she pleased, but would compel him to apply the proceeds in satisfaction of the note on which he was surety.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. ⇨177.]

[Principal and Surety ⇨174.]

Where the surety of an insolvent principal obtains, without fraud, the legal title to a fund belonging to his principal, equity will not compel him to surrender the legal title to his principal, that he may dispose of the fund as he pleases, but if the surety has not paid the debt, will authorize and compel him to apply the fund to its satisfaction.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 503; Dec. Dig. ⇨174.]

Before Dunkin, Ch., at Williamsburg, February, 1856.

In the case of McKnight v. Bradley, first above stated, the Circuit decree is as follows:

Dunkin, Ch. A. Isaac McKnight, son of the complainant, married the daughter of the defendant. In November, 1854, he was much embarrassed, and there were executions in the Sheriff's office against him to the amount of about four thousand dollars. It was agreed between the plaintiff and the defendant that each should advance the sum of two thousand dollars for the purpose—not of satisfying the executions, but of purchasing, and thereby obtaining control of the same. The plaintiff accordingly placed that amount in the hands of the defendant, who, on 2d November, 1854, paid the same, together with a like sum on his own account.

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to William R. Nelson, Esq., Sheriff of the district, taking from him two separate receipts. In the receipt taken on behalf of the plaintiff, eleven executions are specially set forth, with a statement of the interest on each, calculated to the date. Then follows this acknowledgment on the part of the Sheriff:—"Received 2d November, 1854, of Mrs. Jane J. McKnight, by the hands of Dr. James Bradley, nineteen hundred and eighty-six dollars and ninety-nine cents, to be applied in full payment of the foregoing executions up to date, the said executions to be left open for the benefit of the said Mrs. Jane J. McKnight, she having paid the same with her own money, and not in satisfaction of the said executions, but with the view of getting assignments thereof from the plaintiffs.

(Signed) W. R. Nelson, S. W. D."

The defendant's money was paid to the Sheriff in like manner, and a receipt, setting forth the eight or nine executions specifically to which it was applied, was given to him by the sheriff. Other executions were subsequently obtained against A. Isaac McKnight, under which levies were made, and his property sold on the sale day in April,

1855, and afterwards, for the sum of three thousand eight hundred dollars. A contest arose as to the application of this fund, the junior execution creditors insisting that the payments made on 2d November, 1854, were a satisfaction of the existing executions, and that the fund realized under the subsequent sales was properly applicable to their executions. In order to determine the question, at the sitting of the Court of Common pleas for Williamsburg District, for fall term, 1855, two rules were taken out against the sheriff—the history of which is detailed with great clearness in the evidence of N. Philips, Esq., who on that occasion acted as counsel, representing the interests of the defendant, Dr. James Bradley. From this it appears that Mr. Solicitor McIver was assistant counsel with himself. They had a conversation with Mr. Dozier, the counsel of Mrs. Mc-

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Knight, when it was proposed *that they should have a conference at Mr. Nelson's house. The conference accordingly took place. The witness said his client, Dr. Bradley, was aware of this conference, and that both he (Dr. B.) and Mr. McIver notified witness of the conference. Mr. McIver informed witness that there had been a previous conference with Mr. Dozier. The result of the conference (proceeds the witness) was, that they should take out rules against the sheriff, based on these receipts and the assignments. There was no apparent hostility of interest between their client and Mrs. McKnight; they stood in the same position. Mr. Dozier said that the sheriff had called on him to answer the rule—result was that, as there was no difference between Dr. Bradley and Mrs. McKnight, the witness and Mr. McIver should take out the rules, and Mr. Dozier file a formal answer for the sheriff, leaving to the junior execution creditors to contest the matter. Two rules were accordingly taken out against the sheriff—one on Mrs. McKnight's receipt, the other on Dr. Bradley's. Witness took out one rule, Mr. McIver the other. Witness at first thought that one rule would be in the name of Mrs. McKnight, but at trial he found that both assignments were in the name of Dr. Bradley; both receipts were also to Dr. Bradley, but one was expressed to be for the benefit of Mrs. McKnight. Mr. Dozier answered the rules, and some counsel for the creditors contested it. The rules were made absolute. Sheriff Nelson was also examined. He said that at the last Court of Common Pleas, Mr. Dozier, on behalf of Mrs. McKnight, had applied to him for her proportion of sales of A. Isaac McKnight's property. Witness declined until he could see Mr. McIver. It was on this (said the witness) that the conference took place; witness was present at the conference. On the last night of the Court Mr. McIver said that Mrs. McKnight was to get half the money; he told witness

to apply one half the money to the credit of Mrs. McKnight.

The original proceedings on the rules were put in evidence corroborating, in every par-

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ticular, the statements of Mr. *Philips in relation to them. There were two separate rules taken out, and service accepted 14th November, filed 16th November, and both made absolute 17th November. The return of the sheriff stated that the fund was claimed by Dr. James Bradley, as assignee and owner in his own right, and for the benefit of Mrs. Jane J. McKnight of the executions elder in date, and by the several junior execution creditors on the other hand, who contested the right of the elder execution creditors, and that he was unwilling to pay over the fund until the right was adjusted, or without the sanction of the Court. Separate orders were entered on each of the two rules, making them absolute.

After the order had thus been obtained, the plaintiff, Mrs. McKnight, directed the sheriff, out of her moiety of the fund, to apply fourteen hundred and sixty-five dollars to the satisfaction of an execution in his office against herself, as the surety of her son, A. Isaac McKnight, at the suit of the Bank of the State of South Carolina, and the balance, four hundred and thirty-five dollars, to be applied to other executions in his office against her as surety of her said son, A. Isaac McKnight, leaving the other moiety of the three thousand eight hundred dollars for the defendant. The plaintiff avers that by these applications, in addition to what the sheriff had received from other sources on her account, the executions in his office against her would be satisfied, with the exception of a small balance which she could easily pay, without the sacrifice of property. The bill charges that the defendant has prohibited the sheriff from so applying the nineteen hundred dollars to which the plaintiff is entitled, and threatens to issue an attachment against the sheriff for not paying over to him, the defendant, the whole amount of three thousand eight hundred dollars, on the ground that the assignments of all the executions were made to him alone, and that the proceedings under both the rules were conducted in his name.

The defendant relies, for a justification of his proceedings, upon an alleged state of

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facts, entirely independent of, and *beyond the matters thus stated by the bill and established by the evidence. It appears, from the testimony of Ezra Eady, that the two thousand dollars which the plaintiff paid to the sheriff on the 2d of November, 1854, was borrowed from the witness on 30th October previous, upon a note to which the defendant was surety; and it also appears that, at the same time, the defendant borrowed from him a similar amount upon a note, with the plain-

tiff as his surety. It also appears that these notes are unpaid. The defendant in his answer admits that, when he received the two thousand dollars borrowed by the plaintiff from Ezra Eady, "he gave her a receipt that the money should be applied to the purposes for which it was borrowed; that he did pay over to the sheriff, as well the two thousand dollars on his own part as the two thousand dollars borrowed by the plaintiff as aforesaid, with the understanding on the part of the sheriff that the executions to which the said money was applied should not be marked satisfied, but remain open for the benefit and protection of him, the defendant, and the complainant admits that he set apart certain executions which were to remain open for the benefit of the complainant." The defendant further admits that he afterwards procured assignments, in his own name, not only of the executions which he had laid off as aforesaid, but of the executions which had been set apart and were to remain open for the benefit of the plaintiff. The defendant insists that he has a right "to hold the said execution as a security for the payment of the note to Ezra Eady, so as to relieve the defendant from his liability as surety upon said note," or that he has the right to receive the money under the rules against the sheriff for the purpose of doing himself justice in that behalf.

It may be well in the first place to remark, that there was not only an absence of any antecedent agreement that the funds realized under the executions should be applied to the payment of the notes to Eady, but no such agreement is suggested or intimated by

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the answer of the defendant; on the *contrary, he declares that, at the time of the loan, "he believed the plaintiff to be solvent and good for the amount of money." He states circumstances which, at a subsequent period, induced him to apprehend that he might suffer as surety on the note of Eady, and that he thereupon "felt himself bound in self-defence to obtain the assignments in his own name, as he was bound, as the plaintiff's surety, for the money which purchased them."

It is entirely manifest from the evidence, that on the 30th October or 2d November, 1854, the defendant received from the plaintiff two thousand dollars of her own money, to be applied by him in a particular manner and for a specific object. The bill states that this purpose was to pay the money to the sheriff and procure from the plaintiffs in the executions assignments to the amount which each paid to the sheriff; "that the plaintiff being a female, and not conversant with the manner of conducting such a business," placed the money in the hands of the defendant, "who gave her a receipt, stating that the money should be applied as aforesaid." The defendant thereby became the agent or trustee

for the plaintiff for a particular and specified purpose. The receipt which he took from the sheriff on 2d November, 1854, when he paid him the plaintiff's money, may well be regarded as his own acknowledgment of his fiduciary relation, and of the character and purposes of it. Having assumed this agency it was his duty to carry it out, and complete the arrangement.

It was testified by the defendant's daughter, that, a few days after the payment to the Sheriff, her father and the plaintiff were at witness' house; that her father told the plaintiff he had brought those papers for her; witness said the papers were the Sheriff's receipts. The plaintiff declined to take the papers, saying she had been advised not to take them—"that she did not wish to assume any responsibility." Loose and indefinite as was this language, it may be construed as amounting to no more than an avowal of her original reluctance to assume responsibility in completing an arrangement

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*in business with which she was not conversant, and which the defendant had undertaken to do for her. If the defendant either then or afterwards, intended to abandon his trust, or to discontinue his agency in the transaction, he should have so informed the plaintiff in explicit terms, and, at the same time, have placed in her hands the receipt which belonged to her, in order that she might employ another agent to procure the assignments, or enable her to procure them herself. But having assumed an agency for a specified purpose, and been furnished with the means of effecting that purpose, he had clearly no right in his own mind only to repudiate his agency and appropriate the means to a different purpose without either the concurrence or privity of his principal. If the plaintiff had been even apprised by the defendant of his intention to make use of her receipt for the purpose of procuring assignments to himself of the executions which she had paid off, she could at any moment have interposed and prevented the consummation of an object which she had not authorized or sanctioned, and which would defeat the purpose for which she had raised the money. But so far from communicating to his principal any information of a change in his intention, the defendant did much more than allow her to remain in ignorance. The evidence as to the course of proceedings under the rules, and especially the sheriff's returns to the rules prepared after a conference with the defendant's solicitor, shew that, up to that time, the entire fund was claimed by him as assignee and owner, not for himself alone, but in his own right, and for the benefit of Mrs. Jane J. McKnight (the plaintiff.) On this showing both the rules were made absolute, and afterwards, on the last night of the Court of Common Pleas, the defendant's solicitor instructed the Sheriff

to apply one half the money to the credit of the plaintiff, Mrs. McKnight.

The Court is of opinion, upon the evidence, that all the transactions of the defendant in relation to the two thousand dollars placed in his hands by the plaintiff, including, as

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well *the payment to the Sheriff as the assignments of the eleven executions and the proceedings under the rule, must be referred to his agency for the plaintiff, and enured to her benefit in such manner as she thought proper to direct, and it is so declared.

It is ordered and decreed that the defendant be perpetually enjoined from any proceedings under his assignments, or otherwise, to recover from the Sheriff the moiety of the funds in his hands belonging to the plaintiff, according to the judgment herein before declared; and it is further ordered and decreed that the defendant pay to the plaintiff the interest on the said moiety from the 17th November, 1855, the day on which the said rule was made absolute.

The defendant appealed on the grounds:

1. For that the decree is based upon the assumption "that there was not only an absence of all evidence of any agreement between the complainant and defendant, that the funds realized under the executions should be applied to the payment of the notes to Eady, but no such agreement is suggested or intimated by the answer of the defendant." Whereas, there was positive testimony to this effect, by W. O. Bradley, as taken down by his honor the presiding Chancellor, in the following language, to wit: "At Mrs. McKnight's with his father—just as they were leaving—plaintiff said 'when he got the money from the sheriff and paid her note at Eady's,' that she would give him up his receipt;" and such an agreement or undertaking is also suggested or stated in the answer.

2. For that his Honor permitted William R. Nelson, sheriff, to be sworn, and received his testimony in evidence, in behalf of the complainant, who, the defendant submits, was not a competent witness, inasmuch as he was directly interested in the event of the suit—having applied the money in controversy to executions against the complainant, and therefore was swearing off his own liability to the defendant under the attachment which was then suspended over him.

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*3. For that his honor received in evidence the declarations of Mr. McIver as proved by the said William R. Nelson—which, the defendant submits, were incompetent, because there was an absence of all evidence that Mr. McIver was the agent or attorney of the defendant at the time the declarations were made, but, on the contrary, the evidence showed that his agency terminated when the rules were made absolute.

4. For that the proof was, that the complainant was very much embarrassed, and

she said herself "that she was not worth anything," which furnished a reason why the defendant in equity and good conscience had a right to have the money in controversy applied to save himself from ultimate liability as surety of the complainant.

5. For that the charge of interest is improper, there not only being no evidence that the defendant had ever received the money in controversy; but, on the contrary, the evidence and the whole proceedings, especially the order for an injunction, show that he not only never did receive or control the money, but that she has so far had it her own way.

6. For that this Court has no right, and ought not, to decree an injunction to restrain the attachment under the rule made absolute in the defendant's name alone, without some showing at least, that the complainant was likely to sustain irremediable loss, by the defendant's receiving the money in controversy—especially when she had a clear remedy against the defendant, for the misapplication or misuser of such money of hers as he might receive—and, when according to all the showing, the complainant not only interposed no objection to the rules being made absolute in the defendant's name alone, but in effect consented to the same through her attorney, who was present, and defended the sheriff upon occasion of the rules.

7. For that the decree is, in other respects, against justice, equity and conscience.

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*In the case of Bradley v. McKnight, (a) the second cause stated in the caption, the circuit decree is as follows:

Dargan, Ch. Upon the general merits of this case, I concur with the Chancellor who heard it on the original bill, at Feb. Term, 1856, and gave a decree thereon. The facts are well stated in that decree, and they are substantially the same that were proven before me on the second trial. On an appeal from that decree, the Court of Appeals at May Term, 1856, without reversing or modifying the same, made an order in words as follows: "It is ordered and decreed, that so much of the decretal order of the Circuit Court as enjoins the defendant from proceeding against the Sheriff, be continued, and stand in force, until otherwise ordered by the Court; that so much thereof as directs the defendant to pay interest be opened; and that the defendant do, within six months hereafter, file a bill setting forth the equities on which he relies, and that any final judgment be suspended until the hearing of the cause."

James Bradley (the defendant in the original bill) did, accordingly, on 16th August, 1856, file a cross bill against Jane J. McKnight. The statement of the equity, stripped of its verbiage, amounts to this: That

(a) Heard before Dargan, Ch., at Williamsburg, February, 1857.

Mrs. McKnight borrowed from one Ezra Eady the sum of \$2,000, for which she gave her promissory note, dated 30th Oct., 1854, which was payable six months after date, and on which the said James Bradley was her surety; upon this note, before the filing of the cross bill, Eady recovered a judgment, and has issued an execution, but it still remains unpaid. Bradley, in his cross bill, further states, that Mrs. McKnight is insolvent, that he will be compelled to pay her debt to Eady, and that in consequence of her insolvency, he will have no means of enforcing reimbursement from her. The insolvency of Mrs. McKnight is proven to my entire satisfaction; Dr. Bradley will most assuredly have to pay the debt to Eady, and I am con-

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vinced he *will be unable to collect the amount from Mrs. McKnight. If this constitutes an equity which entitles him to relief, the prayer of his cross bill should be sustained.

For the purpose of illustrating the discussion of a principle, I will suppose that Dr. Bradley is in possession of a fund, to which Mrs. McKnight is entitled, and for the recovery of which she has filed her bill, and is entitled to a decree, but for the interposition of the equity which Dr. Bradley has stated in his cross bill. The case as thus presented (which is the most favorable to Dr. Bradley) reduces itself to an abstract question of law. When the principal debtor is insolvent, and is suing his surety in this Court for a debt due by the surety to himself, can the surety resist the claim on account of the outstanding claim on which he is surety, and which has not been paid? I am aware of no authority in support of such a proposition. If Dr. Bradley would be entitled to detain or withhold such a fund, it must be on the principle of discount. But a discount is in the nature of a cross action, and the subject matter of a discount must be a subsisting debt; the debt sued on, and that set up by way of a discount, must be mutually subsisting, at least at the time of the trial. A debt not due, cannot be set up as a discount either at law or in equity. If Dr. Bradley had paid to Eady the debt of Mrs. McKnight on which he was sued, before the filing of his cross bill, (or perhaps before this trial,) his case would have been clear. This defence would then have been good in the case supposed, in law and in equity. Or, if he had brought Eady into Court as a party, the Court could have compelled him to take a decree, both against the principal and the surety; and perhaps in that case, the Court might have decreed that the fund of Mrs. McKnight (being by the supposition in the hands of Dr. Bradley) be paid over directly to the creditor, to the relief of the surety. But Dr. Bradley has not pursued this obvious course, and he must abide the consequences. If a surety is relieved on the ground assumed in the com-

plainant's bill, how is the Court to be assured that the surety will apply *the fund to the payment of the creditor, or that the security himself may not become insolvent before he pays the debt? But the case supposed for illustration, is in fact, not true; Dr. Bradley is not in possession of Mrs. McKnight's fund. That fund has gone in the hands of the Sheriff, and has been by him applied to the satisfaction of executions in his office against her. If it was her money (as assuredly it was) this was a rightful application. Notwithstanding this application of the fund, Dr. Bradley has obtained a rule against the Sheriff, for not paying over to him this money. It was for the purpose of enjoining the enforcement of this rule, that Mrs. McKnight filed her original bill. It was principally for the relief of the Sheriff, who was to be compelled by virtue of these rules, to pay over to Dr. Bradley the very money which he had already paid virtually to Mrs. McKnight, by applying the same to her credit on executions in his hands against her. If the Sheriff is compelled to pay the money to Dr. Bradley, he will be driven to rely for reimbursement on Mrs. McKnight, whom Dr. Bradley has proved to be an insolvent person. As before intimated, I have arrived at the same conclusion with Chancellor Dunkin, as expressed in his decree, namely, "that upon the evidence, all the transactions of the defendant (Bradley) in relation to the two thousand dollars placed in his hands by the plaintiff, (Mrs. McKnight,) including as well the payment to the Sheriff, as the assignment of the eleven executions, and the proceedings under the rule, must be referred to his agency for the plaintiff, (Mrs. McKnight,) and inured to her benefit in such manner as she thought proper to direct; and it is so ordered and decreed."

It is further ordered and decreed, that the cross bill of the defendant, Bradley, be dismissed, and that he be perpetually enjoined from any proceedings under his assignment, or the rule or rules which he has obtained against the Sheriff to recover or collect from the said Sheriff, the said sum of two thousand dollars, or any part thereof, mentioned in the bill of Mr. McKnight, and herein ad-

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judged to belong to her, to appertain to her use and benefit, and to be subject to her control and direction. It is further ordered, that the said defendant, Bradley, pay the costs.

James Bradley, the defendant in the first stated case, and the complainant in the second, appealed on the grounds:

1. Because it is a plain and well settled principle of equity, (sustained and confirmed by an unbroken current of authorities, elementary and judicial,) that when the principal debtor is insolvent, and is suing his surety in this Court for a debt due by the

surety to himself, the surety may resist the demand, on account of the outstanding claim for which he is surety, even though the same be not paid—and all that the principal could possibly ask, (with any pretence of right or conscience,) would be that the surety apply the fund to the satisfaction of the original debt.

2. Because if the surety in this case is not in possession of the fund, his equity is stronger. He is entitled to have the fund applied, so as to exonerate himself; and this as well against the principal, as against the Sheriff, who, if he did pay out the money, acted wilfully, and in his own wrong.

The Equity Court of Appeals, after argument, ordered the case to this Court, where it was now heard.

Rich, Bellinger, for appellant.
Dozier, contra.

The opinion of the Court was delivered by

O'NEALL, J. The defendant in the original bill, and the complainant in the cross bill, has at law the right to compel the Sheriff to pay to him the funds in his hands. It is conceded in the decree, on the cross bill, that if he had paid the debt to Eady, for which he was the surety of the complainant in the original bill, and the defendant in the cross bill, that he could not under the facts stated and conceded to be true,

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be *compelled to forego his legal advantage. Indeed it is said by the Chancellor, "if Bradley had brought Eady into Court as a party," (I suppose defendant to the cross bill) "the Court could have compelled him to take a decree against the principal and surety, and perhaps in that case, the Court might have decreed that the fund of Mrs. McKnight, (being by supposition in the hands of Dr. Bradley) be paid over directly to the creditor, to the relief of the surety." How, after these concessions, the Court can undertake to deprive the complainant in the cross bill of his legal advantage, I do not perceive. For the principles settled in *Taylor v. Heriot*, 4 Des., 227, that a surety may apply to the Court of Equity for relief as soon as he is endangered, is enough to sustain him in the position which he now occupies. He has been guilty of no fraud. The money which bought the executions, and which he set apart for Mrs. McKnight, still, however, taking the assignments in his own name, was raised on the note of the defendant in the cross bill on which he was her surety. She is conceded to be insolvent, and he will have the money to pay. Ought she not to pay the money arising under the executions in his exoneration? That would be the very right of the case. For it is precisely the same as if he had, out of his own pocket, advanced the money, and taken the assignments as he did, in his own name; but stat-

ing that certain of the executions were to be for her. Would the Court of Equity deprive him of his legal advantage by setting up the trust? I have no doubt that until he was refunded, no such thing would be done. Here I think the same principle of equity will apply. Mrs. McKnight must do equity before she demands it of Dr. Bradley.

But it is supposed that as he has not paid Eady's debt, he cannot be protected. At law, where he would have had to rely on his discount, that would have been a fatal objection, if any action could have been sustained on the part of Mrs. McKnight. But she cannot sustain an action at law. Her whole right depends upon the trust which

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Dr. Bradley *assumed in taking the assignments, and which would have been carried out, had it not been for his position as her surety. He has the power at law by attachment to compel the Sheriff to pay the money to him. That is the same as if it was in his hands. Will the Court deprive him of this advantage? I am clear that it ought not. For as surety, he is entitled to the protection of the Court against the wrong which his principal is attempting, by applying the fund to a debt against herself alone, and leaving him to pay the surety debt; a debt contracted to raise the means, by which the purchase of the executions for her was accomplished.

If Dr. Bradley be considered as the agent of Mrs. McKnight, I do not see how that will affect his rights. As her agent, he raised the funds, whereby the executions were bought; but he did not pay for them out of her funds. In the prosecution of the agency, he borrowed the money for himself and her, and he became surety for her part, and she for his part; and it is now ascertained that he must pay for her. Would a Court compel an agent, having still the control of the fund collected under the executions, to turn the same over until he was protected? I apprehend it would not. In *Story on Agency*, chap. 14, § 352, a lien is defined to be "a right in one man to retain that which is in his possession belonging to another, until certain demands of him, the person in possession, are satisfied." The rights of Bradley are somewhat analogous to the rights of lien. He has by his credit acquired the very fund now attempted to be taken from him. He has constructively the possession of it, inasmuch as he has the means at law of compelling the payment. In the *Bank v. Levy*, 1 McMul., 431, the Court enforced the lien of the agent as a means of securing himself against outstanding liabilities. That case, it seems to me, though on a much larger scale than this, yet presents the very principle, whereby Bradley may be protected. It seems to me on every principle of honesty and fairness, he is entitled to have the benefit of the proceeds of the executions,

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originally set apart for the benefit of *the complainant in the original bill, to discharge the debt to Eady.

It is therefore ordered and decreed that the Circuit decrees be reversed, and that Dr. Bradley, the defendant in the original bill and the complainant in the cross bill, be allowed to receive the proceeds of the executions originally set apart for Mrs. McKnight, now in the hands of the Sheriff of Williamsburg District, and that he do apply the same forthwith in discharge of the

debt to Mr. Eady, mentioned in the pleadings.

JOHNSTON (*b*) and WARDLAW, CC., and WARDLAW and MUNRO, JJ., concurred.

DUNKIN and DARGAN, CC., dissented.

WITHERS, J., absent.

Decrees reversed.

(*b*) This is the only case heard by Chancellor Johnston during the term.

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF ERRORS

AT COLUMBIA, SOUTH CAROLINA—NOV. AND DEC. TERM, 1858

ALL THE JUDGES AND CHANCELLORS PRESENT,^(a)

10 Rich. Eq. *573

*MARY BLANDING, Executrix v. THE CORPORATION OF COLUMBIA.

(Columbia. Nov. and Dec. Term, 1858.)

[*Contracts* ⚡213.]

A contract by a Municipal Corporation having a perpetual charter, stipulating to pay a certain sum in town stock, bearing five per cent interest, payable quarterly, and that "the said stock shall be redeemable at the pleasure of the corporation after" a day fixed, is lawful, and gives the corporation the right indefinitely to postpone payment of the principal sum after the day fixed.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 957; Dec. Dig. ⚡213.]

Before Johnston, Ch., at Richland, June, 1857.

Johnston, Ch. The bill was filed by the executrix of the late Abram Blanding, against the City Council of Columbia, praying that they should be required to redeem certain stock which they issued in favor of her testator on the 10th July, 1835. The case made is as follows: On the 13th June, 1835, the corporation of Columbia entered into articles of agreement with Abram Blanding, to purchase from him the water works he had erected in the said town, to supply the inhabitants with water, at an expense to him of

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seventy thousand *dollars. The contract reads thus: "In consideration of which the said A. Blanding expects that the Town Council will pay him on the 1st day of July next, twenty-four thousand dollars in town stock, bearing an interest of five per cent, per annum, payable quarter yearly—that is to say, on the 10th of each of the months of January, April, July and October—the first payment of interest to be made in the month of October next. The said stock shall be redeemable at the pleasure of the corporation, after the 10th July, 1855."

(a) Except Dargan, Ch., absent on account of sickness.

On the 23d July, 1835, Mr. Blanding executed a release of the water works to the corporation; the consideration of the release is thus stated: "For and in consideration of the sum of \$24,000 to me secured to be paid by the said corporation, I have granted and released, &c."

The corporation accepted the release, and thereupon issued to him certificates of stock for \$24,000 in the whole, though varying in amounts. The following is a sample of the certificates issued: "5 per cent. Town Stock. Town of Columbia, July 1, 1835. Be it known that there is due from the corporation of the Town of Columbia unto Abram Blanding, or his assigns, the sum of \$2,000, bearing interest at the rate of five per cent, per annum, from the 10th day of July, instant, payable quarterly, being stock created in pursuance of a contract entered into by the corporation of the said Town with Abram Blanding, for the purchase of the water works, dated the 13th June, 1835, the principal of which stock is reimbursable at the pleasure of the said corporation after the 10th July, 1855." Part of the stock has been disposed of by the plaintiff, who is the executrix of Abram Blanding, but she retains certificates to the amount of \$15,500. About the 10th July, 1855, she demanded of the corporation to redeem the stock, or to issue new stock, bearing legal interest, and payable at a reasonable time, suggesting ten years as such limit. The corporation refused to redeem, and insist that they are not bound to redeem the stock at any time whatever, and that it is their privilege, under the contract, to re-

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deem at their pleasure, or *not to redeem at all; and meanwhile that they are bound only to pay five per cent. interest quarterly. They suggest that "the proviso, that after twenty years the Town should have the privilege of redeeming the stock, may have been regarded as proper to guard against the con-

tendency of the Town being compelled to remain in debt, when an overflowing Treasury, or other circumstances might render it expedient to extinguish the debt."

What was the meaning of the parties to this contract? The corporation insists that by the terms used, it is discharged forever from the payment of the principal, if it sees fit, and has only incurred a liability to pay five per cent interest per annum, payable quarterly, so long as it chooses to withhold payment of the principal. The plaintiff on the contrary insists that the words "the said stock shall be redeemable at the pleasure of the corporation after the 10th July, 1855," import that until that period the corporation could not compel her testator to receive payment of the principal. After that time, they could redeem the stock, whether he would or no; and were bound to redeem it, if he demanded it; and this is the rational construction of the contract.

The terms in which the certificates are couched, confirm this view: "There is due from the corporation to A. Blanding, the sum of \$—— bearing interest at five per cent." This, if the instrument stopped here, would be payable presently, if he demanded it. On their side the corporation had a right to redeem forthwith, if they saw fit. But these words follow: "the principal reimbursable at the pleasure of the corporation, after 10th July, 1855." That is to say, they shall not reimburse before, unless the holder of the stock consent.

Government stocks, those issued by States and cities, where the security is undoubted, owe their market value in part to the length of time they have to run. If redeemable at short periods, the lender is exposed to the recurring trouble, expense and risk of a new investment. Capitalists seek a permanent stock, provided the security is good. On the

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other hand, it is *a great disadvantage to a Government or State, whose resources are bound by a long deferred or irredeemable stock, "to be compelled to remain in debt," according to the language of the defendant's answer, "when an overflowing Treasury, or other circumstances, might render it expedient to extinguish the debt." It is thus clearly seen why this language was employed in the contract, and to use it for the purpose of making the stock irredeemable forever, at the will of the debtor, is a perversion of the meaning.

The corporation valued the water works at \$24,000; this they agree to pay. The scrip acknowledges the debt. As a convenient mode of payment, they stipulate to pay in scrip, to bear five per cent. interest while the contract lasts. The parties contemplated a period when the contract was to expire. At the end of that period see what was the condition of the parties; the one was bound to pay, the other to receive payment, if ten-

dered. How can a clause, inserted manifestly for the purpose of ascertaining the period after which the corporation might redeem their scrip obligation, be converted into a covenant to restrain the creditor from collecting his debt forever? In construing contracts, the purpose is to ascertain the intent of the parties. A literal interpretation, a strict exegesis of the words used, may not always accomplish this. It is a safer rule, more consonant to justice and better calculated to meet the real intent of the parties, to look to the whole contract, to examine its purpose and scope, and to subject to this test particular expressions, which, strictly interpreted, might be found incompatible with the general intent of the parties, and even with the nature of such obligations.

Judged by this rule, the corporation were bound to pay this debt, if demanded by the complainant, on or after the 10th July, 1855. It was so demanded, and they failed to comply with their obligation, which they are now bound to fulfil, with interest at seven per cent as upon any other debt.

It is ordered and decreed that the corporation of the city of Columbia, S. C., do pay to

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the plaintiff, Mary C. Blanding, *the sum of fifteen thousand five hundred dollars, (\$15,500) being the principal of the certificates of stock still belonging to the estate of Abram Blanding, with interest on the said sum from the eleventh (11th) day of July, A. D., (1855,) eighteen hundred and fifty-five, at the rate of seven per cent per annum; any payments which have been made on account of interest, to be allowed as credits pro tanto thereon.

It is further ordered and decreed, that upon such payment of principal and interest being made, the plaintiff do deliver to the defendant the said certificates of stock still remaining in her possession.

The defendants appealed upon the following grounds:

1. Because by the contract with the late Abram Blanding, the defendants are not bound to pay the principal of the five per cent. stock issued to him, before such time as in their pleasure they may determine.

2. Because at least the defendants are not bound to pay the principal of the stock at the present time, or to pay interest thereon at the rate of seven per cent.

The Equity Court of Appeals, after hearing argument, ordered the case to this Court where it was now heard.

Adams, Gregg, for appellants, cited 9 Ves. 177; 6 East, 153; Com. Dig. Stock.

Blanding, DeSaussure, contra, cited, Chit. on Con. 80, 95; 1 McM. 305; 2 Pars. on Con. 1, 3, 6, note f. 13 note r, 47, 368, 405; 3 McC. 480; Harp. 397; 1 N. and McC. 67; 2 Bos. and P. (N. R.) 205 and notes; Chit. on Con. 778, note 1; Shep. Touch. 369, 373; Vin. Ab. Condition B, Sec. A, C. Sec. 6; Bac. Ab.

obligation E. 2; 1 Poth. on Ob. 101, 106, 115; 2 McC. Ch. 471; 1 Swanst. 339 note; 2 Barn. and Ald. 802; 1 P. Wms. 392.

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*The opinion of the Court was delivered by

WARDLAW, Ch. The question presented for judgment in this case is strictly a legal question, dependent on the construction of a contract; and I suppose the case was referred to this Court because the Chancellors desired the advice and aid of their brethren of the Law bench in deciding a matter of common law.

It is a narrow question, to be settled by the determination of two points; the intention of the parties in stipulating that the principal of an acknowledged debt should be payable at the pleasure of the debtor after a fixed day, the debtor contracting to pay a certain rate of interest for detention of the debt; and the lawfulness of a stipulation on the part of a local corporation for such postponement for an indefinite time of the payment of its debt.

The first point must be decided on the words of the contract. Abram Blanding agreed with the Corporation of Columbia, June 13, 1835, to sell to the city the water-works he had erected, at great expense, "for \$24,000 in town stock, bearing an interest of five per cent. per annum, payable quarter-yearly, i. e. on the tenth of each of the months of January, April, July and October; the first payment of interest to be made in the month of October next. The said stock shall be redeemable at the pleasure of the Corporation after July 10, 1855."

The scrip issued and accepted in fulfilment of this agreement pursues substantially the terms of the agreement, employing different words: "The principal of which stock is reimbursable at the pleasure of said Corporation, after July 10, 1855." The difference between redeemable and reimbursable can hardly be appreciated, and both words manifestly relate to the principal of the stock. The recital in the release from A. Blanding to the town, that \$24,000 was secured to be paid to him, cannot vary the construction of the actual contract, because such recitals of consideration are always referential. In

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the form of release prescribed by *statute, payment of the purchase money is acknowledged; and in practice, it is not usual in the recital of consideration in releases to proceed, beyond the acknowledgment of receipt of the price, to describe the particulars of the contract concerning the time and manner of payment. What, then, is the meaning of the contracting parties in stipulating that the stock for the price of water-works should be redeemable after twenty years at the pleasure of the Corporation responsible for the price. In the construction of a contract in

writing, it is the rule to consider the whole instrument, and to give effect to all the words in it which are not nonsensical, inconsistent, nor superfluous. It is indisputable, that if any effect whatever be given to the words, "at the pleasure of the Corporation," they must refer to the exercise of the Corporation's discretion after July 10, 1855; for before that date the Council could not compel the creditor to accept payment, and the stipulation as to the pleasure or discretion of the Corporation was in terms utterly inapplicable.

Are, then, the words, "at the pleasure of the Corporation," mere surplusage? Certainly not, if we can give them a sensible meaning, bearing on the intention of the parties. They seem to have an important bearing in this respect, and to express the agreement of the parties that the principal of the stock should not be paid after July 10, 1855, before such time as in its pleasure the Corporation should determine. A motive for such agreement on the part of the creditor may be readily conjectured. He may have speculated that the rate of interest would be reduced below five per cent. in this State in 1855, as the event was in relation to the Banks of England and France. But whatever may have been the motive of the creditor, we must give effect to his stipulation, unless it be unlawful; and this brings us to the second point.

The Corporation of Columbia, by its charter and amendments, is perpetual in dura-

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tion, and possesses the power of *contracting such debt as is in controversy by issuing stock. It is conceded that a sovereign power may contract debt, redeemable at its pleasure, as in the present case, such as the consols in England and our own Revolutionary 3 per cents.; but it is urged that a subordinate Corporation lacks the element of perpetuity, which gives value to such stock, and consequently has no power to contract in the form in controversy. The force of this distinction is not apprehended by us. Probably, by general law, and certainly under the Act of 1841, the charter of Columbia is liable to modification by the Legislature of the State; but *prima facie* the charter is perpetual, and the town may contract, and others may contract with it, on the hypothesis that the charter now perpetual, will never be repealed. In fact, some of the sovereign States in Europe and America have been suppressed, but it was never supposed that their liabilities were contemporaneously submerged. It is certainly possible that the charter of Columbia may be repealed; but we have no reason to suspect that it will be repealed in such form as will enable it to defraud its creditors. It is suggested, however, apart from this distinction between sovereign and local corporations, that the condition to pay the principal sum at the pleasure of the debt-

or is void, because essentially inconsistent with the obligation to pay at some time. Undoubtedly, an inconsistent condition may be void, and the obligation remain single, as any condition in violation of the policy of the State declared by its legislation would be; and a condition against alienation or liability for debt in a conveyance in fee would be void by the common law. So, too, if by fraud or mistake, the instrument of agreement does not express the intention of the parties, as where one after acknowledging a debt, says he will never pay it, the instrument may be reformed. But in the present case, no fraud, mistake, nor inconsistency is perceived. At the utmost, it is an engagement of the debtor to pay a perpetual annuity, and that is not unlawful.

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On the *construction of the whole instrument, we adjudge that the Corporation of Columbia has a discretion as to time to redeem or reimburse the principal of the debt for the water-works.

It is ordered and decreed that the circuit decree be reversed and the bill be dismissed.

O'NEALL, WARDLAW, WITHERS, WHITNER, GLOVER and MUNRO, JJ., and DUNKIN, Ch., concurred.

Decree reversed.

10 Rich. Eq. *582

*WILLIAM WRIGHT v. NATHANIEL R. EAVES and J. R. HARRIS, Administrator.
NATHANIEL R. EAVES v. WILLIAM WRIGHT and Others.

(Columbia. Nov. and Dec. Term, 1858.)

[Interest \S 17.]

On a bond conditioned to pay the principal sum in three equal annual instalments, with interest from date, payable "annually as it becomes due;" the interest annually accruing after the last instalment fell due, as well as that then and before due, bears interest.

[Ed. Note.—Cited in Sharpe v. Lee, 14 S. C. 343; Watkins v. Lang, 17 S. C. 13, 18; Westfield v. Westfield, 19 S. C. 90; Wilson v. Kelly, Id. 169.

For other cases, see Interest, Cent. Dig. \S 30, 31; Dec. Dig. \S 17.]

[Mortgages \S 319.]

Where from payments made by the debtor or his representative, or other cause, the mortgage debt will not be presumed satisfied as between debtor and creditor, from lapse of time, no presumption of release or satisfaction of the mortgage will arise in favor of one holding under a purchaser from the mortgagor, although twenty years have elapsed since the mortgagor conveyed the premises and delivered possession to the purchaser.

[Ed. Note.—Cited in Daniels v. Moses, 12 S. C. 142.

For other cases, see Mortgages, Cent. Dig. \S 858, 859; Dec. Dig. \S 319.]

[Assignments \S 78; Mortgages \S 235.]

An assignment of the bond carries with it the mortgage given to secure payment of the bond.

[Ed. Note.—Cited in Muller v. Wadlington, 5 S. C. 346; Cleveland v. Cohrs, 10 S. C. 225.

For other cases, see Assignments, Cent. Dig. \S 145; Dec. Dig. \S 78; Mortgages, Cent. Dig. \S 621; Dec. Dig. \S 235.]

[Mortgages \S 248.]

The mortgagor, or purchaser from him, must pay the whole debt to the assignee, even though the consideration of the assignment was a note, or a sum less than the amount of the debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 659; Dec. Dig. \S 248.]

[Mortgages \S 427.]

To a bill for foreclosure against a grantee who holds under an absolute conveyance from the mortgagor, it is not necessary to make the mortgagor, or if he be dead, his representative, a party—the plaintiff may pursue the grantee alone.

[Ed. Note.—Cited in Bryce v. Bowers, 11 Rich. Eq. 49, 51; Trapier v. Waldo, 16 S. C. 287; Butler v. Williams, 27 S. C. 224, 226, 3 S. E. 211; Rutherford v. Johnson, 49 S. C. 468, 27 S. E. 470.

For other cases, see Mortgages, Cent. Dig. \S 1269, 1272-1287; Dec. Dig. \S 427.]

[Mortgages \S 497.]

The purchaser from the mortgagor is not bound by a judgment against the mortgagor for the debt; he may show that the amount due is less. Per Wardlaw, Ch.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1469, 1471-1473; Dec. Dig. \S 497.]

[Parties \S 54.]

The defendant cannot, by cross bill, bring before the Court new parties and new matters for litigation; he must proceed by original bill.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 85; Dec. Dig. \S 54.]

[Executors and Administrators \S 537.]

To a bill to make the surety of a deceased administrator liable for the devastavit of his principal, the representative of the administrator is a necessary party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 2541; Dec. Dig. \S 537.]

Before Wardlaw, Ch., at Chester, June, 1855.

This case will be understood from the circuit decree, which is as follows:

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*Wardlaw, Ch. On November 24, 1826, Robert Kennedy executed a bond to Pamela Gunning, in the penalty of \$5,000, with condition to pay \$2,300 at the times and in the manner following, namely: \$766 66%, on November 24, of each of the years 1827, 1828, and 1829, and to "pay interest on said sum of \$2,300 from this date; and pay said interest annually as it becomes due;" to secure the payment, he mortgaged to her in fee, a lot of land in the village of Chester, which mortgage was duly registered on November 28, 1826; John Dunovant is surety to the bond, and resides in Chester, but as he is insolvent, he has not been made a party to this litigation.

Robert Kennedy remained in possession of the mortgaged premises until July 13, 1831, when he conveyed the same to John Kennedy; the latter paying the price to Robert Robinson, who had bought the lot from the mortgagor, but had not taken title. John Kennedy conveyed with general warranty to G. W. Coleman and wife, November 30, 1836; and they conveyed January 26, 1846, to N. R. Eaves, who is now in possession.

Robert Kennedy paid on said bond \$200, April 20, 1828; and \$250, September 29, 1829, and died intestate in 1832, leaving the balance in arrear. James F. Woods became administrator of his estate, and December 31, 1832, gave bond to the Ordinary for his faithful administration, in the penalty of \$15,000, with John Dunovant and Robert Robinson as sureties. Before full administration, in 1833-4, James F. Woods died, leaving a solvent estate; and his brother, William Woods, afterwards became administrator, de bonis non, of Robert Kennedy's goods and credits, giving an administration bond, dated May 5, 1834, in the penalty of \$10,000, with Robert Robinson and Amzi Neely as sureties. The latter surety afterwards removed to Savannah, Georgia, and he now resides there in possession of a good estate. William Woods has also died, and J. L. Harris is now administrator of Kennedy's estate, unadministered,

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but he has not come into possession of any assets of the estate. Robert Robinson died in 185—, leaving an ample estate, of which J. L. Harris, Perry Gill, and Wm. H. McCorkle are the administrators.

At Fall Term, 1841, of the Court of Common Pleas, for Chester, Pamela Gunning recovered judgment against William Woods, administrator of Robert Kennedy, for \$1,920-70, as the balance due upon said bond, (partial payment having been made,) besides interest and costs. The judgment and the assessment of the Clerk on which it is founded make no mention of annual interest, but the execution *fi. fa.* directs the sum aforesaid with annual interest thereon, from April 1, 1841, and \$24.37 for costs, to be levied (which seems very irregular) of the estate of William Woods. On this execution, payments were made by Robert Robinson, to the Sheriff, to the aggregate of \$1,470 in the years 1842-3-4. On May 7, 1844, Pamela Gunning, on the back of the *fi. fa.*, assigned the execution and the balance of debt and interest remaining due to William Wright, but without recourse to her. The mortgage was delivered to the assignee, but not assigned in writing. According to the calculation of the parties to the assignment, as mentioned therein, the balance which would be due on July 1, 1844, was \$785, or, as the assignee admits that \$300 were paid to him on that day, \$485.

The plaintiff filed the former bill in the caption named on May 28, 1852, for foreclosure of the mortgage given to secure the

debt assigned to him; and the defendant, N. R. Eaves opposes the foreclosure by many defences.

This defendant's plea of the statute of limitations has been already considered and overruled by the Court of Appeals, *Wright v. Eaves*, 5 Rich. Eq. 81. He still insists, however, on the analogous defence, that the bond must be presumed to be satisfied from the lapse of time. The judgment of the Court of Common Pleas in 1841, and the payments towards the debt down to 1844, would be quite conclusive against this defence, if it were set up by the mortgagor or his representatives. And a purchaser, with notice

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from the mortgagor, as *the defendant is by force of the registry of the mortgage, has no superior equity, and is in no better situation than the mortgagor himself. Even where the mortgagor or his vendee with notice has the legal title, it is subject to the trust of paying the debt with lien on the land. He has merely the equity of redemption, and can be rid of the incumbrance, only by paying the debt or showing its payment by positive or presumptive proof. *Nixon v. Bynum*, 1 Ball, 148; *Hughes v. Edwards*, 9 Wheat, 489 [6 L. Ed. 442].

The defendant urges that the plaintiff is assignee of the debt only and not of the mortgage, as there has been no express assignment of the mortgage. In Equity, the debt is the principal thing and the mortgage a mere accessory security; and the assignment of a debt carries with it all the rights and securities of the assignor. By our statutes the assignee of a judgment or a bond for money may prosecute any necessary suit thereupon in his own name, and having thus the legal title he is with stronger reason subrogated to all the securities of him from whom he derives title. It was held in *Jackson v. Blodget*, 5 Con. 202, that if the obligor of a bond secured by a mortgage after assignment of the bond and notice to him of the assignment, although the mortgage is not delivered to the assignee, pay the debt to the mortgagee and take a discharge of the mortgage, this is void as to the assignee. So, in *Green v. Hart*, (1 John. 580,) the endorsement of a negotiable note secured by a mortgage (and with us a bond is in the same category,) and a delivery of the mortgage to the indorsee without any written assignment, were held to constitute an assignment of the mortgage. (See *Jackson v. Hart*, 3 John. Ca. 322. 11 John. 534. *Miles v. Gray*, 4 B. Monroe 517. *Betry v. Heebner*, 1 Penn. 280; *Crafts v. Webster*, 4 Penn. R. 255; *Dick v. Maury*, 9 S. and M. 448; *Henderson v. Herrod*, 10 S. and M. 631.)

In the argument for defendant some reliance was put on the fact, that the plaintiff paid for the debt assigned to him in the note of Edward H. Gunning, and not in money.

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It does *not appear that this note was not

at any time convertible into cash. It served the purposes of the parties as well as money would have done; and the assignor and her representatives make no complaint as to the assignment. No matter at what price the balance of the debt was purchased, it is indifferent to the defendant whether the plaintiff paid too much or too little, as neither alternative increases or diminishes the extent of the lien on his land. His land is encumbered for the actual balance and no more. If the purchaser of the mortgage debt pay for it a less sum than the amount due, he is still entitled to the full benefits of his purchase. *Darcy v. Hall*, 1 Vern. 49; *Phillips v. Yatham*, 1 Vern. 326; *Ascough v. Johnson*, 2 Vern. 66. As Lord Cowper says, 1 Salk. 255, since he runs the hazard of a loss, he ought to have the benefit of the gain.

Finally it is insisted that as personality is the primary fund for the payment of debts, the plaintiff should be required to call the sureties of the former administrations of the principal obligor to account before pursuing the land for which defendant has honestly paid a full price. In fact the existing representative of the obligor is a party defendant, and seems to have no assets. The mortgagee or his assignee is not bound to involve himself in an intricate account of the personality of his deceased debtor; and if the mortgagor has conveyed his equity of redemption absolutely, is not bound to make any one defendant except the grantee. He has the election to resort to the personality, or to pursue his real security, leaving the owner of the equity of redemption to his remedies for reimbursement. *Story, Eq. Pl. 175, 197.*

At the July sitting of this Court, 1852, it was referred to the Commissioner to inquire and report as to the principal and interest due to the plaintiff on the mortgage debt set forth in the pleadings; equities reserved. The Commissioner reports \$203.75 with simple interest from July 1, 1844, to be the balance of the debt. He attains his conclusion by compounding the interest until November 24, 1829, when the last instalment was due, and allowing only simple interest after-

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*wards. The Clerk of the Common Pleas, in making the assessment on which the judgment of *Gunning v. Woods*, administrator of *Kennedy*, in 1841, was based, seems to have compounded the interest at annual rests to the time of the assessment. The plaintiff excepts to the Commissioner's mode of computing the interest on the grounds that by the terms of the condition of the bond, there was an agreement of the parties for an indefinite extension of credit, and for the payment of interest on the principal sum and on the interest annually accruing, until the whole be paid; and that the defendant is concluded as to the sum of the debt, by the judgment of 1841. A third exception contested some of the credits allowed by the Commissioner, but this was substantially abandoned; at

least it was not elucidated at the hearing, and no argument was made on the exceptions except as to the interest.

So far as the mode of computing the interest depends on the words of the bond, the Commissioner is conclusively sustained by the case of *O'Neill v. Sims*, 1 Strob. 115. It is impossible to distinguish between that case and the case under discussion. If the judgment of 1841, were in my opinion conclusive on the present defendant, as to the balance of the debt then adjudged to be due, I should still hold, that simple interest merely accrued afterwards, for there is no judgment for annual interest. I suppose that *Woods*, the defendant in the judgment representing the estate of *R. Kennedy*, would not be concluded beyond this extent; and that the present defendant is not estopped from showing mistake in the judgment as to the amount of the mortgage debt actually due. The mortgage was to secure the debt, not the judgment, and the mortgagor had conveyed his equity of redemption long before the judgment against his representative. The owner of the land was no party to the judgment, and had no right to intervene in the litigation, for the extent of the lien was not directly in question. The issue was as to the extent of the liability of the general es-

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tate of the obligor, *subject to the administration of *Woods*, and not as to the liability of estate previously transferred. On an assignment of mortgage, without the concurrence of the mortgagor, the assignee standing in the place of the original creditor, is subject in all respects to the like equities and settlement of accounts as the mortgagee would be, and the mortgagor is not bound by the amount appearing due on face of the mortgage, *Macclesfield v. Filton*, 1 Vern. 169; *Matthews v. Walwyn*, 4 Ves. Jr. 118; *Williams v. Lowell*, Ib. 389; *Bradwell v. Catchpole*, 3 Swan. 79 n; *Chambers v. Goodwin*, 9 Ves. 254. It is not absolutely necessary that the mortgagor should be made a party to a simple transfer of a mortgage, but his concurrence is desirable as exhibiting his admission of what sum remains unpaid; otherwise according to Lord Loughborough's view in *Matthews v. Walwyn*, the assignee will be liable to be defrauded in paying too much to the mortgagee, as the assignee is entitled only to the sum actually remaining due upon the mortgage. The grantee of the mortgagor before assignment of the mortgage is entitled to more favor and protection than the mortgagor himself, as he is liable to be defrauded by the collusion of the mortgagor and the assignee of the mortgage. Estoppels, against the truth of the case and the correction of mistakes, are so odious, that I shall treat the judgment of 1841, so far as the present defendant is concerned, as *res inter alios acta*. Besides the matter may be well considered as adjudged by the order of reference.

The defence of the defendant and the exceptions of the plaintiff are overruled.

It is ordered and decreed, that unless the defendant, N. R. Eaves, pay to the plaintiff, William Wright, the sum of \$205 75, with interest thereon, from July 1, 1844, and the costs of this suit, on or before the first day of November next, the said defendant be forever barred and foreclosed from his equity of redemption in the mortgaged premises described in the pleadings, and that the Commissioner of this Court proceed to sell the said premises for cash, at public auction, on

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the sale day *in January next or some succeeding sale day, after twenty-one day's advertisement of the sale; and pay to the plaintiff from the proceeds of sale, the principal and interest of his said debt, and to the persons entitled, the costs of this suit, and pay the overplus to defendant.

The latter bill in the caption named, filed May 25, 1853, is styled a cross bill but with little claim to such designation. It seeks to bring before the Court, new parties and new matters of litigation, not in the original suit; and this is forbidden by the procedure of the Court. It was clearly open to demurrer for this cause, but defence was not made in this mode. Controversies in Court would be interminable, if new issues to any extent might be introduced under the plausible cover of cross bills. I have already adjudged the matters suggested in this second bill so far as they constituted defence to the original suit, and that is the main purpose of a cross bill; but it seems unreasonable, that the plaintiff in the original bill should be delayed until the plaintiff in the soldisant cross bill should be able to adjust the relative liabilities of himself and third persons. Story Eq. Pl. 631; Galatian v. Erwin, 11 Opk. 49; S. Con. 561; 2 Mad. Ch. 429; Miff. Pl. 64; Coop. Eq. 85.

This is in fact an original bill for relief. Its main end is to subject the estate of Robert Robinson to antecedent liability to the claim of the assignee of the mortgage and it proceeds upon the dogma that the personal estate of the obligor is primarily liable for this debt—and that this personal estate has been wasted by the first and second administrators, James F. Woods and William Woods, of both of whom Robinson was surety. The proof offered of devastavit is that in a suit in this Court, by John B. Kennedy and the other heirs at law of Robert Kennedy, against William Woods, administrator de bonis non of Robert Kennedy, and administrator of James F. Woods, the Commissioner of this Court on August 24, 1837, submitted a report, confirmed by the Court that there were funds in the hands of the administra-

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tor sufficient to pay this mortgage *debt to Pamela Gunning, set down in the report at \$2,895 30, and all the creditors of the intestate Robert Kennedy and leave a balance of

\$433.10, distributable among the heirs of Robert Kennedy. But to this bill, the creditors were not parties, and it seems by the returns of the administrator, to the Ordinary, that he afterwards paid moneys to creditors not enumerated in said report. The Commissioner in his report does not distinguish between the transactions of the successive administrators, James F. Woods and William Woods, and reserves any right of reclamation by William upon James. It further appeared by the testimony of S. McAlilly, that the heirs of Robert Kennedy, sold some of his real estate in 1837, for \$100, which is now worth eight or ten times that price.

With all this matter, I have already determined that the assignee of the mortgage had no necessary connection of interest; and that he might pursue his lien upon the land without mixing in the accounts, of the personality. As to him the bill is ordered to be dismissed.

As to the representatives of R. Robinson, the new parties, to the second bill, while I have a strong suspicion from the general aspect of the case that Robinson's estate is liable over to Eaves, as Robinson was the original purchaser from mortgagor and was surety on the administration bonds of both the first two administrators, and as he paid the moneys on the execution of Gunning v. Woods, I do not feel safe in adjudging any thing in the state of parties before the Court.

Robinson's administrators demur because representatives of James F. Woods and Wm. Woods are not before the Court; and the demurrer must be sustained, as it is surely important to the adjustment of liabilities to ascertain which of these administrators committed a devastavit, if any were committed. It might turn out, if these parties were before the Court that both administrators had fully and legally administered the assets within their respective control. It may be that Dunovant and Neely are necessary parties.

If the plaintiff, Eaves, had paid the debt

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to the assignee of *the mortgage, he would have had ample remedy at law against those who were liable over to him; and his right to come into this Court in anticipation of such payment, is not clear. I could not retain this cross bill, so called, without subjecting the plaintiff to costs; and I do not perceive that he suffers any further injury by dismissing the bill.

It is ordered and decreed that the cross bill, so called, be dismissed with costs, without prejudice to the plaintiff, to prosecute his claims here or elsewhere, as he may be advised.

The plaintiff appealed on the grounds:

1. Because the Chancellor held, annual interest was not recoverable on Robert Kennedy's bond after the 24th November, 1829, and it is respectively submitted he erred therein; that the parties to said bond, by its terms, agreed annual interest should be paid,

until the whole debt and interest were satisfied and paid—and the Commissioner's report as to the amount due on said bond should be amended, by the allowance of such annual interest.

2. Because the judgment of the Court of Common Pleas, entered Fall Term, 1841, is conclusive as to the amount then due, not only on the personal representative of Robert Kennedy, but also the defendant holding the mortgaged premises—and the complainant is entitled to enforce the lien of the mortgage for the amount so adjudged to be due, and accruing interest.

The defendant, N. R. Eaves, appealed on the following grounds:

1. Because the case made by the original and cross bill was such that the Chancellor, either on the original or cross bill, should have ordered and decreed that the complainant, William Wright, should be compelled to look in the first instance to the personal

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estate of Robert Kennedy, for the payment of the mortgage debt, as the personal estate is the fund primarily liable for the payment of debts of all kinds.

2. Because from the case made, it clearly appeared that Wm. Wright had two funds, to which he might look for the payment of his debts, to wit: The personal estate and the mortgaged premises; and therefore on a well recognized principle of equity, he should have been ordered to look to that one that would save and indemnify N. R. Eaves, as prayed for in his cross bill.

3. Because the complainant, in original bill, cannot maintain a suit to foreclose the mortgage in his own name, as the mortgage was not assigned to him; and the assignment of the execution of Pamela Gunning v. William Woods, administrator, was not sufficient for that purpose.

4. Because the estate of Robert Kennedy owned other lands which were liable for this debt, to wit: the Dr. Lee lands and other lands, which his heirs at law have sold; and therefore the Chancellor should have ordered a reference to ascertain and report what lands and other property did in fact belong to Kennedy's estate.

5. Because the plaintiff's demand, as it appears before the Court, is a stale claim, and is, and was before the filing of the original bill, barred by lapse of time, as the judgment against William Woods, as administrator of Kennedy, and the payments thereon, are *res inter alios acta*, and cannot affect the rights or interests of N. R. Eaves, in whose favor a conveyance may now be legally and equitably presumed.

6. Because the laches of the complainant in enforcing his mortgage, permitting as he did the estate of Robert Kennedy to be distributed, and withholding action on his mortgage, until all the parties having knowledge of the facts have died, leaving the said Eaves

without means of defence against said mortgage or of indemnity against other parties primarily liable, has barred the complainant of the equitable relief prayed for in his original bill, until he shall have exhausted

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*all means of enforcing his debt against the estates of Robert Kennedy, and of his administrators.

7. Because if the presumption of satisfaction of said mortgage be not a bar to complainant's bill, it is sufficient under the facts of the case to put the complainant to the proof, that the defendant had actual knowledge of the fact, at the time he became the purchaser of the lot for valuable and lawful consideration, that the debt was still unpaid.

8. Because the cross bill of N. R. Eaves should have been sustained, the same being well filed, and tending to avoid a multiplicity of suits, and to do equal and exact justice and equity to all parties in interest.

9. Because the case involves a question of title to lands, which this Court has not the power to try; and the Chancellor should, if the bill was retained, have ordered an issue at law to try the question whether the title to the house and lot was not vested absolutely in the defendant, N. R. Eaves.

Williams, for plaintiff, cited, on the question of interest, *Gibbes v. Chisolm*, 2 N. and McC. 38; *Singleton v. Lewis*, 2 Hill, 409; *O'Neill v. Bookman*, 9 Rich., 80; on defendant's first and second grounds of appeal, *Coop. Eq. Pl.* 39; *Story Eq. Pl.* §§ 75, 196, 197; on his third ground, *Crosby v. Bowman*, 2 Day, 425; *Austin v. Burbach*, 2 Day, 474; and on his fifth, sixth and seventh grounds, *Thayer v. Cramer*, 1 McC. Ch. 395; *Nixon v. Bynum*, 1 Bail. 148; *Hughes v. Edwards*, 9 Wheat. 491; *Heyer v. Pruyn*, 7 Paige, 465; *Perkins v. Pitts*, 11 Mass., 125; *Newman v. Chapman*, 2 Rand. 93; *Tucker v. Hunt*, 6 Rich. Eq. 183; *Coote on Mort.* 452; *Dowling v. Ford*, 11 Mees. and W. 329; *Hodle v. Healey*, 6 Mad. 181; *Price v. Copner*, 1 S. and S. 347; *Hansard v. Hardy*, 18 Ves. 455; 2 Ves. Jr., 84; 5 Bro. P. C. 281; *Hil. on Mortgage*, 17; *Yates v. Humbly*, 2 Atk. 358; *Baker v. Morris*, 10 Leigh, 384; *King v. Minford*, Sax. 274; *Aylet v. King*, 11 Leigh, 486; *Nelson v.*

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Carrington, 4 Mass. 332; *Story Eq.* § 1023; *Thayer v. Davidson*, Bail. Eq. 412; *Smith & Cuttino v. Osborne*, 1 Hill, Ch. 342; *Drayton v. Marshall*, Rice, Eq. 374; *Invack v. Edwards*, 1 Hoff, Ch. 282.

Thomson, Bellinger, contra.

The opinion of the Court was delivered by

O'NEALL, J. To two points in these cases has the attention of the Court of Errors been directed. The first is to the computation of interest; and the second, whether the lien of the mortgage has been released or removed by lapse of time?

1. We think the mode of computing interest was properly settled in *O'Neill*, guardian, v. *Bookman*, 9 Rich. 80; and as equity follows the law, it can be hardly necessary to say anything more on this point. Indeed the full opinion of my brother Withers, in that case, on a contract like this, for the payment of interest annually, ought to supersede comment. But as this matter has been discussed in the Court of Errors, and as there still is variety of opinion among some of the members, it may be well enough to say that a majority are entirely satisfied with the decision in the case above alluded to.

The contract to pay interest annually is the same thing as if the party at the end of each year promised as much money as would be equal to the interest, which might then be due. In such a contract, there can be no doubt, interest must be computed on the sums thus annually set down as due. Although this may compound the interest, which is not a direct legal consequence of either the loan or forbearance of money; yet I think parties may make just such a contract without its being obnoxious to the charge of usury. For it is at last no more than taking seven per cent. interest on money forborne. For the interest on such a contract due at the end of the year is really so much forborne for another year. I agree entirely with what was said by one of the Chancellors—that too

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much interest is charged and exacted in the accounts of trustees in equity. But it is to be remembered that they make no such contract as that before the Court. They are simply custodians of the funds in their hands, which they often keep for months and years before they can invest. Still they must pay interest, and sometimes in that Court accounts are made up with annual or semi-annual rests. If that be right and free from usury, how can it be said that a decision directing interest on interest to be annually computed on a contract stipulating for the payment of interest annually, is usurious. But I forbear; the point has been decided, and so it must remain.

2. It has been decided by the Court of Appeals in Equity, in this case, that the defendant could not rest on the statute of limitations. That decision is not now brought before the Court of Errors, but it can do no harm to say that I think it was decided right. For neither the defendant Eaves, nor any one of those under whom he claims, had ten years adverse possession of the premises. The several possessions cannot be linked together as was decided in *King v. Smith*, Rice, 10. If Eaves had, fortunately for him, been in possession for ten years, after the case of *Mitchell v. Bogan*, decided December Term, 1857, (and which ought to have been in the 1st No. of 11th Richardson [686].) I should not have hesitated at law, to have given him the benefit of the statute of limitations. For

that case declares that the mortgagee, as against third persons, stands as at common law, and may maintain trespass to try titles. It may be in equity, that as the mortgage is on record, he may be charged, as a trustee, and thus prevented from relying on the bar of the statute. But that is not necessary to be now decided. The question is, does a presumption from lapse of time in this case arise that the lien of the mortgage has been released or removed? There is no doubt that the debt, to secure which the mortgage was given, remains. For the presumption is rebutted by payments and the judgment at law. As a general rule, the security (the mortgage) ought to be regarded as co-exist-

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ent with the debt. If there were any facts which would go to show a separation, I would readily admit the force of a presumption that the lien of the mortgage was released, but that is not the case here; for when the debt was assigned to the complainant, Wright, the mortgage was delivered to him, as accompanying the debt. If the original mortgagor was before the Court, could he pretend that the mortgage was released when the debt subsisted? I do not perceive how he could legally rest on any such presumption from lapse of time. The defendant Eaves, claiming under him, can be in no better situation.

The answer of the defendant under the decree of December, 1852, makes a statement which shews that there can be no such a thing as a presumption from lapse of time that the mortgage lien has been released. For he tells us that in 1837, August, not more than fifteen years before the bill was filed, in a report in a case between *J. B. Kennedy et al.*, heirs at law of the mortgagor, *Robert Kennedy, v. William Woods, administrator, et al.*, this very debt, to secure which the mortgage was executed, was set down as subsisting, and provision was made for its payment. But still it is clear it was not paid. It must be recollected that this was within eleven years of the creation of the debt and execution of the mortgage. There could be no presumption of either payment or release then. If nothing afterwards had been done, then, indeed, the presumption would have attached. But at Fall Term, 1841, still within less than twenty years from the creation of the debt, judgment was recovered at law on the bond, and payments were made on the judgment in '42, '43, '44, to the amount of \$1,470; not by the administrator of the obligor, but by Robinson, who had purchased the mortgaged premises, but had not taken titles, the purchase money being paid by John Kennedy, who took the titles, and under whom the defendant claims; this was clearly an admission of the subsistence of the legal lien of the mortgage to within six years of the defendant's entry, and that would seem to be an end to the sup-

posed presumption. The defendant's cross

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*bill, too, shews that he does not rely so much on the supposed presumption of release as he does that the party complainant, without resorting to him, might recover his debt from the sureties of the administrators of Kennedy; and in this position, which admits the existence of the debt and of the mortgage too, I think he virtually admits everything necessary to establish the complainant's rights.

I do not understand a presumption from the lapse of twenty years to be irrebuttable; but that it is evidence that all things have been done according to the usual conclusion from such long silence and acquiescence, until a contrary belief is created by facts inconsistent with it. *Stover & Barnes v. Duren*, 3 Strob. 448 [51 Am. Dec. 634]; *McQueen v. Fletcher*, 4 Rich. Eq. 160-1-2. I am satisfied that the facts of payments both before and after the recovery at law, the judgment at law, the delivery of the mortgage to the complainant, and the statements and defences of the defendant in his answer and cross bill, are utterly opposed to the presumption of release or removal of the lien of the mortgage.

With the judgments which we have expressed on the two points considered, the case is remanded to the Court of Appeals in Equity, to make such order as may conform thereto, and give effect to the complainant's rights.

WITHERS, GLOVER, and MUNRO, JJ., concurred.

WHITNER, J. I concur on the subject of interest with the foregoing judgment.

JOHNSTON, Ch. I concur in the result of so much of this opinion as relates to the subject of interest.

WARDLAW, Ch. I concur as to the principal point concerning the presumption of release or satisfaction. I dissent on the question of interest.

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*DUNKIN, Ch., dissentiente. The defendant, and those under whom he holds, have been in the actual, exclusive possession of the premises, claiming it as their own, for more than twenty years consecutively, prior to the institution of these proceedings. In *Riddlehoover v. Kinard*, 1 Hill, Eq. 376, it is stated that after twenty years' possession, the Court will presume a grant from the State, payment of a legacy, ouster of a tenant in common, satisfaction of a mortgage, or almost anything which is necessary to secure the possession and quiet the title. In *Willison v. Watkins*, 3 Peters, 43 [7 L. Ed. 596], the doctrine was held to apply as between the original mortgagor and mortgagee.

In order to give effect to this presumption, it was ruled in *McLeod v. Rogers*, 2 Rich. 22, and repeated in *Thomson v. Peake*, 7 Rich. 355, that the possession of the several successive alienees may be tacked. The language in the latter case is: "The fact of possession for more than twenty years in the various persons successively occupying the land, though not for that time in any one, is enough to raise the presumption of a grant."

So that to entitle him to the benefit of this presumption, the defendant is regarded as having become the purchaser in 1831, and having held possession from that time. After twenty years the presumption is absolute and requires no circumstances to support it. After that time the onus of proof is on those who seek to repel the presumption. As between the mortgagor and mortgagee, as between debtor and creditor, an acknowledgment of the debt, as it will repel the presumption of payment, will preserve the lien of the mortgage. But as between the mortgagee and the alienee of the mortgagor, no debt exists. If the mortgaged premises prove insufficient, no one pretends that the alienee of the mortgagor is liable for the deficiency. The mortgagee had a lien upon the premises and nothing more. After twenty years possession by the alienee, this lien is presumed to be satisfied, although the debt may still be a subsisting demand, as between the debtor and creditor, mortgagor and mortgagee.

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This may be illustrated by a transaction of very common occurrence. A bank, or any other creditor, holds a mortgage of ten lots in the city of Charleston to secure payment of a debt. The debtor, desirous of selling one of the lots, in order to perfect a title, procured a release from the bank of the lien on this lot, either in consideration of receiving the purchase money, or because the bank is satisfied with the security of the remaining nine lots, which are still subject to the mortgage. As between the bank and the debtor the debt subsists, but the lien of the mortgage on the tenth lot is released and gone. Now, after an uninterrupted possession of twenty years by the purchaser of the tenth lot, the law presumes this release on the part of the bank, although no proof of an actual release can be produced; nay, although the Court may believe that no such release was, in fact, executed. If the defendant, in 1831, had executed a mortgage of his own land to Pamela Gunning to secure the bond of Robt. Kennedy, and no proceeding were had for more than twenty years, a release of the lien would be presumed, although as between the creditor and the principal the debt may be preserved by recent acknowledgments. (Even if the defendant had become surety on the bond, after a lapse of twenty years, and no acknowledgment on his part, he is entitled to the benefit of the presumption, not-

withstanding intervening acknowledgments on the part of his principal.) Some of the decisions arising out of the peculiar provisions of the Act of 1791, have been the subject of criticism, as will be seen from the judgment of Chancellor Harper in *Thayer v. Davidson*, Bail. Eq. 412. But the only case cited from our books to preclude the defendant from the protection afforded by lapse of time, is *Nixon v. Bynum*, 1 Bail. 148. Nor is that decision necessarily inconsistent with these principles when the facts are scrutinized. Until within eleven years of the institution of the proceedings, the premises had been in possession of the mortgagor and his devisee, Thomas J. Howell. By the stat. 3 and 4 W.

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and M. c. 14, (P. L. 87,) *even prior to 5 Geo. 2, c. 7, Thomas J. Howell might have been sued at law on the bond of his father, the testator. He was the debtor of the obligee, and he and the heir, by the provisions of the Act 3 and 4 W. and M., could be united in the same suit at law. Under these circumstances it might well be that the devisee could neither avail himself of the statute of limitations or the presumption arising from lapse of time; and, as has been already stated, his alienee, Bynum, had only a possession of eleven years. But upon the principle now advanced, a purchaser who has been in quiet possession for a longer period than would bar a writ of right in Westminster Hall, might be turned out of his freehold by an outstanding incumbrance of which he had never, in fact, heard, notwithstanding the presumed notice from registration, a notice (it may be remarked) which very able jurists have held not to deprive him of the benefit of his possession, but only to preclude him from the plea of purchaser for valuable consideration, without notice. See *Thayer v. Davidson*, ut supra, and *Drayton v. Marshall, Rice*, Eq. 373 [33 Am. Dec. 84]. It is a misapprehension to suppose that the defendant's title is derived through Robert Robinson, or that Robert Robinson ever made any payment, except on the execution against Woods administrator of Robt. Kennedy, Robinson being surety on the administration bond. Robt. Kennedy, the mortgagor, conveyed to John Kennedy in 1831—he to Coleman and wife, and defendant holds under their conveyance. The payments by Robinson were in 1842–3–4.

But in another point of view it is to be feared injustice has been done to the defendant. In 1837, fifteen years prior to the institution of these proceedings, the heirs and distributees of Robt. Kennedy (the obligor in the bond) filed a bill against the administrators for an account, and by the report of the Commissioner 24th August, 1837, it appeared that, after making allowance for the payment of this particular debt, set down at \$2,895.30,

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and also of all the other creditors of the *in-

testate, a balance remained in the hands of the administrators for distribution, of \$433.10, and this report was confirmed by the Court.

The creditors were not parties, nor was it necessary that they should be. It was also proved that, in the same year, the heirs of Robert Kennedy sold portions of his real estate. The parties all resided in the village of Chester. In *Vernon v. Valk*, 2 Hill, Eq. 257, which was a bill by a creditor to charge the real estate of his debtor in the possession of his devisee, Chancellor Harper, adverting to the propriety of making the personal representative a party in such case, refers it to the principle, that the Court of Equity in all cases delights to do complete justice, and not by halves, as first to decree the heir to perform this covenant, and then to put the heir to another bill against the executor to reimburse himself out of the personal assets, which may be more than sufficient to answer the covenant; and where the executor and heir are both before the Court, complete justice may be done by decreeing the executor to pay as far as the personal assets will extend, the rest to be made good by the heir out of the real estate. In ordinary cases it may be inconvenient and a hardship upon the creditor to delay him in the enforcement of his mortgage until an account be taken with his executor. But, in *Goodhue v. Barnwell, Rice* Eq. 198, the principle was fully recognized that if the creditor stands by and suffers the personal representative to misapply or squander the assets, he is not entitled to recover against the heir. It cannot be supposed that the defendant in this case is in any worse condition. Pending the proceeding against him to foreclose this mortgage, he filed what he entitled a cross bill against the plaintiff as well as against the administrators of Robert Kennedy and the surety on their bond. The object was, among other things, to shew that the debt was paid, or ought to have been paid, from the personal estate of the obligor, and, in any event, to have complete justice done by directing pay-

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ment, in the first *instance, by those primarily liable, and only resort to the defendant in the event of a deficiency. This bill was dismissed by the Chancellor, and this judgment forms one of the grounds of appeal.

The whole case was referred to the Court of Errors in order to give the defendant the benefit of this ground. I think the defendant should have been allowed the opportunity of presenting his equities as arising under this bill, and that the past delay of the plaintiff in enforcing his rights against the real debtor, or his assets, precludes him from insisting on a decree against the defendant until an investigation has been made and the equities adjusted.

In respect to the mode of calculating interest I should concur in the judgment of the circuit Chancellor.

JOHNSTON, Ch., and WHITNER, J. We concur in the substance of so much of this opinion as relates to the release of the mortgage; but not in so much as relates to the subject of interest.

WARDLAW, J. I concur in the opinion of Chancellor DUNKIN, on the point of presumption, and will add some observations to what he has said about the calculation of interest.

In the case of *O'Neill v. Sims*, (1 Strob. 215) the opinion had the unanimous support of the five Judges that heard the case. In the case of *O'Neill v. Bookman*, 9 Rich. 80, only four Judges sat, and the decision was made by three, who had, between the two cases, taken the places of three of the five that sat in the first case.

The Act of 1777, P. L. 286, forbids the taking of greater interest than \$7, for the for-

bearance of \$100 one year, and "after that rate for a greater or lesser sum, or for a longer or shorter time." \$14.49 for the forbearance of \$100 two years is then usurious, and if it is to be sanctioned by the agreement of the parties, so might be 10 per cent., or the compounding at half yearly rests. A Court

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of Equity may subject a delinquent trustee to usurious interest by way of punishment; but this cannot justify a stipulation of parties to the same effect.

There is a difference between an express promise to pay interest up to the time when the principal may become due, (which is only a mode of expressing an increase of principal,) and an agreement to pay interest on interest, when at any moment payment of the whole amount, principal and interest, may be required by the creditor.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF ERRORS

AT CHARLESTON, SOUTH CAROLINA—JANUARY TERM, 1859

JUDGES AND CHANCELLORS PRESENT.

HON. JOHN B. O'NEALL,
" JOB JOHNSTON,
" BENJ. F. DUNKIN,
" D. L. WARDLAW,

HON. T. J. WITHERS,
" F. H. WARDLAW,
" J. N. WHITNER,
" T. W. GLOVER.

10 Rich. Eq. *604

*THE ATTORNEY-GENERAL, ex relatione, THE INDEPENDENT OR CONGREGATIONAL CHURCH OF WAPPETAU, CHRIST CHURCH PARISH v. THE SOCIETY FOR THE RELIEF OF ELDERLY AND DISABLED MINISTERS, AND OF THE WIDOWS AND ORPHANS OF THE CLERGY OF THE INDEPENDENT OR CONGREGATIONAL CHURCH, IN THE CITY OF CHARLESTON, and Others.

(Charleston. Jan. Term, 1859.)

[*Constitutional Law* ⇨125.]

The funds of "the Society for the relief of elderly and disabled Ministers, and of the widows and orphans of the Clergy, of the Independent or Congregational Church in the State of South Carolina"—a corporation which had existed since the year 1789—having increased to an amount much beyond what was necessary for the purposes of their charter, in 1834, the Legislature, upon the petition of the Society, passed an Act to amend the charter of 1789, whereby said charter was repealed, the name of the Society changed, and the Society authorized to appropriate its funds to other purposes than those mentioned in the charter of 1789. The Act of 1834 was accepted by the Society:—*Held*, That the Act of 1834 was no violation of that provision of the Constitution which prohibits a State from passing any law impairing the obligation of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 371; Dec. Dig. ⇨125.]

[*Corporations* ⇨610.]

A corporation may, at any time, surrender its charter and accept a new one with other and different provisions.

[Ed. Note.—Cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 315.

For other cases, see Corporations, Cent. Dig. § 2425; Dec. Dig. ⇨610.]

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[*Charities* ⇨48.]

*A corporation for religious or eleemosynary purposes, may, without violation of the Constitution, apply for and obtain an amendment of their charter authorizing them to apply their surplus funds to other purposes than those for which the charity was originally established.

[Ed. Note.—Cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 306; McAlhany v. Murray, 89 S. C. 448, 71 S. E. 1025, 35 L. R. A. (N. S.) 895, Ann. Cas. 1913A, 1008.

For other cases, see Charities, Cent. Dig. § 104; Dec. Dig. ⇨48.]

[This case is also cited in St. Philip's Church v. Zion Presbyterian Church, 23 S. C. 302, without specific application.]

Before Dunkin, Ch., at Charleston, June, 1858.

For a full understanding of the case reference should be had to the same case as reported in 8 Rich. Eq. 190. The relators under the leave then given amended their bill so as to raise the question, whether the Act of 1834 was constitutional. His Honor held that the Act was constitutional, and from his decree an appeal was taken. The Equity Court of Appeals referred the case to this Court where it was now heard.(a)

(a) The reporter was not furnished with copies of the amended and supplemental bill in this case, the circuit decree and grounds of appeal, but he believes they can hardly be necessary to an understanding of the opinion of the Court of Errors, which states and fully discusses the simple question of law which the case involved.

Whaley and Rutledge, for appellants.
DeSaussure, Yeadon and Petigru, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. The origin and history of what is sometimes termed the Clergy Society of the Independent or Congregational Church, is set forth in the former decree in this cause. 8 Rich. Eq. 190. The character of the corporation is described and the general principles applicable to such corporations. In that decree a construction was given to the Act of 1834, to which no objection was taken by the relators, and to which no objection is now taken. The only question submitted for our consideration is, whether the Act of 1834 be a violation of that provision of the Constitution which prohibits the Legislature from passing any law impairing the obligation of contracts.

It would be difficult to say that, in the

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strict application of the term, there were any founders of the charity, except, as the creator of all incorporations, the State may be regarded as the founder. But, if there were any founders in any other sense, the Circular Church is more entitled to the character than either the members of the Legislature who contributed their pay-bills, or the generous individuals who annually threw in their mite at the Church door. But the inquiry may not be very important. Previous to 1789 the Society had been formed, and the particular occasion of forming it, as well as the general purposes of it, are stated in the former decree. In March, 1789, William Hollinshead, Isaac L. Keith, and Josiah Smith, with other members of the Society, petitioned the Legislature for an Act of Incorporation. If the petitioners did not prepare the Act which was then passed, it is not too much to presume that they, and all other persons interested in the charity, approved of the action then adopted by the Legislature in response to the petition. If the terms of the charter had been unacceptable—if the powers granted were too restricted, or, on the other hand, were too general and indefinite, the Society may, perhaps, have declined to accept it. The funds of the Society at that time were inconsiderable, if any fund actually existed. The charter was accepted, acted upon, and remained unchanged from that time until the year 1834. All the funds of the Society, worthy of any notice, accrued subsequent to the Act of Incorporation in 1789. By the second clause of this charter it is declared that "it shall, and may be lawful for the said corporation hereby erected, to take and hold, to itself and to its successors, forever, any charitable donations or devises of lands and personal estate, and to appropriate the same for the benefit of the said corporation, in such manner as may be determined by a majority of the members thereof." It was truly argued by the appellants that "a

corporation, created by statute, possesses only those properties which the charter of its creation confers upon it, either expressly or as incident to its very existence, and that it derives all its powers from that Act, and is

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capable of exerting its faculties only in the manner which that Act authorizes." Head and Amory v. Providence Insurance Company, 2 Cranch 127 [2 L. Ed. 229]; Dartmouth College case, 4 Wheat. 636 [4 L. Ed. 629]. If the Court look only to the language of the charter it would be difficult to affirm that the defendants might not be justified by the literal provisions of the Act of 1789 if that Act were still in existence. But it is said that the title of the Act and the preamble all demand that these powers should be construed in a limited sense, and in reference to the subject matter that the funds should be applied for the specific purposes for which the original Society was instituted, and that they can be applied by the corporation, in no event, for any other purposes. The argument is entitled to great consideration, and, to a certain extent, is well founded. If, instead of fulfilling the objects of their creation, the majority of a corporation should disregard, or neglect, those objects, and pervert their funds to other purposes, the ordinary tribunals of the country have the authority, and it would be their duty to correct the abuse. But this scarcely meets the case. If the funds collected by a corporation have accumulated to an amount which not only enables them to carry out and perfect the work which gave rise to their creation but to leave a surplus, it may then become the subject of legitimate inquiry by the corporation, whether under the powers granted by the charter, they have authority to employ such surplus; or, if the object of their creation was fully accomplished, their charter should be surrendered, or subjected to forfeiture for nonuser.

It is not proposed to recapitulate the history of this charity. But in 1789, and for some years afterwards, several churches fell under the denomination of Independent or Congregational, and the funds of the society were very limited. In process of time, through the benevolence of individuals and the judicious and careful management of the officers of the corporation, the fund greatly

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increased, while the numbers of churches of this denomination diminished, and the objects of the bounty of the society, never numerous, had become very few. As early as 1815, Dr. Ramsay was able to say that the objects, within the strict letter of the Act, did not exceed one half of the interest of the capital fund. Seeing this accumulation, the society first adopted a resolution discontinuing the annual collection at the church door. But the fund still increased so as, at one time, to have amounted to seventy thousand

dollars, with few or no objects entitled to its bounty.

Under these circumstances the society, in 1834, were driven to the inquiry, what disposition should be made of this surplus fund, continually increasing, while the original purpose of its creation had almost ceased to exist. They had already made some slight appropriations to aid the distressed families of clergymen not falling within the strict description of this denomination, and for other purposes, and latterly larger sums had been appropriated, which had excited the doubts of the more cautious, and which, therefore, stimulated and justified the inquiry.

Those who had sanctioned these appropriations, supposed that the society had the authority, under the general powers granted by the charter of 1789, while all saw the inconvenience arising from an overgrown, unemployed fund, if not the ultimate danger to the charter from a non user of their powers. Whatever difficulty might appear in the construction of the Act of 1789, no doubt existed as to the power of a corporation to surrender its charter. It is one of the incidents of a corporation, and is so stated by the elementary writers, 4 Rep. 77. What were the various motives which may have influenced the members of the society in applying for the passage of the Act of December, 1834, or what were the motives of the several members of the legislature in passing that Act, (as was stated in the decree of 1856) it is not the province of the Court to inquire. The

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charter of 1789 was thereby sur*rendered by the corporation and accepted by the legislature. The society was rechartered for twenty-one years. According to the construction heretofore given to the Act of 1834, all the objects of the bounty of the society, under the Act of 1789, all the obligations of the corporation of 1789, in regard to those objects, are embraced and secured by the Act of 1834. The Act of 1789 had provided that the corporation might appropriate "the funds for the benefit of said corporation in such manner as might be determined by a majority of the members thereof." The Act of 1834 authorises the corporation "to appropriate the funds to such charitable, benevolent, religious and other purposes, for the benefit of the said corporation, and of the said Independent or Congregational Church in the city of Charleston, in such manner as might be determined by a majority of the members thereof." It is very difficult to perceive that this is any enlargement of the general powers vested in the Corporation of 1789.

But if the charter of 1789 had merely provided that the funds to be collected should be applied by the corporation to the relief of disabled ministers of this denomination, and had vested the corporation with no further or general powers as to the appropriation of these funds, it does not necessarily follow

that the Act of 1834 is repugnant to the provisions of the Constitution. Individuals might set about to collect funds for building such an establishment as the Greenwich Hospital on the Thames, or the Roper Hospital in Charleston, with the condition or upon the confidence that the expense of maintaining and conducting the same would be defrayed by Government, and they obtain a charter, authorizing them to apply their funds to the erection of such edifice. Through the charitable donations of individuals, collections at the churches, jurors' certificates, &c., in the course of years, while the buildings are being constructed, three times the amount necessary for the purpose may come into the hands of the corporation. When the buildings are completed the corporation would

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*become functus officio, and might properly be dissolved, or the charter surrendered. In either event the corporation would cease to exist, and while the real estate, if any, of the corporation would revert to the grantor, the personal assets, according to the better opinion, would vest in the State. But prior to such event, and in anticipation of it, the corporation apply to the legislature for such amendment of their charter as would authorize them to hold and appropriate their funds also for the purpose of assisting in defraying the expenses of the hospital, or some kindred purpose. In the opinion of the Court it would be competent for the legislature to grant such amendment without the violation of any contract, express or implied. Any individual, throwing in his contribution under the original charter, does it with that implied understanding, and gives up his entire interest in the gift to the corporation. According to the shewing of the relators, the capital of this corporation in 1834 amounted to eighty-five thousand dollars, and, for more than twenty years preceding, there had been none, or comparatively few beneficiaries entitled to the bounty. Twenty-five years have since elapsed, and it was stated at the hearing that there is not now, nor had been for several years, a single beneficiary, and that the funds, after deducting all the alleged abrasions, now exceeded forty thousand dollars. The appropriations of which the relators complain have been chiefly for the permanent improvement of the Church edifice in the body of which the society was formed, and by the bounty and active benevolence of whose members the resources of the society were, in the main, originally contributed, and have been faithfully and successfully managed. It was not unbefitting that, in seeking an amendment of their charter, and in enumerating "the charitable, benevolent and religious purposes," to which they asked the sanction of the legislature in appropriating their funds, the society should gratefully remember and piously designate the Independent

ent or Congregational Church in the city of Charleston, commonly known as the Circular Church.

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*In the judgment of this Court the Act of 1834 presents no violation of the inhibition of

the constitution, and it is so directed to be certified to the Court of Chancery.

O'NEALL, WARDLAW, WITHERS,
WHITNER, and GLOVER, JJ., and WARD-
LAW, Ch., concurred.

REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME XI

FROM MAY TERM, 1859, TO MAY TERM, 1860
BOTH INCLUSIVE

By J. S. G. RICHARDSON

STATE REPORTER

CHARLESTON, S. C.
McCARTER & DAWSON
1861

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CHANCELLORS AND JUDGES

DURING THE PERIOD COMPRISED IN
THIS VOLUME.

CHANCELLORS AND JUDGES OF THE EQUITY COURT OF APPEALS DURING
THE YEAR 1859.

HON. JOB JOHNSTON, (b)
" BENJ. F. DUNKIN,
" GEO. W. DARGAN, (c)

HON. F. H. WARDLAW, (b)
" JAMES P. CARROLL, (d)
" JOHN A. INGLIS. (d)

CIRCUIT JUDGES, AND JUDGES OF THE LAW COURT OF APPEALS DURING
THE YEAR 1859.

HON. JOHN B. O'NEALL, (a)
" DAVID L. WARDLAW,
" THOMAS J. WITHERS,

HON. JOSEPH N. WHITNER,
" THOMAS W. GLOVER,
" ROBERT MUNRO.

JUDGES OF THE COURT OF APPEALS, ESTABLISHED BY ACT OF
DECEMBER, 1859.

HON. JOHN B. O'NEALL, *Chief Justice.*
" JOB JOHNSTON, *Associate Judge.*
" F. H. WARDLAW, *Associate Judge.*

(a) Elected Chief Justice, December, 1859.

(b) Elected Associate Judge, December, 1859.

(c) Died in 1859.

(d) Elected December, 1859.

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CASES IN EQUITY

COURT OF APPEALS

AT COLUMBIA, MAY TERM, 1859.

CHANCELLORS PRESENT: (a)

HON. JOB JOHNSTON,
HON. B. F. DUNKIN.
HON. F. H. WARDLAW.

11 Rich. Eq. *1

***J. S. GUIGNARD and Others v. W. J. HARLEY and Others.**

(Columbia. May Term, 1859.)

[*Equity* ⌘394.]

Solicitors and Commissioners in Equity are not entitled to charge the fees, allowed by the Act of 1827 for "attending on" and "holding reference," for attending before the commissioners to take, and for taking, under the Act of 1830, the testimony of witnesses to be used at the trial of the cause.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 857; Dec. Dig. ⌘394.]

[*Costs* ⌘172.]

Solicitors are entitled to the fee, allowed by the Act of 1827 "for attending on reference," for attending before the commissioner at the taxation of costs, only where the taxation has been referred to the commissioner by an order of Court.

[Ed. Note.—Cited in *Huffman v. Stork*, 25 S. C. 272.

For other cases, see *Costs*, Cent. Dig. § 677; Dec. Dig. ⌘172.]

[*Costs* ⌘251.]

The fees paid by a solicitor for obtaining a copy of the appeal decree, will be allowed him only where such copy is necessary.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 959; Dec. Dig. ⌘251.]

[*Costs* ⌘172.]

The solicitor of each party is entitled to charge for his argument on circuit, and on the appeal.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 682; Dec. Dig. ⌘172.]

[*Equity* ⌘394.]

For swearing witnesses examined before the commissioner, under the Act of 1830, he is entitled to charge; but the charge to which he

is entitled, is not \$1 for each witness, but \$1 for all sworn in the case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 857; Dec. Dig. ⌘394.]

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[*Equity* ⌘394.]

*Where the commissioner appoints a day for taking the examination of witnesses, under the Act of 1830, and "causes the adverse party to be notified," for such notice, actually given, he is entitled to charge as for a summons.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 857; Dec. Dig. ⌘394.]

[*Equity* ⌘394.]

For reporting the testimony taken under the Act of 1830, the commissioner is not entitled to the charge of \$3 allowed by the Act of 1827, for "making up and returning report."

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 857; Dec. Dig. ⌘394.]

[*Costs* ⌘251.]

Where an appeal is taken, the commissioner may charge for a copy of the decree furnished the solicitor of the appellee.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 959; Dec. Dig. ⌘251.]

[This case is also cited and approved in *Hughey v. Eichelberger*, 11 S. C. 36.]

Before Dunkin, Ch., at Barnwell, February, 1859.

After the final decision of this cause in the Appeal Court, 10 Rich. Eq., 253, the commissioner for Barnwell taxed the costs of the defendants. The complainants objected to the taxation, and in September, 1858, his Honor, Chancellor Dargan, made an order directing the commissioner for Richland to tax the costs. In December, 1858, the commissioner for Richland submitted his report, to which the complainants filed exceptions, which were heard before his Honor, Chancel-

(a) Chancellor Dargan ill and unable to attend.

lor Dunkin, at Farnwell, February, 1859. His Honor made the following decree:

Dunkin, Ch. On the 15th September, 1858, Chancellor Dargan made an order, directing the commissioner in equity for Richland district, to tax the costs in the cause above stated. The whole amount of the bill of costs as taxed and allowed by Mr. Commissioner Pearson, is \$986.13. The items to which objection is taken, amount to \$413. The exceptions, as well as the reasons and authorities to sustain them, are distinctly set forth in the papers which make part of the decree—the declared object being, not merely to obtain justice in this particular case, but to settle the practice upon some points upon which a diversity of opinion exists among the profession, and a variety of practice prevails in different Equity districts. Entertaining grave doubts upon several of the points ruled by the commissioner of Richland district, it is deemed, nevertheless, expedient, for the purpose of having the matters subjected to the judgment of the tribunal in the last resort, to overrule the sev-

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eral exceptions taken, and to *confirm his report, which adopts the taxation of the commissioner of Barnwell district. It is accordingly so ordered and decreed.

The complainants appealed.

Bellinger, for appellants.

Aldrich, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. If the fees provided by law for services on the part of officers of this Court, do not remunerate them, or if there is an omission in the statutes to annex compensation to some duties to be performed, though the temptation may be strong, in such cases, to eke out the compensation by resorting to strained construction, the Court, though it cannot be insensible to the hardship of the case, is solemnly bound to restrain the abuse. There is no compensation allowed independently of that which is provided by statute; and the party laying claim to costs must lay his finger on some statutory provision, expressly or by necessary implication, allowing them.

In this case exception is taken to charges by the solicitors for attending before the commissioner to take the testimony; which was taken under the statute of 1830, 6 Stat., 411.

The statute of 1827, 6 Stat., 333, expressly declares, "That every officer herein named, shall charge and receive, for the discharge of the various duties of his office the fees hereinafter particularly recited, and no others; and that for all services not hereinafter specifically recited, the said officers shall not be entitled to any fee, but the said services, so omitted in this Act, shall be taken and understood as incidental to others for which fees are charged;" and "That all Acts, or

parts of Acts, in relation to fees of any of the officers hereinafter named, be, and the same are hereby, repealed; and that this Act shall be taken and considered as the only Act in force in relation to the fees of the officers hereinafter recited."

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*The only items in this fee-bill, relied on to sustain the charge of the solicitors in this case, are the following: "complainants' solicitors"—"each day attending before commissioner, on reference, five dollars"—and, "defendants' solicitors"—"each day's attendance, on reference, before commissioner, five dollars."

Was the proceeding under the Act of 1830, a reference, in the sense of the Act of 1827?

That Act, 6 Stat., 411, provides that either party to a suit in equity, shall have the right, upon giving the adverse party his solicitor or agent ten days' notice, to examine any witness, or witnesses, before the master or commissioner in equity of the district; whose duty it shall be, upon the application of the party, desiring the examination, his solicitor or agent, to issue a writ of subpoena for such witnesses; and upon their coming before him, to commit their testimony, given on oath, to writing, each party having the right of cross-examination and exception to the admissibility of testimony; and the master, or commissioner, shall certify such examination and testimony to the Court, to be read in evidence upon the trial; and, for this service, he shall be paid by the copy-sheet.

It may be convenient here to proceed with the further provisions of this statute, so far as it may be applied to this case. It further enacts, that on an application by a party to examine witnesses, the master, or commissioner, shall appoint a day for the purpose, and cause the adverse party to be notified.

The Court perceives no feature of a reference in such proceeding; and therefore, cannot sustain the solicitors' charges for attending on a reference. There may be, and is, much difficulty in defining the meaning of this term. But in theory of law, it always implies that the matter referred has been before the Court, and comes from the Court to its commissioner; and this is the true

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idea, even in cases where the *Legislature has authorized the commissioner to grant orders of reference. He grants them in the place of the Court.

It would never enter into the mind of any one, witnessing the examination of witnesses on a trial in Court, that the proceeding constituted a reference. Neither does the examination of them out of Court and before the commissioner, unless some matter has been referred to the commissioner, as the subject of the examination; such as to inquire into certain facts, or points of inquiry, and report the result, with the testimony, &c.

I should say, that were the Court to order the commissioner to take the testimony, generally, in a cause, preparatory to a hearing, this would no more be a reference, as understood in the practice of this Court, than an examination by other persons under a commission.

The Legislature has, in the Act of 1830, directed the mode in which testimony may be taken, and constituted the commissioner an agent to take it, as it might have constituted the sheriff, ordinary, or any other officer or person. This is the scope of the Act; and, though it would have been very proper, to have provided compensation to solicitors in such case, this case does not fall within the provision upon which they rely. The objection is, therefore, sustained.

Another charge of solicitors objected to, is attendance upon "a reference to tax costs." This relates to the taxation of costs by the commissioner of Barnwell. The parties by solicitor, laid before him their bill of costs, and supported them against objection. But this was no reference, and the solicitors are not entitled to the charge.

It is different under the order of Chancellor Dargan, referring these matters to the commissioner of Richland. This was a reference in its proper sense; and the charge is proper.

This objection is, therefore, sustained as to the original taxation by the commissioner of Barnwell; but overruled as it relates to the investigation before the commissioner of Richland.

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*Another objection is to charges for amount paid for copies of the opinion of the Court of Appeals. In *Pinchback v. McCraven*, 1 Hill Eq. 413, it was held that a charge for money expended for a copy of an appeal opinion, when such opinion was necessary to the party who got it, was allowable. In that case, the necessity for the copy arose out of peculiar circumstances. In this case, the bill was dismissed on circuit, and upon appeal the decree was affirmed.

In general, such opinion could be valuable to the party who procured it, only for its reasoning; or to guide that party in some ulterior proceeding. But it might, possibly, be of use, in defining and explaining, the circuit judgment: and should, for such purpose, be filed in the Circuit Court as part of the record. Of course, when that would be proper, only one copy would be necessary.

With these instructions, the point must be recommitting. If a copy was necessary, it should be allowed—not as costs to counsel, but as expenses. Unless a copy was necessary, it would have been sufficient to file the certificate of the clerk of the Appeal Court, of the result, which, by the Act of 1832, 7 Stat., 332, § vi, that officer is bound to transmit free of charge.

Another objection is, to charge of counsel

for arguments in the Circuit and Appeal Courts. It is not necessary to discuss a matter so plain. The fee-bill of 1827, expressly allows the charge made. The arguments were made; and were made in conformity to the regular and settled practice of the Courts in which the matter was adjudicated. If more than the proper number of counsel was heard—which was not the case—or if counsel were heard, who were not entitled to be heard, the point was open for objection at the time; and we have a right to suppose, if no objection was made, the proceeding was not objectionable; or was allowed by consent of the party now objecting. This objection is overruled.

So far for the solicitors. We come now to the fees of the commissioner.

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*The first charge objected to, is for "seventeen days engaged in reference to take testimony."

It has been already decided that this was no reference; and the charge is not allowable on that ground. The objection is, therefore, sustained.

The next charge objected to is, "witnesses each day sworn, \$17." That is \$1 per day for swearing witnesses on the "reference" to take testimony, which lasted seventeen days.

The Act of 1827 allows the commissioner for "swearing all the witnesses on reference before him, or on trial in court, \$1." The charge must, therefore, be cut down to \$1; and to that extent the objection is sustained. It has been contended, indeed, that as this was a proceeding under the Act of 1830, even this sum should not be allowed. The argument is based upon the declaration of that Act, that "for this service the said master or commissioner shall be paid by the copy-sheet;" from which it has been inferred that this provision is intended as a compensation for all the services rendered by commissioners under that Act. But the collocation of the words of the statute, as well as the apportionment of the compensation to the writing done, shows that the provision was intended to be confined to the duty of "certifying such examination and testimony to the Court, to be read in evidence on the trial of the cause;" for which "service the said master, or commissioner, shall be paid by the copy-sheet."

The next objection is to the charge of "eighty-seven summons, at thirty-seven and a half cents each, \$32 62."

The Act of 1830, in its second section, makes it the duty of the commissioner, on the application of a party to examine his witnesses, to appoint a day, and "cause the adverse party to be notified." This, I suppose, is to be done by issuing a summons, to be lodged by the applying party with the sheriff to be served. This service does not come within that for which he is to be paid by the copy-sheet. The Act of 1827 allows

him, "for every summons, thirty-seven and a

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half *cents." This would seem to be a sufficient warrant for summoning the adverse party, in this case; but as there were not eighty-seven adverse parties, it seems hardly possible to sustain this charge for the full amount. It has been argued that as the "references" were continued from day to day, for seventeen days, the commissioner was obliged to summon the parties, whom the Act requires him to notify, from day to day; and so such parties might be summoned several times. That depends on circumstances. If, at an adjournment, no day could be appointed for the next meeting, and the commissioner was compelled to issue his summons for that purpose, and did issue it, (for charges are not intended for services not rendered,) such charge is allowable. Otherwise it cannot be sustained. This point will be left for investigation when the report is recommitted.

The next objection is to the charge for "reporting testimony, \$3."

This service is included in the provision of the statute of 1830, to be compensated by copy-sheet; and the objection is sustained.

The last objection is to a charge "for copying circuit decree," \$5 37. When the bill was dismissed, and an appeal was taken, this copy was called for by appellee's counsel. (*Pinchback v. McCraven*, 1 Hill Eq., 413.) It would seem to be necessary for him, in order to prepare himself to sustain the decree. The objection is overruled.

It is ordered that the decree be modified according to the foregoing opinion; and let the cause be remanded to the circuit, and the report be recommitted to Mr. Commissioner Pearson.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

11 Rich. Eq. *9

*W. W. BELCHER v. HUGH McKELVEY,
Administrator.

PETER TUCKER and Others v. W. W.
BELCHER and Others.

(Columbia. May Term, 1859.)

[Equity ⚡340.]

Bill by the next of kin of donor to set aside a bill of sale of a slave, expressed to have been made in consideration of \$1,000 paid, on the ground that the sale was made in contravention of the Act of 1841 against emancipation, and alleging that the money paid was the donor's own money, being the earnings of the slave, and that there was a secret trust that the slave should be emancipated; *Held*, That the answer of defendant denying the trust, and averring that the money paid was his own money and not the earnings of the slave, was responsive and self-proving; and, the evidence being in-

sufficient to overthrow the answer, the validity of the bill of sale was sustained.

[Ed. Note.—Cited in *Ford v. Porter*, 11 Rich. Eq. 253; *Gore v. Clark*, 37 S. C. 547, 16 S. E. 614, 20 L. R. A. 465.

For other cases, see Equity, Cent. Dig. § 698; Dec. Dig. ⚡340.]

[Slaves ⚡7.]

Where a gift of slaves is made by the donor, in contravention of the Act of 1841 against emancipation, the gift is void whether the purpose of the donor is communicated to the donee or not.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. §§ 20-29; Dec. Dig. ⚡7.]

[This case is also cited in *Ford v. Porter*, 11 Rich. Eq. 250, as to facts, and cited and criticized in *Gore v. Clarke*, 37 S. C. 537, 16 S. E. 614, 20 L. R. A. 465.]

Before Wardlaw, Ch., at Laurens, June, 1858.

This case will be understood from the circuit decree, and the opinion delivered in the Court of Appeals.

The circuit decree is as follows:

Wardlaw, Ch. Robert Tucker, late of Laurens district, died April 19, 1855, leaving, as his next of kin, a brother, Peter Tucker, of Alabama, and many nephews and nieces, most of whom are absent from the State. On April 24, 1854, said R. Tucker executed a bill of sale of one of his slaves named George, to W. W. Belcher, of Abbeville, reciting a consideration of \$1,000, and warranting the title and soundness of the chattel; and, on June 13, 1854, he executed a paper, purporting to be his last will and testament, whereby he attempted to bestow

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his whole estate, real and personal, *upon the said Belcher; and, on the day last mentioned, he also executed a bill of sale of all the slaves remaining in his possession, namely: Ben, Bird, Nancy, Jenny, Letty, Jane and her infant child, absolutely to said Belcher, after reserving to himself the use for life, for the consideration professed of love, good will and affection towards his friend Belcher, and of \$50 received from him. After the death of Tucker, an attempt was made to prove his will and testament in due form of law; but it was set aside as a testament by the ordinary, and, on appeal to the Common Pleas, by the verdict of a jury, affirmed by the Law Court of Appeals. Hugh McKelvey became administrator of the goods and credits of said deceased, and was proceeding to sell the slaves named in the bill of sale of June 13, 1854, under the order of the ordinary, when, on December 14, 1855, the former bill in the caption was filed for injunction of the sale and for general relief; and, on the ex parte application of the plaintiff, an injunction was granted by a Chancellor at Chambers. Afterwards, the second bill in the caption was filed by some of the next of kin of the deceased against the other next of kin and Belcher, for partition of some real estate of which R. Tucker was

seized at his death, and for having declared void both of the bills of sale aforesaid, as executed through undue influence, and in violation of the provisions of the Act of 1841 to prevent emancipation, &c. 11 Stat., 154.

Defendant Belcher objects to the second bill on the score of multifariousness, as he is impleaded concerning the partition of the land, in which, on the showing of the plaintiffs, he has no interest; but plaintiffs were right in impleading him as to this matter, to ascertain, in disembarassment of their title, whether he set up any claim as devisee. He does so claim; and it is plain that an issue in the Court of Law must be ordered to determine this controversy, which has not been determined by the refusal of the ordinary to admit the testament to probate, although affirmed by the Court of Law, and which cannot be adjudged in this Court.

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Crosland v. Murdock, 4 McC., 217; Tygart v. Peeples, 9 Rich. Eq., 46. As this point must remain open, it is desirable, on the points which are within the cognizance of this Court, dependent on a common state of facts, to avoid comments, so far as practicable, which may be prejudicial to either party.

Certain facts of the case are proved to my satisfaction, and generally are undisputed. When the bills of sale were executed, Robert Tucker was about eighty years of age, altogether unlettered, and of a mind, originally feeble, impaired by age and disease. He labored under the delusion of being bewitched; and, when he led conversation, he commonly talked of bugs and lizzards running under the skin of his legs, asking his companions if they did not see the vermin. His neighbors dealt with him in small matters of trade, but usually through the agency and under the supervision of some of his slaves. He spoke rationally about the weather and the like topics, but was incapable of extended reasoning. He usually asked high prices when he wished to sell, and offered low prices when he wished to buy; and, in his small purchases from merchants, he asked for the articles of merchandise, but one of his slaves, generally George, would make the selection. He was unmarried, and excessively fond of his slaves and indulgent to them; indeed, they fared better than he did himself. Some of his relations, as Mrs. McKelvey and John T. Beaufort, were kind to him, and were treated affectionately by him, but he supposed he could give shares of his estate to these only in common with the rest of his kin; and from most of the latter he was estranged, supposing that they envied his pecuniary condition, and waited greedily for his death. His slaves, especially George, had great influence over him, and he anxiously desired their emancipation at his death. Of defendant Belcher, he knew nothing whatever by personal intercourse—although he designates him as his friend—except from the representations of George, in these par-

ticulars apparently truthful, that Belcher was a bachelor, a clever man, and the kind

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master of many slaves. *George was a cabinet-maker, and had worked at his trade for some years in the neighborhood of defendant, Belcher, and had there taken as a wife a woman, Rachel, belonging to Williamson Norwood in his lifetime. George was shrewd and intelligent, had been taught to read well, and he enjoyed the confidence of his master, Tucker. On April 24, 1854, he drove his master in a carryall to the house of W. Blakely, Jr., and producing the bill of sale of that date, in Belcher's handwriting, and \$900 in bank bills, and Tucker acknowledging the previous payment of \$100 to him by George, Blakely attested as a witness the mark of Tucker to the bill of sale, and then delivered it to George. At the time, George said that \$700 of the money belonged to himself, and that he had borrowed \$200 from Belcher, and thereupon Tucker returned \$200 to be repaid to Belcher, and Blakely, as Tucker's agent, took possession of \$700. About a week afterwards, John Johnson also attested the bill of sale on the acknowledgement of Tucker and Blakely; and George then, in their presence, said he had paid \$1,000 for himself, and Belcher was to befriend him. It is supposed that Belcher in his answer means to aver the payment of \$1,000 as the price of George, yet the averment is in terms somewhat equivocal. He says "he sent by George the sum of \$1,000" and a bill of sale in defendant's handwriting, and told him to pay the money to Tucker and take a bill of sale in the presence of witnesses—and "that all the money paid for George was his own money, and that no part was the earnings of George." It is not directly inconsistent with this statement, that all the money sent was furnished by George, nor that the money paid was much less than the nominal consideration. He further avers, however, that "when George disappeared, his earnings were not enough by about \$300 to replace the sum this defendant paid for him," (is it meant in his purchase?) "which this defendant has never received." At all events, it is considered that defend-

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ant was bound to prove his averment of payment, and that in the absence of proof, he is committed by the admissions of his agent, George.

Johnson further testifies that two or three days after he had attested the bill of sale, he was sent for to Tucker's house, when Tucker said, in the presence of George, I wish you to draw a bill of sale to Belcher for my other slaves. I wish my negroes to be free at my death, and not to serve another; and George has told me that Belcher would befriend him and the other negroes by taking them to a free State. Witness said to George, you are Belcher's property, and George replied, I am not afraid; Belcher is too good a man not to

do what he has said, and he will contrive a way for my escape. On this occasion, witness did draw up a deed of gift from Tucker to Belcher of the former's land and negroes, and George, from his own money, paid \$1 50 for the service; but the matter was not then consummated. George then seemed more interested than Tucker in having the deed drawn, and although witness advised it would do no good, said he wanted it done. Afterwards, in June, the bill of sale and the will were drawn by Mr. Henderson at Laurens C. H., and George was present in the village and near Mr. H.'s office, but probably not within its doors.

Oswald Richardson, an attesting witness of the deed, testifies to little conversation at the time of the execution, except that Tucker, on being asked by Atwood, why he gave his property to one he had never seen, replied, that Belcher was a bachelor and a clever man—and afterwards remarked, that the matter was arranged by the papers, just as he wanted it.

Joseph Crews testifies, that sometime before the deed was executed, George, in Tucker's presence, frequently said the old man (meaning T.) wished his negroes to be free, and carried to a free State after his death, and that his land should be used to defray expenses; and offered to have such a will drawn in the name of the witness, as lega-

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tee; but witness, *on reflection, declined. Both Tucker and George counselled with him about Act concerning negroes hiring their time. He further testified, that he saw George at Mr. H.'s office on the day when the deed was prepared; and that on same day Tucker bought his burial clothes at store of witness, which were selected by George.

It appears by the admissions of the answer and the testimony of M. O. McCaslan, that George is now in a free State, probably in Pennsylvania. I do not understand it to be contested that George left this State with the consent of Belcher, after Tucker's death. The answer of this defendant states: "George, whilst in this (Abbeville) district, had, as already stated, become the husband of a woman," Rachel, "and had become much attached to her. There were reasons which induced those having the ownership or control of this woman to give their active or tacit consent to her leaving the State. This defendant has no doubt she did so about April, A. D. 1856, and that George went with her. This was not in pursuance of any understanding, agreement or trust, with Robert Tucker, deceased, but arose solely in consequence of George's relation with the woman alluded to." The defendant elsewhere denies that either of said bills of sale was made under any trust or confidence, express or implied, that the slaves named therein were to be held in nominal servitude in this State, or to be emancipated without its limits on removal.

For further details of the pleadings and evidence, I refer to the pleadings themselves, to the depositions of witnesses, taken by commission, and to my notes of testimony.

The evidence is not sufficient, in my opinion, to demonstrate the absolute incompetence of Robert Tucker, in April or June, 1854, to make contracts, but clearly establishes such imbecility on his part as to render him an easy subject of imposition and undue influence. Those dealing with him should be held to proof of the fairness of their transactions. There is no pretence of valuable consideration for the deed of June, and although

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the answer alleges the payment of *money for George, no evidence of the payment is made, and the bill of sale of April must be treated like the other, as a mere voluntary conveyance. The answer on this point is not responsive, so as to be self-proving.

In a recent circuit opinion, in the case of Cloud v. Calhoun, I expressed by views as to the effect of answers, suggesting matters of independent defence or avoidance. I suppose that a sale on the unlawful trusts mentioned in the second and third sections of the Act of 1841, particularly the latter section, is no less liable to be declared void than a voluntary donation; although there is more influence in a mere gift than a sale in aiding the implication of the trust itself. It is not clear, where the donee is a mere volunteer, that it is not enough to bring the gift within the scope of the Act, that the donor certainly intends an unlawful trust, although the donee may not be fully cognizant of it. If the trust be not executed, the donor is defrauded; and whether it be or not, there is an attempt to defeat the policy declared by the Legislature in the enactment. It is difficult to convert one into a trustee without his consent, and the trust under the Act must always be in the donee, and merely the creation, or attempt at creation, of the trust on the part of the donor; still, a donee, or other person, should not be allowed to take advantage from the fraud of another, and one may naturally suspect fraud, or purpose to create a trust, when unreasonable and extravagant bounty is conferred on him by a stranger.

The conclusion in the present case, however, does not rest on such doubtful propositions. The proof satisfies me that George had very great influence with his master, Tucker, which he exercised to produce a violation of the provisions of the Act. George, at least, had full knowledge of the design of his master to create the unlawful trust of removing the slaves from the State, with the purpose of emancipation, and actively co-operated in its creation; and he must be regarded as the agent of defendant, Belcher,

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in accepting *such trust as to both bills of sale. This principal is as much responsible for the acts and declarations of his agent,

as if done or uttered by himself personally. Evasion of the Act would be as easy as progress in a smooth and broad highway, if the donee be held committed only by his individual acts.

McKelvey, the administrator of Tucker, is one of the next of kin of his intestate, and one of the plaintiffs in the cause, and it was faintly suggested that the case is within the principle of *Vose v. Hannahan*, 10 Rich., 465. But McKelvey is a necessary party, and sues as one of the next of kin, in conjunction with others, and not in his representative character.

It is also said that the Act applies only to cases where the slaves abide within the jurisdiction of the Court. But George was converted to the use of Belcher after the death of intestate, and having been permitted to escape from the State, this defendant must be held to account for his value.

It is adjudged and decreed, that the gifts of the slaves, in the bills of sale of April and June, 1854, are void and of no effect, and that defendant, Belcher, be held to account for the value of George, for the benefit of R. Tucker's distributees—it being understood that the other slaves, or their proceeds, are within the control of some of these distributees.

It is also ordered and decreed, that the bill of Belcher v. McKelvey, the first in the caption, be dismissed.

It is also ordered that an issue be made up forthwith between the parties, in which W. W. Belcher shall be the actor, to be tried in the Court of Common Pleas for Laurens district, to test the validity of the devise of land to him by the supposed will of June, 1854; and that, in the meantime, so much of the second bill, as relates to the partition of land, be retained.

W. W. Belcher appealed on the grounds:

1. Because there was no trust or confidence

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tending to *emancipation of the slaves, in contravention of the Act of the General Assembly.

2. Because in no event should he be held to account for the value of the slave George, who was bona fide sold by the intestate in his lifetime.

3. Because the decree, if sustained by the testimony, is based upon the declarations of the slave George, which were wholly incompetent.

4. Because the decree was contrary to the testimony and the equities of the parties.

Thomson, Henderson, for appellant.

Young, Simpson, contra.

The opinion of the Court was delivered by

DUNKIN, Ch. It is proposed first to consider the imputed error of the decree in rendering the appellant accountable for the value of the slave, George. It appears that, on 24th April, 1854, the intestate executed a bill of sale of George to the defendant for the

consideration of \$1,000. The bill of sale was in the handwriting of the defendant, who resided in Abbeville district,—contained a warranty of title and soundness, and was executed by the intestate under his hand and seal, in presence of attesting witnesses. George passed immediately into the possession of the defendant, with whom he remained for about two years thereafter; and disappeared, to wit: about April, 1856, in the manner stated in the evidence. These proceedings on the part of the next of kin of the intestate were instituted — 1858, and it is, among other things, substantially and directly charged, that, although the bill of sale of April, 1854, was for an apparent valuable consideration, yet the money on that occasion paid to the intestate, was, in fact, his own money, being the earnings of his slave George placed in the hands of the defendant for that purpose; and that a secret

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trust existed, that George *was to be emancipated by the defendant, or held by him in nominal servitude. The bill calls upon the defendant to answer upon oath, all and singular the matters charged. Thus interrogated, the defendant answered that he did purchase George at the time mentioned—that he made the purchase at the request of George, who desired that the defendant might be his master, because he, George, would be near his wife who lived in that neighborhood—that he, the defendant, sent the bill of sale, drawn by himself, with the sum of one thousand dollars, to be paid to the intestate by whom the bill of sale was to be executed—the defendant avers that all the money paid for George was his own money, and that no part was the earnings of George—that, from the time of the execution of the bill of sale, George remained with the defendant as his master, and that there was no trust, or confidence, when the defendant became the owner of George, that he should be held in nominal servitude, or should be emancipated. By the decree of the Circuit Court, it is held that this answer of the defendant in relation to the payment of the consideration, is "somewhat equivocal." "But that, at all events, the defendant was bound to prove his averment of payment." And again, it is held that, "although the answer alleges the payment of money for George, no evidence of the payment is made. The answer on this point is not responsive, so as to be self-proving; and the bill of sale of April must be treated as a mere voluntary conveyance."

The existence and the exigency of the general rule of this Court is not called in question, to wit: that the answer of a defendant responsive to the charges of the bill, should, in general, be taken as true unless contradicted by two witnesses, or one witness, and strong corroborating circumstances. But the Chancellor rests his decision on the distinction, recognized by the Court in *Cloud v. Calhoun*, 10 Rich. Eq., 358, that the answer

has not this effect when "suggesting matters of independent defence or avoidance." The distinction, though not so familiar as the

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rule, is certainly well established as well in reason as by authority. A defendant, charged with the receipt of a sum of money, and by his answer admitting the receipt, cannot exonerate himself by an averment that he had paid it to the plaintiff's use. But to a majority of this Court, it seems a misapprehension to hold, in this case, that "the defendant was bound to prove the payment of the consideration money." As against the intestate and all claiming as volunteers under him, the bill of sale of 24th April, 1854, under the hand and seal of the intestate, stands for proof, until successfully assailed. The onus of proof is on those who maintain that the deed speaks other than the truth. To establish this, the plaintiffs, by their bill, undertake to purge the conscience of the defendant, and require him to answer the charge that the money paid was not, as the bill of sale purports, his (defendant's) money, but was the earnings of the slave of the intestate, and consequently, in law, the intestate's own money. When the defendant replies to this, that "all the money paid for George was his own money," and, not content with this, adds, "and that no part was the earnings of George," it appears to the Court a direct and categorical response to the charge of the bill in that behalf, and entitles the defendant to the full benefit of the effect of an answer in such cases. Giving to the defendant the advantage of this rule, he stands as a purchaser for valuable consideration under the bill of sale, 24th April, 1854. The intestate received, in his lifetime, the value of his property. The defendant explicitly denies any fiduciary relation, express or secret—and the Court is not aware of any principle by which the defendant, under these circumstances, can be held responsible for the value of George to the next of kin of the intestate.

The deed, 13th June, 1854, by which the intestate transferred seven slaves (by name) to the defendant, stands on a different footing. It was manifestly voluntary—made to a perfect stranger—and a life estate was reserved to the donor. It was executed on the

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same day that he attempted to make a testamentary disposition of his whole estate, real and personal, in favor of the same donee. The testimony abundantly establishes that the object of the donor was to contravene the provisions and defeat the policy of the Act of 1841. By the terms of that Act all such efforts are made to enure to the benefit of the next of kin of the donor, but the object of the Act is the protection of the public. And I share in the apprehension of the circuit Chancellor, that the purposes of the Act might easily be frustrated if it were neces-

sary to bring home to the knowledge of the voluntary donee the unlawful designs of the donor. In the analogous case of a voluntary deed in fraud of creditors, it is not necessary to establish the scienter on the part of the donee. In Story's Eq., § 351, the authority of Pothier and other civil law writers is cited for the doctrine applicable to this class of cases. It was the rule of the civil law to avoid all alienations or other dispositions of their property made by debtors to defraud their creditors. Hence all such dispositions were annulled, whether the donee knew of the prejudice intended to the creditors or not. In the language of Pothier, the inquiry is not whether he, to whom the gift was made, knew of the intention of the donor, but only whether the creditor was defrauded. The voluntary donee has no cause of complaint except that he is not permitted to enjoy that which the donor had no right to give away. But it is difficult to infer a want of knowledge on the part of the defendant. The design of the intestate is clearly established. Shortly prior to June, 1854, he had executed a deed of the same character to another person (Johnson), which was afterwards returned to him, declaring, at the time, that his wish was "to have his negroes free and not serve after his death." And, again, the witness, Crews, says that, some time before the deed, George, in presence of intestate, said "the old man wished the negroes free, and carried to a free State after his death, and land to pay expenses;" and George offered to have a will made in his

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(witness') name. That he (the witness) had some idea of accepting the offer at first, but, on reflection, declined. Then, on the same day, the intestate executed a will, by which he devised and bequeathed his land and slaves to the defendant, and executed this deed by which he transferred to him the slaves only. The defendant was an entire stranger to him. He had heard that "he was a bachelor and a clever man." All this proves the purpose, as well as the expectation, of the intestate in executing the papers. Can it be doubted that the defendant, hearing of this unexpected bounty on the part of a perfect stranger, was put on the inquiry, and that his inquiries were satisfied? It does not clearly appear, from the evidence, to whom the deed was delivered for the defendant, nor from whom he received it. It probably came to him through the hands of George. But the answer of the defendant in relation to the will, which was a part of the same transaction, is a clear admission of the defendant's fiduciary relation in some way. "This defendant was impressed with the idea that a confidence was reposed in him by the said Robert Tucker, deceased—that there was a duty incumbent upon him which it would be sheer weakness to decline—that it would be equivalent to a betrayal

of a trust." And that, under this impression, he had taken the necessary steps to test the validity of the will, which had, as to the personality, terminated unsuccessfully. On the face of the will, as well as of the deed, the gift of the property to the defendant was equally absolute and unconditional. It was the secret "confidence" which the defendant "had an idea was reposed in him" by the donor, and "which it would be equivalent to a betrayal of trust to decline," against which the various provisions of the Act of 1841 were directed, and which rendered the deed void.

If the conduct of the intestate had been entirely spontaneous, such would be the conclusion in relation to the validity of this instrument. But he was about eighty years of age—exceedingly feeble in mind and body—very much under the influence of his slaves,

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especially of George, who was shrewd *and intelligent. Without recapitulating the evidence detailed in the decree of the Chancellor, his conclusion is well sustained, that "it clearly established such imbecility on his part as to render him an easy subject of imposition and undue influence," and the inference is strong, from many parts of the testimony, that the influence of his slaves was manifested in the concoction of the instrument providing for their benefit.

For the reasons hereinbefore stated, we are of opinion that the defendant was not accountable to the distributees of Robert Tucker, deceased, for the value of the slave, George; and that, in this respect, the decretal order of the Circuit Court should be reformed, and it is so ordered accordingly. In all other respects the decree of the Circuit Court is affirmed and the appeal dismissed.

JOHNSTON, Ch., concurred.

WARDLAW, Ch., said: I doubt as to the effect given to the answer, and as to the bill of sale for George; I concur in other respects.

Decree modified.

11 Rich. Eq. *23

*RICHARD G. HOWARD v. ROBERT R. CANNON and Others.

(Columbia. May Term, 1859.)

[Assignments for Benefit of Creditors ⌋194.]

An absent defendant, having an interest under an assignment for the benefit of creditors, may be restrained by injunction from enforcing his judgment by seizure and sale of the assigned estate—the judgment having been recovered against the assignor after the execution of the assignment.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 602; Dec. Dig. ⌋194.]

[Courts ⌋507.]

A party who obtains judgment in the United States Court, may be restrained by the

Court of Equity of this State, from enforcing his judgment by levy and sale of property not liable to levy and sale under his execution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1414; Dec. Dig. ⌋507.]

Before Johnston, Ch., at Darlington, February, 1859.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Dargan, for appellant.

Phillips, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. Robert R. Cannon on March 18, 1858, conveyed to the plaintiff, Richard G. Howard, all his lands, chattels and credits, in trust, primarily, for the payment of his debts, in terms and according to a classification which are not apparently impeachable. The assignor was greatly embarrassed in his affairs, to the extent of probable insolvency; and the assignee filed this bill to call in the creditors and marshal the assets of the assignor. After the conveyance to the plaintiff, Cummings and Styron, residents without the limits of this State, recovered judgment for a large sum against the assignor, Cannon, in the Circuit Court of the United States for South Carolina, and when.

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this bill was *filed, were proceeding to execute their judgment by the seizure and sale of some of the slaves assigned, through the agency of W. H. Wingate, deputy of D. H. Hamilton, who is the marshal of the United States, for the district of South Carolina. Upon hearing affidavits supporting the allegations of the bill, Mr. Commissioner Haynesworth granted a special injunction, restraining Cummings and Styron, in common with other creditors of Cannon, who had obtained judgments against Cannon after the execution of the deed of assignment to plaintiff, from seizing and selling the property assigned. Cummings & Styron, by attorney, pleaded to the jurisdiction of this Court, on the ground that the subject of suit was under the exclusive jurisdiction of the Circuit Court of the United States, inasmuch as that Court had first taken cognizance of the controversy between them and Cannon; and their agent, Wingate, in like manner, pleaded to the jurisdiction of this Court. The Chancellor on circuit sustained the pleas of Cummings & Styron and of Wingate, to the jurisdiction of this Court, and excepted them from his order calling in the creditors of Cannon to present and prove their demands.

The plaintiff appeals from so much of the decree as sustains the pleas to the jurisdiction and exempts Cummings & Styron from the call on creditors to present and prove their demands. The Chancellor proceeded mainly on the reason, not suggested by the pleas, that Cummings & Styron were non-

resident and had no such property here, the subject of litigation, as brought them within the cognizance of the State Court.

The plaintiff, in his first ground of appeal, impugns, and we think justly, this course of reasoning, because Cummings & Styron had a direct and substantial interest in the subject of controversy. The Act of 1784, 7 Stat. 210, gives jurisdiction to the Court as to absent defendants notified by advertisement in the newspapers for three months, without express restriction as to their having prop-

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erty in the State. But the *obvious injustice of concluding a party where neither his person nor property was within the jurisdiction, properly induced the Court to give an interpretation to the Act conformable to justice. It has not been questioned since *Winstanley v. Savage*, 2 McC. Eq., 435, that non-residents cannot be made parties except in reference to their property here. In this case, however, Cummings & Styron had immediate property in the subject of controversy, for the deed to the plaintiff was an express trust for all the creditors of Cannon in the property assigned. It was held in *Kinloch v. Meyer, Speers, Eq.*, 427, that the Court of Equity would entertain jurisdiction of a bill seeking to subject the share of an absent distributee in the hands of an administrator, to the payment of the distributee's debts. That case is conclusive of the principle involved in this case. Here the issue is as to the share of absent creditors, in the hands of a trustee, to be administered. This is simply a matter of authority, and it is superfluous to reiterate reasoning well expressed heretofore. I content myself with citing some of the cases. *Bowden v. Schatzell*, Bail. Eq., 360 [23 Am. Dec. 170]; *Cruger v. Daniel*, McM. Eq., 189; *Garden v. Hunt*, Chev. Eq., 42; *Taylor v. Williamson*, McM. Eq., 348; *McKinne v. City Council of Augusta*, 5 Rich. Eq., 55; *Hurt v. Hurt*, 6 Rich. Eq., 114; *Brenan v. Burke*, 6 Rich. Eq., 200.

The second ground of appeal assails the reasoning expressed in the pleas, that the subject of controversy was within the exclusive jurisdiction of the Circuit Court of the United States, which rendered the judgment of Cummings & Styron v. Cannon. We have every disposition to avoid even the appearance of conflict with the tribunals of the United States created under the Constitution, and we have no disposition to quibble between restraining processes and restraining persons from proceeding under them. But surely there is a substantial difference between undertaking to revise the judgment and procedure of a co-ordinate or even superior tribunal, and interfering to restrain

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parties from acts not authorized by our equals or superiors. It does not impugn, in any respect, the judgment of the Federal

tribunal, that we interpose to prevent parties under our control from abusing the process of that Court. It has granted a judgment against Cannon, and we make no offer to restrain the execution of their judgment from the estate of Cannon. But we do not perceive that, under a judgment against Cannon, the estate of Howard or any other person can be legitimately seized and sold. The judgment of Cummings & Styron is left intact; and we simply determine that they or their agent had no authority to seize the property of a stranger under pretence of its operation. To determine otherwise would be to adjudge that a plaintiff, in execution against a pauper, might obtain satisfaction from any rich inhabitant of the State. It is suggested, however, that the plaintiff should have applied to the Circuit Court of the United States on the equity side, for relief in this case. But the plaintiff could not have obtained relief there, as most of the creditors were resident in the same State with himself. It is unnecessary to discuss the provisions of the Constitution and of the Acts of Congress in relation to this matter, as it is settled, by adjudication, that the Circuit Court of the United States has no jurisdiction as to defendants resident out of the district in which the Court is held. *Russell v. Clark*, 7 Cranch, 69 [3 L. Ed. 271]; *Carneal v. Banks*, 10 Wheat., 181 [6 L. Ed. 297]; *Ford v. Douglas*, 5 How., 143 [12 L. Ed. 89].

It is ordered and decreed, that the appeal be sustained, and the circuit decree modified accordingly.

It is further ordered and decreed, that the defendants, Beaseley & Wingate, deliver to the plaintiff the chattels seized by them.

JOHNSTON and DUNKIN, CC., concurred.
Decree modified.

11 Rich. Eq. *27

*ISOM KIRKPATRICK v. VALENTINE
ATKINSON and Wife.

(Columbia. May Term, 1859.)

[*Equity* ⇐381.]

Where an issue at law is ordered, the verdict of the jury, though approved of by the presiding Judge, is not obligatory on the Chancellor; he may direct a new trial, or even decide the cause in opposition to the verdict.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 815; Dec. Dig. ⇐381.]

[*Appeal and Error* ⇐901.]

Upon an appeal from a Circuit Chancellor's decree, refusing to order a new trial at law, it is incumbent on the appellant to show that the Chancellor has miscarried; it is not enough for the Court of Appeals to have misgivings as to the result attained by the Chancellor.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1771, 3670; Dec. Dig. ⇐901.]

[*Equity* ⇐380.]

Where incompetent evidence was received on the trial of the issue at law, the Circuit

Chancellor is not bound, like a Law Court of Appeals, to grant a new trial on that ground; he may, if he is satisfied with the verdict upon consideration of the competent testimony, refuse to grant a new trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 820; Dec. Dig. ☞380.]

[*Executors and Administrators* ☞130.]

Where the personal representative is entitled to an account of rents and profits accruing before the death of his intestate, he has such an interest as entitles him to file a bill to set aside, on the ground of fraud, a conveyance of the land made by the intestate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 537-540; Dec. Dig. ☞130.]

[*Equity* ☞87.]

From analogy to the statute of limitations, the Court of Equity generally adopts the period of the statute as a bar to equitable demands. Sometimes a shorter period is held to preclude the plaintiff, and where the circumstances of the case make it inequitable for the defendant to insist on the bar of the statute, the Court will not enforce it.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ☞87.]

[*Executors and Administrators* ☞130.]

In June, 1847, J. M. executed two deeds, by which he conveyed his land and negroes to V. A., reserving the use to himself for life. He remained in possession until 1852, when he died intestate. In May, 1856, the plaintiff administered on his estate, and shortly afterwards filed a bill, to set aside the deeds, on the ground of misrepresentation and fraud, and of the incapacity of the donor. The allegations having been found true, and it not appearing that the capacity of the donor had improved, the statute of limitations was held not to bar the plaintiff's bill.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 537-540; Dec. Dig. ☞130.]

[*Descent and Distribution* ☞9.]

[Cited in *Leaphart v. Leaphart*, 1 S. C. 208, to the point that at common law, where landlord dies intestate before rent is due, the rent goes to his heirs.]

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 7-9; Dec. Dig. ☞9.]

[This case is also cited in *Huff v. Latimer*, 33 S. C. 258, 11 S. E. 758, as to application of rents of intestate estate at common law.]

Before Dargan, Ch., at Chester, June, 1858.

John McKelvey and Elizabeth, his wife, on the 23d of June, 1847, executed two deeds, whereby the said John McKelvey, reserving the use to himself and wife during their

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*lives, conveyed all his real and personal estate to the defendants, Valentine Atkinson and wife. Elizabeth McKelvey died in September, 1848, and John McKelvey died in July, 1852. In May, 1856, letters of administration on the estate of John McKelvey were granted to the plaintiff, who, thereupon, filed this bill, to set aside the said deeds. In July, 1857, an order was made, directing an issue, to determine whether the donor was of sufficient capacity to execute the deeds, and whether said deeds were procured to be executed by misrepresentation, fraud, or undue influence. The issue was tried at Ches-

ter, Spring Term, 1858, before his Honor, Judge O'Neill, and the jury found for the plaintiff on both the issues.

The defendants appealed, and in June, 1858, moved the Court at Chester for a new trial. His Honor, Chancellor Dargan overruled the motion, and decreed in favor of the plaintiff.

The defendants appealed on the grounds:

I. Because the Chancellor erred in not granting a new trial on the grounds taken before him, to wit:

1. Because the presiding Judge erred in receiving, as evidence, the declarations of John McKelvey, and Elizabeth McKelvey in derogation of their own deeds, after execution thereof.

2. Because the presiding Judge erred in permitting the opinion of witnesses as to the competency of John McKelvey, and his capacity to make the deed, without any fact, showing want of capacity.

3. Because from the proof it was clear that the said John McKelvey made his own contracts up to the time of his decease; that he had resided with the defendant for the space of two years, long after execution of said deed, without any manifestation of displeasure as to the terms or with the defendants; that there was no proof of any single fact showing want of capacity to understand

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the deed in controversy. *The verdict of the jury finding want of capacity is without evidence.

4. Because there was no proof of misrepresentation, undue influence or fraud on the part of the defendants. The verdict of the jury finding that the said deeds were procured by fraud, misrepresentation, and undue influence, is without evidence.

5. Because it is respectfully submitted, that the presiding Judge erred in stating and suggesting to the jury, in order to sustain the testimony of James Robinson, that the deed in question might have been lodged with the clerk of the Court, with a request not to record the same, when there was no proof, nor any effort to prove the same, thus supplying to the jury, facts to sustain the testimony, without which it must have been discredited.

II. Because the complainant, Isom Kirkpatrick, as administrator of John McKelvey, had no right to the rents and profits of the real estate of John McKelvey; the heirs-at-law, and not his administrators being entitled thereto; the decree of the Chancellor directing such accounting is erroneous and ought to be reversed.

III. Because the decretal order directing an issue to try the validity of the deed made to the defendant by John McKelvey, of his land, is erroneous; the heirs-at-law of John McKelvey, being no party to the proceedings, and they are the only persons who have a right to test the validity of said deed.

IV. Because more than four years having elapsed since the execution of the deeds, before the commencement of the suit, the statute of limitations was a bar to so much of the bill as relates to the negro slaves, and other personal property: the decree of the Chancellor overruling said plea was erroneous.

V. Because the costs of suit should have been paid out of the estate, and not by the defendants.

[For subsequent opinion, see 4 S. C. 126.]

Melton, McAlily, for appellants.

Smith, contra.

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*The opinion of the Court was delivered by

DUNKIN, Ch. At the original hearing of this cause in the Circuit Court, the presiding Chancellor, after an examination of some of the witnesses, deeming the inquiries involved in the pleadings peculiarly proper for the consideration of a jury of the vicinage, who were best acquainted with the parties and witnesses, directed an issue at law. The result was certified to this Court by the presiding Judge, who tried the issue and who was satisfied with the verdict. On a motion for a new trial, before the Circuit Court of Equity, in July last, the Chancellor, after a review of the evidence appearing in the notes of the presiding Judge, expressed his satisfaction with the verdict rendered by the jury, dismissed the motion for a new trial and proceeded to a final decree in the premises, which is the subject of this appeal.

The principal grounds taken involve the proposition that the result attained by the concurrent judgment of the jury, the presiding Magistrate in the Court of Law, and of the circuit Chancellor, is not warranted by the testimony. Every human tribunal is fallible, and all the machinery invented for eliciting the truth may sometimes prove ineffectual, but such is not the general presumption. The parties had, in the first instance, the advantage of the time-honored observance of calling on jurors to respond to questions of fact. Their verdict, approved as it was by the presiding Judge, was not obligatory upon the Chancellor. Unless satisfied with the finding, he was at liberty to direct a new trial, or even to decide the cause in opposition to the verdict. This is an appellate tribunal, and it is incumbent on the party asking for a revision of the Chancellor's judgment to satisfy this Court that he has miscarried. It is not enough that this Court may have misgivings as to the result which has been attained. But it is objected that the law Judge received evidence which should not have been admitted, and that on this ground the Chancellor should have ordered a new trial. This subject is very fully treated in *Lyles v. Lyles*,

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1 Hill Eq. *76. It is not like a motion for a new trial at the other end of the hall. The issue is directed for the purpose of satisfying the conscience of the Chancellor, and if, upon a review of the competent testimony, that object has been attained, the Chancellor is not bound to reject the verdict, because, in his opinion, the Judge erred in law on the admissibility of a part of the evidence. In this case there was testimony besides that to which objection has been taken; and we cannot say that it was not sufficient to have satisfied the Chancellor with the result.

The second ground of appeal insists that, in any view, the administrator is not entitled to the rents and profits of the real estate, but that they belong to the heirs-at-law of the intestate. The rents and profits, which accrued during the lifetime of the intestate, belong to his personal representative, and not to his heirs. After that period, the right to the rents and profits accompanies, of course, the inheritance. The decretal order upon this point is not very distinct, but it must be so construed. And this furnishes an answer to the seventh ground. As the right to an account of the rents and profits which accrued during intestate's lifetime would belong to the administrator, he was entitled to an inquiry as to the validity of the deed.

It remains to notice the defence of the statute of limitations, very faintly urged at this hearing. It has been often reiterated that proceedings in this Court are not within the statute of limitations, but that this Court, generally, adopts this period as a bar to equitable demands from analogy to the statute. Sometimes, however, a shorter period has been held to preclude the plaintiff, as in the case of *Kirksey v. Keith* [11 Rich. Eq. 33], heard at this sitting. And where, from the circumstances, it would be inequitable for the defendant to insist on the lapse of time, this Court is not bound to enforce the bar. The jury have found not only that "the deeds were procured to be executed by misrepresentation and fraud," but that the intestate "was not of sufficient capacity to execute the deeds."

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*The intestate always retained possession, and it was not suggested that his capacity subsequently improved. Under these circumstances he could not be expected to have known his wrongs, or to have adopted the proper means of redress. The plaintiff instituted these proceedings soon after taking out letters of administration, and within four years from the death of his intestate.

It is ordered and decreed, that the decree of the Circuit Court be affirmed, and the appeal dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

11 Rich. Eq. *33

*WILLIAM KIRKSEY, Jr., v. EXECUTORS W. L. KEITH and Others.

(Columbia. May Term, 1859.)

[Equity ⇨141.]

Where a party files a bill to set aside his own deed, on the ground of duress, and more than four years have elapsed since the deed was executed, if he wishes to avoid the effect of his laches by showing that the duress continued after the deed was executed, he must make the question in his pleadings and by evidence at the trial.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 329; Dec. Dig. ⇨141.]

[Equity ⇨87.]

Upon demands purely legal, the Court of Equity follows the decisions at law in applying the bar of the statute of limitations; but where the peculiar remedies of the Court are sought, a shorter time than the legal bar may be sufficient to prevent the Court from giving relief.

[Ed. Note.—Cited in Kirkpatrick v. Atkinson, 11 Rich. Eq. 31; McMakin v. Gowan, 18 S. C. 505.]

For other cases, see Equity, Cent. Dig. § 242; Dec. Dig. ⇨87.]

[Husband and Wife ⇨220.]

Where a husband sues his wife, and the bill is taken pro confesso against her, the Court is not bound by her admission, but may treat the case very much as if she were an infant, and hold the husband barred by his laches in applying for relief.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 801; Dec. Dig. ⇨220.]

[This case is also cited in Brown v. Brown, 44 S. C. 383, 22 S. E. 412, as to the doctrine of laches.]

Before Wardlaw, Ch., at Pickens, June, 1858.

The decree of his Honor, the Circuit Chancellor, is as follows:

Wardlaw, Ch. On March 6, 1854, William Kirksey, Jr. released and conveyed to W. L. Keith, uncle of grantor's wife, three houses and lots in the village of Pickens, and the distributive share of said William in the estate, real and personal, of his brother, Silas Kirksey, deceased, in the hands of said W. L. Keith, as administrator, in trust for the use of said William's wife, Eady Catharine, and his children, Rebecca and Joseph Brown; with power in said W. L. Keith to sell and re-invest said estate for the benefit of the beneficiaries, and also to appoint another trustee in his stead to act for said wife and children. On May 15, 1856, W. L. Keith, as trustee, sold and conveyed the village lots

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to Alexander Bryce, *Senior, for the price of \$610. W. L. Keith died May 20, 1856, leaving a will, of which Elizabeth B. Keith, Elliott M. Keith and Thomas J. Keith, are executors; and at his death he had not exercised the power of appointing a substitute or trustee; nor had he fully administered the goods and credits of said Silas Kirksey, deceased; and of such as were unadministered, Frederick N. Garvin became administrator.

On May 3, 1858, William Kirksey, Jr. filed this bill, making his wife and children, the executors of W. L. Keith, and the administrator, Garvin, defendants; in which he alleges that said deed of trust was obtained from him by fraud and duress practised by said W. L. Keith, and prays that the deed may be set aside and cancelled; that the executors of W. L. Keith may account for and pay over to him the proceeds of the lots sold, and that they and Garvin may likewise account and pay his portion of Silas Kirksey's estate in their hands and control. Elizabeth and Elliott, two of the executors of Keith, in separate answers, admit the importunity, but deny any fraud or duress of their testator concerning the execution of the deed; a formal answer is put in by next friend for the children of plaintiff, they being infants; and the bill is taken pro confesso against the wife, Eady C., and against T. J. Keith and F. N. Garvin.

It is considered that such duress is proved in this case as to render the deed voidable, and that no positive confirmation by the grantor is established. Sto. Eq. J., 239 and n; Gregg v. Harlee, Dud. Eq., 42. It is unnecessary to repeat the words of the witnesses, as a summary of the evidence will suffice: W. L. Keith had been, at the time of his death, for twenty-eight years Clerk of the Common Pleas for Pickens, and he possessed great influence in his region. William Kirksey is civil and intelligent when sober, but he was, about 1854, addicted to intemperance, and when drunk disposed to violence. On January 10, 1854, William Kirksey was arrested and committed to jail on a peace warrant issued by W. L. Keith, as magistrate ex-officio, based on information

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by *Kirksey's wife. On February 17, 1854, Kirksey entered into a recognizance to keep the peace before W. J. Gantt, a magistrate, himself in the sum of \$1,500, with seven sureties, each in the sum of \$250, and was discharged from imprisonment. He was brought back in three or four days afterwards by L. C. Craig, one of his sureties, and surrendered to the clerk, who took him to jail without new warrant, and he remained in confinement until he executed the deed, when he was discharged on his own recognizance by Keith. Throughout the imprisonment, W. L. Keith frequently and strongly urged Kirksey to make a deed of trust for the benefit of his family, and, until this purpose was effected, obstructed his enlargement as far as practicable. He dissuaded Mr. Parsons, now ordinary, and Mr. Hagood, now clerk, who were inclined to become Kirksey's sureties in a recognizance for his good behavior, from interference in his behalf until he should execute the deed, insisting that the sum of the recognizance should be \$5,000, at least, and threatening to prose-

cute for estreat in case of any breach; promising, at the same time, to discharge the prisoner on his own recognizance, if he would execute the deed. He induced Sheriff Bryce to withdraw an indulgence he had granted to the prisoner on account of failing health, of changing his cell in the upper story of the jail to the lower room, saying that if Kirksey were confined he would make the assignment as he ought to do; and he said to the Sheriff when the deed was executed, that Kirksey would have made it before if he had been kept in the upper cell. Kirksey at first refused to execute the deed, declaring he would rather rot in jail, but after his health had suffered, he said to the Sheriff, I will do anything that is right to get out of jail, as the infernal place will kill me. This was reported to Keith, and he took the deed which had been previously prepared, to the jail, and read it to Kirksey, who assented to its provisions; and the parties proceeding to the Clerk's office, the deed was executed there in the presence of the Sheriff and P. Alexander, as attesting

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*witnesses, while Kirksey was sober, and he was then set at large on his single recognizance. This is duress in its most reprehensible form, namely: under color of law by one of its ministers. This Court, however, cannot give damages for the tort of Keith, and he takes no pecuniary interest under the deed which can be reached. After the arrest, plaintiff and his wife lived apart for about nine months, but their cohabitation was then resumed and has since continued.

If the plaintiff had made timely application to this Court, he might well have been entitled to the relief sought, of having the deed declared void, but his laches creates an obstacle seemingly insuperable. He acquiesced in the instrument for more than the statutory bar of four years after the duress had been removed, without clamor or suit. As to the children who are infants and take beneficially under the deed, it can hardly be controverted that the Court is bound to interpose this bar in their behalf, for the formal answer of infants, submitting their rights to the protection of the Court, is never interpreted as waiving any proper defence, which should be made for them; and I think one under the disability of coverture is entitled to the same protecting interposition of the Court, where she has waived no right by separate answer put in under leave of the Court, nor on private and separate examination, and she is committed only by an order pro confesso entered for lack of answer. Such order should be rarely, if ever, entered against a married woman sued separately, unless in case of great contumacy on her part in refusing to make any defence; and certainly her defence, disclaimer or surrender, is most regularly made by an-

swer filed on leave of the Court. It is said, that whenever a husband as plaintiff sues his wife as a defendant, he elects to treat her for the purposes of the suit as a feme sole, and she may answer as a feme sole without leave of the Court. Sto. Eq. Pl., sec. 17. But this privilege of the wife is not to be turned to her disadvantage, nor is she to be construed as admitting whatever she

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forbears to answer. It is at least *certain that it is in the discretion of the Chancellor to determine what evidence shall be required to prove the demand of a bill taken pro confesso. *Steam P. Co. v. Roger, Chev. Eq., 48.* And I am not content in this case with the evidence of the wife's waiver or surrender of her interests under the deed. The settlement, although unfairly produced, is fair in its provisions. Upon proper application, a trustee may be appointed for the wife and children of the grantor.

It is ordered and decreed that the bill be dismissed, but without costs as to the executors of W. L. Keith.

The complainant appealed on the grounds:

1. Because it is respectfully submitted that the complainant did not acquiesce in the instrument sought to be avoided, for more than four years after the duress had been removed.

2. Because the statutory bar was incomplete in its operation at the time the complainant applied to this Court for relief, and it is, therefore, inapplicable to his case.

3. Because there was no sufficient acquiescence in the instrument, on the part of the complainant, either in point of time, or by deed or act, to bar him from the aid of this Court to avoid the said instrument.

4. Because the order, pro confesso, against Eady Kirksey, the wife of the complainant, was regular and binding upon her.

Reed, Wilkes, for appellant.

Keith, Orr, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The first ground of appeal insists, that the plaintiff did not acquiesce in the deed sought to be cancelled, for more than four years after the duress, under which it had been executed, had been removed. It is stated in the argument here, in support of this ground, that the undue influence of the grantee, W. L. Keith, over

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the plaintiff, continued *during the life of the former, and ceased only at his death, which happened two years before the bill was filed. The conclusive reply is, that the pleading of plaintiff assails the deed exclusively for duress preceding and attending the execution of the deed; and that at the trial there was no offer of proof of duress or malign influence afterwards. The case in this respect is settled by the doctrine of *Beck v. Searson*, 8 Rich. Eq., 130.

The third ground of appeal additionally insists that there was no acquiescence of the plaintiff, by act or deed, barring him from relief in this Court. The decree does not proceed on the affirmation of any such fact; contrariwise, concedes that there was no positive confirmation of the deed by the grantor. What is treated as acquiescence is simply the forbearance of the plaintiff for four years and two months to institute any suit or plaint. It was the laches or default of the plaintiff, not his active misconduct, which was considered a bar to his relief. We are not convinced of error in the Chancellor in this respect.

The second ground of appeal affirms that the bar of the statute of limitations was incomplete in duration when the bill was filed. This means and implies that one who pursues an estate for any claim in equity, is entitled, in addition to the four years allowed by the statute of limitations, to nine months for the commencement of his complaint by bill, because, under the Act of 1787, no action can be instituted for nine months after the death of a testator or intestate for recovery of any debt of the deceased. It seems to be the doctrine of the Law Court that the effect of the latter Act is to prolong the barring term of the statute of limitations as to all suits for nine months, wherever the representative is exempt from action for this fraction of a year for recovery of a debt; yet in the last case on the point, *Lawton v. Bowman*, 2 Strob., 190, one member of that Court placed his concurrence entirely on the score of authority, avowing his belief that the result was against principle. It is plain that neither

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*the statute of limitations nor the Act of 1787 applies, in express terms, to the Court of Equity; yet in avoidance of any appearance of conflict between co-ordinate tribunals, we would follow here the decisions of the Law Court as to demands strictly legal. I have sufficiently expressed my views, as a single Judge, concerning the operation of the Act of 1787, as to this Court, in the case of *Sollee v. Croft*, 7 Rich. Eq., 34, and as to the statute of limitations in *White v. Bennett*, *Ib.*, 260. We follow the statute of limitations in positive bar of legal demands, whether in obedience or analogy, it is immaterial to consider; but it has certainly never been authoritatively intimated in this Court that we could not bar the peculiar remedies of this court at a term short of the term of the statute. We exact diligence in plaintiffs. The Chancellor in his decree barred the plaintiff for his laches, and not by the terms of the statute of limitations. The doctrine on this subject is well stated by C. J. Taney, in *McKnight v. Taylor*, 1 How. 161 [11 L. Ed. 86]: "It is not merely on the presumption of payment or in analogy to the

statute of limitations that a Court of Chancery refuses to lend its aid to stale demands. There must be conscience, good faith and reasonable diligence to call into action the powers of the Court. In matters of account, where they are not barred by the act of limitations, Courts of Equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice when the original transactions have become obscure by time, and the evidence may be lost. The rule on this subject is settled by *Platt v. Valtier*, 9 Pet., 416 [9 L. Ed. 173], and where conscience, good faith and reasonable diligence are lacking, a Court of Equity is passive and does nothing; and therefore from the beginning of Equity Jurisdiction, there was always a limitation of suit in that Court." V. C. Wigram supports this doctrine in 3 Hare, 357, *Tatam v. Williams*. In our own case of *White v. Bennett*, 7 Rich. Eq., 260, a vendee suing for specific perfor-

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mance, was held to be barred by his laches for two years and three months. This case, like that, belonged to the peculiar remedies of this Court. It should be borne in mind that the person whose death, in this case, is supposed to prolong the term of the statute, is a naked trustee, and that his representatives are not pursued for any relief out of his estate.

On the fourth ground we consider it unnecessary to add to the remarks in the decree.

It is ordered and decreed that the appeal be dismissed, and the decree be affirmed.

DUNKIN, Ch., concurred.
Decree affirmed.

11 Rich. Eq. *41.

*C. R. BRYCE, Ex'or, v. G. S. BOWERS and JOHN STORK.

(Columbia. May Term, 1859.)

[Parties \hookrightarrow 84.]

B mortgaged land to A, to secure the payment of a bond, and afterwards conveyed the land to C, who conveyed to D. B, then, assigned his estate for the benefit of his creditors, and died insolvent. On bill filed by A, against C and D, for foreclosure, no demurrer was filed, for lack of proper parties. *Held*: That defendants could not insist, at the hearing, that the personal representative of B should be made a party to the bill.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 112; Dec. Dig. \hookrightarrow 84.]

[Mortgages \hookrightarrow 127.]

That the assignee of B was not a necessary party to the bill.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1269, 1272-1287; Dec. Dig. \hookrightarrow 427.]

Quære, whether to a bill against the party in possession of the mortgaged land, for foreclosure of the mortgage, the personal repre-

sentative of the deceased mortgagor is, in any case, a necessary party.

[Ed. Note.—Cited in *Trapier v. Waldo*, 16 S. C. 287; *Butler v. Williams*, 27 S. C. 224, 226, 3 S. E. 211; *Rutherford v. Johnson*, 49 S. C. 468, 27 S. E. 470.]

[*Mortgages* ⇐277.]

Where a mortgage has been duly registered, a subsequent purchaser of the land will not be protected by presumptions of payment arising from the lapse of time, where the mortgagor himself is not so protected—he having made payments which rebut the presumption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 726; Dec. Dig. ⇐277.]

[*Payment* ⇐17.]

A promissory note, not expressly taken in payment of a bond, held, not to be payment.

[Ed. Note.—Cited in *Union Bank v. Wando Min. & Mfg. Co.*, 17 S. C. 362.

For other cases, see *Payment*, Cent. Dig. § 70; Dec. Dig. ⇐17.]

Before Dargan, Ch., at Richland, June, 1858.

The decree of his Honor, the Circuit Chancellor, is as follows:

Dargan, Ch. On February 21, 1833, James Fenton executed a mortgage to John Bryce, of a lot in Columbia, to secure a bond given by said Fenton to said Bryce for \$500, dated 21st February, 1833, payable the 1st of January, 1834, and bearing interest from the date. The interest on this debt was paid annually, and with great punctuality, up to 1st July, 1855. About that time Fenton had become insolvent, and on the 4th June, 1855, he made an assignment to Henry Davis of the most of his estate for the payment of his debts, in a certain order or classification therein pre-

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scribed. *Bryce's debt, secured by the mortgage as aforesaid, was embraced in the first class of preferred debts; it was not specifically provided for, but the assignee was directed, out of the proceeds of the sale of the property assigned, to pay, "the several mortgages, judgments and executions now existing and in force against me, according to their legal order and priority."

On or about the 12th February, 1850, Fenton, for the consideration of \$1,200, sold and conveyed to G. S. Bowers the same lot which he had previously bought from and mortgaged to Bryce. He took a bond and mortgage for \$1,000 of the purchase money, \$200 of the same having been paid in cash. This debt was subsequently paid in full, and satisfaction entered 22d October, 1852. Bowers had possession of and lived on the premises from the time of his purchase in February, 1850, for four or five years, and afterwards rented it to his co-defendant, John Stork, until the 11th day of March, 1857, when he sold and conveyed the said lot to the said John Stork in fee, with a covenant of warranty as to the title. Stork, at the date of the filing of the bill, was in possession, and still is.

The mortgage of Fenton to Bryce was duly recorded. No express notice either to

Bowers or Stork was proved, nor is it believed there was any.

This is a bill filed by C. R. Bryce, the Executor of John Bryce, to foreclose the mortgage against Bowers and Stork. The latter is a necessary party, and so, perhaps, is Bowers. The legal representatives of Fenton should also have been made parties to these proceedings. So invariably is this rule observed, and so essentially important is it in many cases, that I doubt the propriety of my going on with the case without Fenton being represented. But as Fenton made an assignment, and died utterly insolvent, I suppose, (but do not know,) that he has no legal representatives. But as the defendants did not plead this matter in abatement, nor interpose an objection in any form on this ground,

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I do not feel *that my duty calls upon me to start the objection, which certainly would have prevailed if it had been made. If a decree for foreclosure should be made, and the land should sell for more than enough to satisfy Bryce's mortgage, the surplus would not belong to Fenton's legal representatives, nor to his assignee—it should go to Stork and Bowers, and they are both parties before the Court. We have, then, all persons before the Court who have, or can have, any interest in the property, and substantial justice can be done. In a case like this, it would be a mere matter of form to make the legal representatives of Fenton parties to the cause.

This case has been referred to the commissioner to report as to the mortgage, and the amount due thereon; also, to report any special matter. In his report, the commissioner states the amount due upon the mortgage. He also reports the evidence as adduced by either party on the questions raised, and recommends that the whole amount due on the mortgage be paid by sale of the mortgaged premises.

The defendants except to the report of the commissioner, on the ground that the lien of the mortgage was waived or lost by the plaintiff's testator:

1. Because the said John Bryce permitted his mortgage to fade away, and perish by lapse of time, so far as the defendants are concerned.

Where there is a debt secured by a mortgage (be it of lands or chattels) which would be subject to the plea of the statute of limitations, or to the presumption of satisfaction arising from the lapse of time, but for promises, payments or other transactions between the mortgagor and mortgagee, keeping the debt alive as between themselves, will the lapse of twenty years protect a subsequent purchaser or mortgagee, affected only with implied notice, from the lien of the first mortgage? That is the question intended to be raised on this exception.

After the lapse of twenty years, the debt

due to Bryce was neither actually paid, nor was it subject to the presumption of satisfaction. Not a dollar of the principal had been

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paid; *but the annually accruing interest was punctually paid up to a short period before the death of both parties. Here is a third party claiming the benefit of a presumption which has been most completely rebutted. This is a doctrine which only applies as between creditor and debtor, and it seems to me absurd and unmeaning to apply it otherwise.

A creditor has a debt secured by a mortgage as to which he is perfectly satisfied with the payment of the interest, or the performance of other conditions which the parties may agree on; he is content to let the principal remain unpaid; twenty years elapse; no presumption of satisfaction can arise as between the mortgagor and mortgagee, because of their agreement. But a third party, who is a subsequent purchaser or mortgagee, steps in and says: Though your debtor cannot claim the benefit of the presumption of satisfaction, I can; you advanced your money on the security of a mortgage which is admitted on all sides to be unpaid. I have laid out my money subsequently in the purchase of the same property, and though in this Court the doctrine prevails, prior in tempore potior est in jure, yet my equity is higher than yours. I purchased without notice of your prior claim, and therefore my claim should be preferred. The colloquy might be supposed to be further extended, by the mortgagee saying: I did give you notice in the way the law prescribes, and in the only way in which it was possible for me to have given you notice. I did not personally know you (as the case may be), or that you, among all the living sons of Adam, contemplated purchasing the lot of land covered by my mortgage: so, proceeding in the way the law directs, and the only possible way, I gave notice to all the world that my mortgage existed; you had the implied notice, which is as strong and effectual where it exists as express notice, and much more easily proved. To this, the only response of the second purchaser would be an admission that he had notice, but he did not know that the debt was unsatisfied. In a case like the present, then, the complaint dwindles down to this: the sec-

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*ond purchaser, knowing of the existence of the mortgage, did not know but that it may have been satisfied. How is such notice to be given? To individuals? That is absurd. In the newspapers? That would be ineffectual. By the public registry? Where is the law which requires a mortgagee to give notice by registry that a mortgage, otherwise outstanding and in force, is not satisfied?

But if the lapse of twenty years, after a bond debt secured by mortgage is due (though kept alive and of force as between mort-

gagor and mortgagee, by payments or acknowledgments), renders such mortgage inoperative, and defeats its lien as to a subsequent purchaser with only constructive notice, still, the facts of this case do not come up to the terms of the proposition. The debt of Fenton to Bryce was due 1st January, 1834. On the 1st January, 1854, it would have been subject to the presumption of satisfaction from the lapse of twenty years, but for the annual payment of the interest. On the 12th February, 1850, Fenton conveys the mortgaged premises to the defendant, Bowers. It wanted, then, nearly four years of the time necessary to create the legal presumption on which the defendant relied. If the doctrine were true, it does not apply in this case.

It is proper for me to state, that I bear in mind the fact, that the legal question raised in this exception is pending before the Court of Errors in Wright and Eaves and others [10 Rich. Eq. 582], and nothing that I have said here is to conclude my judgment when that case shall come up for decision.

2. That said Bryce did not give the defendant notice of his claim of lien on said lot, but stood by and saw him purchase, take possession and hold it for a number of years, without giving such notice.

The language of this exception, I apprehend, is not intended to be taken in its literal sense. There is no pretence that Bryce actually stood by, and saw Bowers purchase, &c. The parties all lived in the same town, and hence it was inferred that Bryce was aware

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of the transaction between *Fenton and Bowers, from the change of possession. But there is no evidence, inferential or other, that Bryce knew the terms on which Bowers held.

3. Because the said Bryce did not take or accept payment of his mortgage out of the money raised and set apart in the hands of Davis for him, by Fenton's deed of assignment, which was fully known and acquiesced in by the said Bryce.

There is controversy about a large portion of the assets assigned. For a great part, they have not yet been realized, and perhaps never will be; there is litigation with the estate of Peay still pending about a large portion of the assets. Bryce was not bound to let go a better security for a worse. To compel him to do so would not be equitable. Besides this, why might not the creditors of Fenton, for whose benefit the assets were assigned, say to Bryce: "you have two liens or resources from which to satisfy your debt; do you resort to your mortgage, under which we have no claim, and leave the assigned effects to us, which is our only resource." What answer could be made to such a demand? This doctrine is never applied, except to the claims of creditors with liens. Bowers and Stork are purchasers, not

creditors of Fenton. If they are creditors at all, they are only simple contract creditors—their claims arising under a breach of the covenant of warranty of title. But they are not claiming under the character of creditors.

4. That the said Bryce, by taking from Fenton a negotiable promissory note for the amount of the mortgage, and giving him further time of payment from the 2d of April, the date of the note, to the end of ninety days thereafter, released and discharged said mortgage.

The facts bearing on this exception are these: On the 2d April, 1855, Fenton made a note to Bryce for \$500, payable at ninety days, which note was endorsed and discounted by Bryce at the Commercial Bank. It was stipulated by Bryce that if this note was paid by Fenton at its maturity, the mortgage should be delivered up to him satisfied.

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There *was no contract that the note should be taken in payment or satisfaction of the mortgage, or that the time of payment should be extended; but simply if, or when, the note was paid, it should operate as a satisfaction of the mortgage. Though it may have been in violation of implied faith, there was nothing in the agreement which would, in law, have prevented Bryce from instituting process for the foreclosure of the mortgage the next day after the note was given. A note, though given for the same debt, is not a satisfaction of a pre-existing bond, or other specialty, until it is paid, unless there be a stipulation to that effect. Such was not the understanding of the parties to this transaction. It would be absurd to suppose a shrewd business man, or any one whose capacity was above that of an idiot, to have given up a debt amply secured by mortgage, for the simple note of hand of his debtor, known to be embarrassed, if not insolvent.

There was nothing in the circumstances which attended this transaction that would operate to the discharge of a surety, if there had been one to the note. But suppose that a surety, had there been one, would have been discharged? What had that to do with the case? Where is the analogy? The counsel for the defendant says, in his argument, that the mortgaged lot is the surety! I can understand how land may be a security, but how it can be a surety, passes my powers of comprehension.

The exceptions to the report are overruled, and the report is confirmed. And it is ordered and decreed that the mortgage be foreclosed, and that the mortgaged premises be sold on the terms recommended by the commissioner in his said report—said sale to take place on the first day of January, 1859.

The defendants appealed:

1. Because the plaintiff should have made the legal representative of James Fenton, deceased, or at least Henry Davis, his as-

signee, a party defendant to his bill and pro-

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ceedings in *this Court, to foreclose his said mortgage. And not having made either the one or the other a party, the Court, according to its usage and practice, will not proceed to a decree in the cause.

2. Because each and every one of the exceptions taken by the defendants to the report of the Commissioner, against the plaintiff's right and equity to foreclose his mortgage on the house and lot in question, was well founded and fully sustained by the pleadings and proofs, and, therefore, should have been sustained by the Court.

Bauskett, for appellant.

De Saussure, contra.

The opinion of the Court was delivered by

WARDLAW, Ch. The bill in this case is simply a bill for foreclosure of a mortgage, and does not seek payment of the debt from the defendants beyond the estate in their possession subject to the plaintiff's lien. The defendants never contracted, in any form, to pay the debt claimed, and it would have been absurd and unjust to pursue them nakedly for this purpose; but they acquired estate with implied notice of an existing lien upon it for satisfaction of plaintiff's demand, and cannot complain of the enforcement of this limited right. In the first ground of appeal, defendants insist that the personal representative of the deceased mortgagor, or, at least, the assignee of his estate, by deed of the mortgagor in his lifetime, should have been made a party defendant. Personalty, in case of land, is the primary fund for payment of debts; and, as Courts of Equity delight to do complete justice, and not by fragments, as first to decree the liability of the heir or alienee of the realty, and then put him by another bill to claim reimbursement out of the personalty, they usually exact, to avoid circuity of action, that in suits concerning the bonds or covenants of one deceased, the executor or administrator, as well as the

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heir, devisee or *alienee, shall be a party. *Knight v. Knight*, 3 P. Wms., 333; *Valk v. Vernon*, 2 Hill Eq. 257; *Drayton v. Marshall*, Rice Eq., 373 [33 Am. Dec. 84]. Yet, Courts of Equity have not acted on this doctrine in bills simply for foreclosure; for, although a mortgage is a debt primarily charged on the personal assets, a mortgagee is not bound to involve himself in an intricate account concerning the personalty of his debtor, and may, at his option, pursue singly his real security, leaving the terre-tenant to his remedies for reimbursement. *Duncombe v. Hansley*, cited by Mr. Cox, 3 P. Wms., 333; *Coop. Eq. Pl.*, 38; *Calv. Part.* 167; *Stor. Eq. Pl.*, 175, 176.

In some of the English cases, and in our own case of *Drayton v. Marshall*, a distinction is intimated as to the necessity of bring-

ing the personal representative before the Court, between bills for foreclosure and bills for the sale of the mortgaged realty. In England, bills for foreclosure are usually brought to quiet the estates of the mortgagees, simply, by barring proceedings of the mortgagors for the equity of redemption; but here, as in the Irish Chancery, bills of foreclosure proceed for the sale of the mortgaged premises. In my judgment, so far as the making of parties is concerned, bills for foreclosure here stand on the same footing as in England. Certainly there is a great difference in procedure between barring the rights of the mortgagor and enforcing payment of the debt from the sale of the mortgaged premises; but the substantial result is identical, as in both instances the lien is enforced. It is precisely similar to the difference of practice as to partition and dower, always specific in England, here commonly by sale or assessment. Whatever may be the form of procedure as to foreclosure, the same propriety exists of exempting the mortgagee from the necessity against his option of intermeddling in the administration of the personality. One having a ready remedy should not be delayed until the equities of all interested in the matter should be adjusted. I expressed these views briefly in the circuit opinion in *Wright v. Eaves*, Ms., December, 1858 [10 Rich. Eq.

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582], and they *were not disapproved by the Court of Errors, although my learned and expert associate, Chancellor Dunkin, did express some preference, that in addition to an administrator de bonis non, who was a party there, representatives of sureties of former administrations of the mortgagor's estate should be made parties in order that complete justice might be done. That was a bill for foreclosure against the alienee of the mortgagor. In *Scott v. Davis*, Ms., Columbia, December, 1856, I, 122 [9 Rich. Eq. 38], the representative was treated as an unnecessary party in a bill for foreclosure, on the principle of the case of *Goodwyn v. State Bank*, 4 Des., 389.

In this particular case it may not be necessary to rely on the general doctrine. The defendants do not demur for lack of parties, and so far from insisting on the necessity of making Fenton's personal representative a party, they, by their averments, help the plaintiff, suggesting that Fenton died insolvent and intestate, and that no person has administered on his estate. This may be well considered as waiving any plea that an executor or administrator of Fenton should have been impleaded by the plaintiff; but in the same connection the defendants substantially insist that the assignee of Fenton should be a party. As to the assignee they cannot be considered as concluded by their

answer. All of us concur in the conclusion that the assignee was not a necessary party, but there is difference among us in the process of reasoning, by which this result is attained. It is proper to avoid, so far as practicable, discussion of matters which may be hereafter litigated. If the plaintiff were in the first class of preferred creditors, whether he accepted or not the terms of the assignment, within the time limited, as the Chancellor supposed, then the defendants might have paid the debt and obtained an assignment of the mortgage entitling themselves to the same preference, or may be now entitled to subrogation to the rights of the mortgagee on payment of the debt, and in this view the defence is, to a great extent, unfructual and fanciful, and should be dis-

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allowed as not formally pleaded. If, *however, the assignment be interpreted as in trust for the payment of such creditors as accepted its terms in proper time, then the plaintiff (or the defendants, if in any event his substitutes,) is not within the protection of the deed of assignment, and the assignee is a stranger, and consequently an unnecessary party. Personally I am not involved in this dilemma, for I believe on general principles that the mortgagee at his option may exclusively pursue his real security. On the other questions submitted, we consider argumentation unnecessary as they are authoritatively settled by the case of *Wright and Eaves*, above referred to, or are in themselves plain.

It is ordered and decreed that the Circuit decree be affirmed and the appeal be dismissed.

JOHNSTON and DUNKIN, CC., concurred.

DUNKIN, Ch. I should have more hesitation as to the propriety of calling in the assignee of James Fenton, if I thought that the mortgage to the plaintiff's testator was protected by the assignment. But, according to the construction which I give to that instrument, the assignee was required only to pay off the existing liens on the property assigned; and for the obvious purpose of enabling him (the assignee) to give a clear title to the purchasers. But the premises mortgaged to Bryce, constituted no part of the assigned estate, and, besides, in the eighth class of creditors, the note, subsequently given by Fenton for the mortgage debt, is specifically provided for; why, if already payable in class No. 1? But, as plaintiff's testator never accepted the terms of the assignment, he would have no claim under this latter provision, and, therefore, no right to which the defendants could be subrogated.

Decree affirmed.

11 Rich. Eq. *52

***MARTHA TOMLINSON and THOMAS TOMLINSON, Jr., v. THOMAS TOMLINSON, Sr., and Others.**

(Columbia. May Term, 1859.)

[Equity ⚡430.]

Circuit decree set aside by the Circuit Court, and rehearing ordered on newly discovered oral testimony.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034-1047; Dec. Dig. ⚡430.]

Before Johnston, Ch., at Chesterfield, February, 1859.

In this case, it is deemed proper to publish the petition and all the affidavits upon which the case was heard.

The petition is as follows:

The State of South Carolina.

To their Honors, the Chancellors of the said State:

The petition of Martha Tomlinson and Thomas Tomlinson, Jr., sheweth that Henry M. Tomlinson, late of Chesterfield district, died intestate on the 1st June, 1855, and administration of his personal estate was granted to your petitioners, who published the usual notice to creditors, and a few days before the expiration of the time limited therein, Thomas Tomlinson, Sr., preferred a claim as holder of a promissory note for \$8,000, signed by W. H. Tomlinson, agent, bearing date July 5th, 1853, payable to the order of the said Henry M. Tomlinson three years after date, and endorsed by him in blank, and required of your petitioners, as administrators of the endorser, payment thereof; that your petitioners had, until then, never known or heard of the existence of any such claim, and from their acquaintance with the business of their intestate, and with the circumstances of all the parties (maker, endorser, and holder,) to said note, were persuaded that the said note and its endorse-

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ment were not *genuine, or not bona fide, and constituted no valid claim against the estate of their intestate, and your petitioners, therefore, refused to pay the said claim; that in consequence of the large claims preferred against the estate, particularly by the said Thomas Tomlinson, Sr., and suits at law instituted by many of the creditors, your petitioners filed their bill in your Honorable Court about the 25th day of November, A. D., 1856, against the said Thomas Tomlinson, Sr., and others, creditors and distributees, praying, among other things, that the creditors of the intestate might be restrained, by injunction, from suing at law, and required to prove their demands in this Court, and that the assets might be marshaled and the estate settled here; that, by an order made at February Term, 1857, the creditors were called in, and the said Thomas Tomlinson, Sr., among others, presented his aforesaid claim; that, impelled by their conviction

aforesaid, your petitioners exerted themselves to the utmost to discover something in relation to this note and its endorsement, the transaction in which it originated, the consideration for making and endorsing of it, the time when, the party from whom, circumstances under which, and consideration for which the said Thomas Tomlinson, Sr., became the holder, but owing to the fact that one of your petitioners is a female, and the other a youth just grown up, and not of age at the death of the said intestate, his father, your petitioners labored under great disadvantages, and were never able to find any person, even among all those, clerks and others, who had been most intimately connected with the intestate and his business, who had ever known or heard of the existence of the said note; that application for information on these subjects was made to the said Thomas Tomlinson, Sr., himself, and also to his son-in-law, Culpepper Wadkins; but the said Thomas Tomlinson, Sr., would not talk on the subject, and seemed studiously to ward off all attempts to get information from him, and the said Culpepper Wadkins either disavowed all knowledge on the sub-

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ject, or would not disclose that he *had any knowledge about it; that, under these circumstances the hearing before the commissioner and before the Circuit Chancellor came on, and your petitioners were necessarily restricted in their resistance to this, as they believe, most unrighteous demand, to a contest about the genuineness of the endorsement and the handwriting of the intestate; that, on this point, the decision of the commissioner and of the Circuit Court has been rendered against your petitioners, establishing the said claim to the extent of \$8,833.22, from which decree your petitioners have brought up their appeal to your Honors, and the same is now pending. Your petitioners further shew, that the intestate and the said W. H. Tomlinson, about the years 1838 to 1843, were partners in mercantile business in the Town of Cheraw; that, after their dissolution, the said William H. Tomlinson continued business as a merchant in his individual name for a short time and the intestate used to endorse for him; that some short time after the dissolution of their partnership, about the terms of which the said William was dissatisfied, he, the said William, declared to a third person, that he then had the intestate's blank endorsement, and, if he did not do what was right, he would use it; that, after that time, the said William was constantly engaged in mercantile business, and used many printed blank promissory notes in his business, of a printed date, subsequent to 1839-40; that after the said claim of the said Thomas Tomlinson, Sr., as holder of the said \$8,000 note, had been presented, the said W. H. Tomlinson, (the maker, under his style of

W. H. Tomlinson, agent,) was asked, on behalf of your petitioners, if he intended to allow the estate of the intestate to pay this amount, to which he replied that he did, and justified himself by reference to the advantage, as he alleged, the intestate had got in their old dissolution; that the said \$8,000 note appears, upon inspection, to have been an old printed blank form made before the year 1840, as the printed figures in the date are 183—; that after the intestate's death,

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at the instigation of *the said William H. Tomlinson, the said Thomas Tomlinson, Sr., brought an action of trover against your petitioners to recover some twelve or more negroes, of which the intestate had had possession for twenty-five years, and had raised many of them from birth, with a view, if successful, by the recovery, to indemnify himself and the said Culpepper Wadkins against certain suretyships for the said W. H. Tomlinson to the Wadesborough bank and elsewhere; and after the claim founded upon the said \$8,000 note had been preferred by the said Thomas Tomlinson, Sr., and the intended suit in trover aforesaid was talked of, the said W. H. Tomlinson said, in reply to the enquiry of a third person, that if there should be a recovery in the trover case, payment of the note would not be required. Your petitioners further shew, that the foregoing facts were known to your petitioners, or to their solicitors, before the hearing of the Circuit Court; some of them, however, having been learned only a short time previously; but your petitioners, though their efforts, under the advice of their solicitors, were directed to this very end, were not able to discover any privity between the said W. H. Tomlinson and the said Thomas Tomlinson, Sr., in the acquisition by the latter of the said promissory note, and the possession thereof, by reason whereof the acts and declarations of the said W. H. Tomlinson could affect the rights of the said Thomas Tomlinson, Sr., as the holder of the said promissory note; that after the decree of the Circuit Court had fixed beyond relief, as it was supposed, the liability of your petitioners' intestate, for the payment of the said note, the said Culpepper Wadkins then disclosed the fact, that long after the death of the said Henry M. Tomlinson, to wit: in the year 1856, the said W. H. Tomlinson delivered the said promissory note to the said Thomas Tomlinson, Sr., as an indemnity to him and the said Culpepper Wadkins against their liability aforesaid, as sureties for the said W. H. Tomlinson to the Bank of Wadesborough and elsewhere; that at

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that time, under those circumstances, *and for such consideration, the said Thomas Tomlinson, Sr., acquired the possession of the said promissory note. And your petitioners further shew, that since the hearing in the Circuit Court a verdict has been rendered for the defendants in a suit in the State Courts

of North Carolina, brought by the Bank of Wadesborough against the said Thomas Tomlinson, Sr., and the said Culpepper Wadkins, to recover one of the debts, against their liability for which the said deposit of the said promissory note was intended as an indemnity; in which suit, however, a new trial has been granted by the Circuit Court.

Your petitioners now charge the facts to be, that the aforesaid endorsement by the intestate, was made upon a printed blank form, shortly after the dissolution of the partnership between the intestate and the said William H. Tomlinson, and designed, according to some cotemporaneous understanding, to be filled up and used by the said W. H. Tomlinson, for his accommodation in his then existing mercantile business; that after its original purpose had failed, or proved unnecessary, it was wrongfully kept in existence by the said W. H. Tomlinson, without the knowledge or consent of the intestate; that after the lapse of more than ten years, and after the authority to fill it up had, if not by mere lapse of time, at least, by the death of the intestate, been revoked, it was fraudulently filled up and put into circulation by the said W. H. Tomlinson, and that the said Thomas Tomlinson, Sr., if not a wilful and active participator in the fraud, did not acquire the property in the said note and become the holder thereof bona fide, and for valuable consideration, but mala fide, and under circumstances of gross negligence, to say the least, and by the aid of the testimony of the said Wadkins, discovered since the Circuit hearing and decree, this chain of facts can be established.

Wherefore your petitioners pray that the said cause, so far as respects the question of the validity of the claim and demand of the said Thomas Tomlinson, Sr., as holder of the

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*aforesaid promissory note, against the estate of the said Henry M. Tomlinson, as endorser, may be sent back to the Circuit Court to be reheard upon such testimony as your petitioners and the said Thomas Tomlinson, Sr., shall be able to adduce, or else that your petitioners may have leave to file a bill in the nature of a bill of review, that the decree of the said Circuit Court upon the said question and upon the liability of the said estate of the intestate by reason of the said endorsement, may be reviewed and reversed or modified, or that your petitioner may have other suitable relief, &c.

Inglis & Inglis,
Solicitors for Petitioners.

The State of South Carolina. }
Chesterfield District. }

Martha Tomlinson and Thomas Tomlinson, Jr., come in person before me and say, on oath, that the facts stated in the foregoing petition are all either known to them personally, or they have been informed of them by others, in whom they have confidence; that so far as those facts are within

their own knowledge, they are true, and so far as their knowledge of them has been derived from the information of others, they believe them to be true.

Martha Tomlinson.

Sworn and subscribed before me, this 30th day of April, A. D., 1858.

John F. Matheson, Notary Public.

Certificate.

We hereby certify that we have examined the foregoing petition, and are of opinion that the new matter alleged to have been disclosed by Wadkins since the Circuit decree, is relevant and material to the issue, and if

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known, would, in *connection with the other facts stated in the petition, have entitled the petitioners to a decree, or, at least, have made a determination in their favor, very probable.

John A. Inglis.

A. C. Spain.

Affidavits in Support of Petition.

The State of South Carolina, }
Chesterfield District. }

Before me, K. T. Morgan, the subscribing officer, comes in person, Edmund J. Waddill, and makes oath, that he, deponent, was well acquainted with the late Henry M. Tomlinson, and also is well acquainted with William H. Tomlinson, a surviving brother; that the two brothers were merchants in partnership in Cheraw, from about 1838 to 1843; that in the year 1845, (as well as deponent can now remember the date,) after the dissolution of their said partnership, the said William H. Tomlinson, in conversation with this deponent, said that his brother Henry had, in the terms of dissolution, got the advantage of him, (William) but that he had in his possession, his (Henry's) blank endorsement, and if he (Henry) did not do what was right, or as he had promised, he (William) would use the said blank endorsement; that after the death of Henry M. Tomlinson, when Thomas Tomlinson, Sr., the father of the two, had preferred against the estate of the said Henry, his claim as endorsee of the \$8,000 note, purporting to be made by W. H. Tomlinson, Agent, in favor of said Henry, and endorsed by the latter in blank, and when there was a rumor of the intended suit in trover, which was afterwards brought by the father against the administrators of Henry, to recover some twelve or more negroes which were in Henry's possession at his death, deponent asked William H. Tomlinson, if the negroes should be recovered by the father, whether the collection of the said

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note of \$8,000 would be *insisted on, and William H. Tomlinson replied that it would not; and further deponent saith not.

E. J. Waddill.

Sworn and subscribed before me, this 30th day of April, A. D., 1858.

K. T. Morgan, Magistrate.

The State of South Carolina, }
Chesterfield District. }

Before me, Kenan T. Morgan, the subscribing officer, comes in person, Culpepper R. Wadkins, who, being duly sworn, deposes—That he was well acquainted with the late Henry M. Tomlinson in his lifetime; and that he has known William H. Tomlinson for twenty-five years past. That he (deponent) is the brother-in-law of the said Henry and William. Deponent saith further, that about the year 1853, he (deponent) became surety for the said William H. Tomlinson in the Bank of Wadesborough, N. C., for a large amount, and that Thomas Tomlinson, Sr., the father of the said William H., was his co-surety therein. That deponent continued after that time to endorse for the said William H. in the Bank of Wadesborough, until about the beginning of the year 1856, when his liabilities on account of his said suretyship amounted to a very large sum, say \$13,000. That some time in the Spring of the year 1856, and about a year after the death of the said Henry M. Tomlinson, deponent, in the course of a conversation had with the said William H. Tomlinson, relative to the liabilities aforesaid, of this deponent and the said Thomas Tomlinson, Sr., as sureties, as aforesaid, for him (the said William H.), asked the said William H. how he was going to redeem his (William's) promise to secure his (William's) father and himself (deponent) in their liabilities incurred as aforesaid on his (William's) behalf, and that the said William H. replied by exhibiting to deponent a note for \$8,000, purporting to have been drawn by the said

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*William H. Tomlinson, under the signature employed by him at that time in the prosecution of his mercantile business—viz.: "W. H. Tomlinson, Ag't"—payable to the order of the said Henry M. Tomlinson, and endorsed in blank by the said Henry M., and saying that he (William H.) would "assign" over the said note to his (William's) father and deponent, to secure them as he had promised. Deponent saith further, that the conversation referred to above was had at the residence of the said Thomas Tomlinson, Sr., the father of the said William H., in Stanly county, N. C.; that the note aforesaid was then in the possession and control of the said William H., and that he (the said William H.) promised deponent to "assign" over the said note for the benefit of deponent and the said Thomas Tomlinson, Sr., before he (the said William) should leave his (William's) father's house. And further deponent saith not.

C. R. Watkins.

Sworn to and subscribed before me, [the word "has" in the fifth line from the top of the first page having been first interlined,] this third day of May, A. D., 1858.

K. T. Morgan, Magistrate.

The State of South Carolina, }
Chesterfield District. }

Thomas Tomlinson, Jr., comes in person before me, and says on oath, that, after the bill was filed by deponent and his mother, Martha Tomlinson, as administrators of the estate of Henry M. Tomlinson, against the creditors and distributees of the said intestate, and after Thomas Tomlinson, Sr., under the order made in the said cause, calling in the creditors to prove their demands, had presented his claim as holder of a promissory note for \$8,000, purporting to be made by W. H. Tomlinson, Ag't, on the 5th July, 1853, and payable to the order of Henry M. Tom-

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linson, three years *after date, and endorsed by the said Henry M. Tomlinson, in blank, and before the hearings had before the commissioner and the Circuit Chancellor, upon the validity of the said claim, deponent made every effort in his power to discover how the said Thomas Tomlinson, Sr., came to be the holder of the said note, and at what time he acquired the possession of the same, but could find no one who had ever heard or known of the existence of it until it was produced as aforesaid, as a claim against the estate of the said Henry M. Tomlinson; that among others, deponent applied to Culpepper R. Watkins—a son-in-law of the said Thomas Tomlinson, Sr., residing quite near to him, and, therefore, supposed by deponent to have some knowledge on the subject—for information as to the time when, the place where, the person from whom, the consideration for which, and the circumstances under which, the said Thomas Tomlinson, Sr., had become the holder of the said note, but the said Watkins disavowed any knowledge about the matter, and left deponent to believe that he could not give the information sought; that within a few days after the adjournment of the Circuit Court, in February last, at which the Chancellor decreed in favor of the said claim of the said Thomas Tomlinson, Sr., establishing the said note as a valid demand against the estate, deponent was on a visit to the said Watkins, at his residence in North Carolina, with a view to get information from him about the matters involved in another suit, pending at law, between the said Thomas Tomlinson, Sr., and the administrators of the said Henry M. Tomlinson, and, in a conversation had with said Watkins, he asked deponent if the "estate" had lost the "note case," and being told in reply that it had, he said that if so he ought to have one-half of the amount, and to deponent's inquiry, "why so?" he said that William H. Tomlinson had given the note in question to his father, the said Thomas Tomlinson, Sr., to be used and applied as an indemnity to the said Thomas and himself (Watkins) against the liability which they

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had jointly *incurred as sureties for the said William to the Bank of Wadesborough and elsewhere, and had promised him (Watkins) so to do; that the said Watkins afterwards wrote to deponent, in reply to a letter referring to the said conversation; that the said William had the said note in his own possession, and shewed it to him (Watkins) in the year 1856, about April, and at that time promised, as aforesaid, and expressed his purpose then forthwith to deposit it with his father for the purpose aforesaid, and that this occurred near to the residence of the said Thomas Tomlinson, Sr. Deponent further says, that he also applied to the said Thomas Tomlinson, Sr., himself, for information as to when, how, and from whom he got the said note, but could get no information from him, as he studiously avoided all conversation with deponent on the subject, and deponent had and could obtain no knowledge about this particular point until after the Circuit decree aforesaid.

Thomas Tomlinson, Jr.

Sworn to and subscribed before me, this 8th day of May, A. D., 1858.

K. T. Morgan, Magistrate.

Affidavits for Respondent.

\$8,000. Cheraw, S. C., July 15th, 1853.

Three years after date, I promise to pay to the order of Henry M. Tomlinson, \$8,000, value received.

(Signed) W. H. Tomlinson, Agent.

Endorsed, H. M. Tomlinson.

The State of North Carolina, }
Stanly County. }

Thomas Tomlinson, Sr., maketh oath, and says, That Henry M. Tomlinson, the intestate in the pleadings men*

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tioned, was, in his lifetime, and at the time of his death, and his estate still is justly and truly indebted to this deponent, in the sum of \$8,000, with interest on the same from the 5th day of July, A. D., 1856, by virtue of his endorsement of the negotiable note above copied; and this deponent further says, that neither he, this deponent, nor any other person, by his order or to his knowledge or belief, for his use hath received the said sum of money or any part thereof, or any security or satisfaction for the same or any part thereof. And this deponent further says that he is aware of no discount to which said note is subject.

Thos. Tomlinson.

Sworn to before me this 18th day of December, A. D., 1857.

Witness my hand and official seal,

[L. S.] William Allen,

Commissioner of Deeds for the State of South Carolina.

South Carolina, }
Chesterfield District. }

I, J. C. Craig, Com'r Equity for said district, do certify that the foregoing is a true and correct copy taken from the original.

Given under my hand and seal of office, this 18th day of November, A. D., 1858.

[Seal.] J. C. Craig, Commissioner.

The State of North Carolina, }
Stanly County. }

Thomas Tomlinson, Sr., comes in person before me, and, after being duly sworn, makes oath, and says, That he never has refused to give any information in regard to the note for \$8,000, which is the subject matter of the appeal in the case above stated, to the administrators, the complainants; nor has he in any way evaded their enquiries with respect to said note. On the contrary,

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he, this deponent, on or about the *10th day of December, A. D., 1857 (the only time when inquiry was made of him on the subject), stated the consideration moving from this deponent for the endorsement of said note, to Thomas Tomlinson, Jr., one of the complainants.

Deponent further says that some time in June, A. D., 1856, deponent sent a message by Martha Tomlinson, one of the complainants, to the said Thomas Tomlinson, Jr., the other complainant, to come up and see him, this deponent, and it might save the estate of Henry M. Tomlinson, his intestate, cost and the administrators trouble. Deponent further says, that, at the time last mentioned, viz: June, 1856, no proceedings had been instituted for the recovery of the said note, and deponent thought some arrangement might be made by which said note could be settled without suit. Deponent further says, that, finding that complainants paid no attention to his request, suit was instituted on said note, to recover from the estate of Henry M. Tomlinson what it justly owed this deponent on account of his endorsement of said note. Deponent further says, that on or about the 10th day of December, 1857, he stated to Thomas Tomlinson, Jr., that deponent had sent him the message aforesaid, and that Thomas Tomlinson, Jr., did not deny having received said message.

Deponent further swears that William H. Tomlinson has not been his agent since the death of the said Henry M. Tomlinson (except for the purpose of making a demand for certain slaves claimed by this deponent), and that said William H. was never authorized by this deponent, to say that if deponent recovered the slaves in the action commenced for their recovery, that the collection of said note would not be insisted on by this deponent.

Deponent further says, that he never knew or heard of the conversation between C. R. Watkins and William H. Tomlinson in re-

gard to the assignment of a note for \$8,000 to protect deponent and said Watkins in their

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suretyship for the *said William H. Tomlinson, mentioned in the affidavit of said Watkins, until a copy of said affidavit was sent to deponent by his solicitors in the case above stated. Thomas Tomlinson, Sr.

Sworn to before me this 21st day of October, 1858.

[L. S.] William Allen,
Commissioner to take the acknowledgments of Deeds, &c., &c., for the State of South Carolina.

The State of North Carolina, }
Stanly County. }

Before me, William Allen, appeared C. R. Watkins, of said County, and, after being duly sworn, says that the object of this affidavit is to explain the one given the third day of May, 1858, before K. T. Morgan, of Chesterfield district, S. C., in the case of the administrators of the late Henry M. Tomlinson, Sr., of Stanly County, N. C., in Equity, the declaration stated in that affidavit concerning the eight thousand dollar note: Thomas Tomlinson, Sr., was not present at the time, and did not hear it.

November 15, 1858.

C. R. Watkins.

William Allen,
Commissioner for the State of South Carolina.

The State of North Carolina, }
Stanly County. }

Before me personally appears C. R. Watkins, who on oath says: That he desires to make further correction to his affidavit made before K. T. Morgan, Esq., on the 3d day of May, A. D. 1858, in the case of Martha Tomlinson and Thomas Tomlinson, Jr., administrators of H. M. Tomlinson, v. Thomas Tomlinson, Sr., and others, by stating that the

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facts detailed *in said affidavit were all made known to the said Thomas Tomlinson, Jr., administrator, as aforesaid, before the reference before the Commissioner in Equity, and that deponent promised to attend said references as a witness, if the said Thomas Tomlinson, Jr., desired it; but never being called upon to do so, he (this deponent) did not attend. Deponent further says on oath, that he did not intend to say in said affidavit that the note therein alluded to was endorsed in blank by the said Henry M., for he does not remember whether such was the fact, nor does he remember the date or the time of maturity of said note. Deponent further says, that not only was Thomas Tomlinson, Sr., not present at the conversation between this deponent and William H. Tomlinson, detailed in said affidavit, but deponent believes that he knew nothing about it at the time, for some time after said conversation deponent asked the said Thomas Tomlinson, Sr., if the said William H. had as-

signed over the said note to secure this deponent and the said Thomas Tomlinson, Sr., from liability, by reason of their suretyship for the said William H., when the said Thomas Tomlinson, Sr., replied that he had not, and nothing that then passed indicated that the said Thomas Tomlinson, Sr., knew of the proposition of the said William H., to assign the said note for the purpose aforesaid. Deponent further says, that the affidavit of the 3d of May, 1858, was made hurriedly, and therefore he finds it necessary to make these corrections.

C. R. Watkins.

Sworn to before me, the 2d day
of February, 1859.

William Allen, [L. S.]

Commissioner for the State of South Carolina.

JOHNSTON, C. It is ordered, that the order made at February Term, 1858, in the

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cause wherein Martha Tomlinson *and Thomas Tomlinson, Jr., are complainants, and Thomas Tomlinson, Sr., Ann Eliza Tomlinson and others, distributees and creditors of Henry M. Tomlinson, deceased, are defendants, in which cause this petition is filed, confirming the report of the commissioner upon the claims against the intestate, Henry M. Tomlinson, proved before him, in so far as the said order establishes the claim of the defendant, Thomas Tomlinson, Sr., as holder of the promissory note of \$8,000, mentioned in the petition, as a valid demand against the estate of the said intestate, be rescinded; and that the said cause so far as the validity of the said claim of the defendant, Thomas Tomlinson, is involved, be set down for a rehearing.

It is further ordered, that the former order of this Court in the said cause, enjoining the creditors of the intestate, Henry M. Tomlinson, from proceeding in their actions at law, be so modified as that the defendant, Thomas Tomlinson, Sr., may proceed to trial and verdict in his action heretofore commenced in the Court of Common Pleas, for Chesterfield district, as alleged endorsee and holder of the aforesaid promissory note of \$8,000, to recover against the present petitioners, as administrators of the estate of Henry M. Tomlinson, upon the liability of the said Henry M., as alleged endorser of the said promissory note—that the said Thomas Tomlinson, Sr., have leave and right to file a declaration in the said action, and the present petitioners, defendants in the said action, be required to plead to the said declaration—that the said parties bring the said action to trial and verdict in the said Court of Common Pleas for Chesterfield district—and when the said action shall be fully disposed of (by appeal, if necessary,) at law, that all further proceedings at law in the said action be suspended, and the said record be brought into this Court for the further order

of this Court touching the same, in conformity to the result attained at law.

The defendant, Thomas Tomlinson, Sr., appealed on the grounds:

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*1. Because the case made by the petition raises a new question, making an entirely new issue, and requiring new depositions.

2. Because the petition bringing forward matter entirely new, and raising an issue not before the Court on the original hearing, should have been accompanied by a bill in the nature of a bill of review.

3. Because the evidence said to have been discovered since the original hearing was not in writing.

4. Because it appeared from the affidavit of the very witness, whose testimony was said to have been discovered after the original hearing, that the said testimony was in fact made known to one of the complainants, Thomas Tomlinson, Jr., before the reference and before the original hearing.

5. Because, as it is respectfully submitted, his Honor erred in ordering an action at law to test the validity of said claim, the case being before him merely on a petition to rehear in the Court of Chancery.

6. Because the testimony said to have been discovered since the original hearing, is not material.

McIver, for appellant.

Inglis, contra.

[Authorities cited: *Huson v. Pickett*, 2 Hill, Ch., 351; *Hunt v. Smith*, 3 Rich. Eq., 541; 6 B. Munro, 340; *Dexter v. Arnold*, 5 Mason, 304; *Durant v. Ashmore*, 2 Rich., 194; *Simpson v. Dawes*, 5 Rich. Eq., 425; 6 Rich. Eq., 364; *Mitf. Eq. Pl.*, 83; *Story, Eq. Pl.*, § 412; 3 *Dan'l Ch. Pr.*, 1624, 1688; *Dogan v. Dubois*, 2 Rich. Eq., 85; *Carson v. Hill*, 1 *McM.*, 76; *Aiken v. Cathcart*, 3 Rich., 133; 3 *Dan'l Ch. Pr.*, 1631; *Story, Eq. Pl.* § 421, 422; 2 *Mad. Ch. Pr.*, 483; *Johnson v. Lewis*, 1 Rich. Eq., 390; 2 *Dan'l Ch. Pr.*, 1624-1630, note 1; 2 *Smith's Pr.*, 49, 32, 34; 2 *Russel R.*, 91; 3 *Eng. Ch. R.*, 44; 1 *Ves.*

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and B., 141; *Rich. Eq. Cas.*, 405; **Perkins v. Lang*, 1 *McC. Ch.*, 30; *Haskell v. Raoul*, 1 *McC. Ch.*, 22, 32; *Huson v. Pickett*, 2 Hill, Ch., 351; *Johnson v. Britton*, *Dud. Eq.*, 28; 5 *Rich. Eq.*, 519; 3 *John's Ch.*, 124.]

The opinion of the Court was delivered by

DUNKIN, Ch. After a careful consideration of the grounds of appeal, this Court is of opinion that the judgment of the Chancellor may be well vindicated upon the facts presented, and is not at variance with any principle heretofore established.

The plaintiffs (the widow and son of Henry M. Tomlinson, deceased,) had filed a bill to marshal the assets of their intestate's estate. Among the claims presented, under the order of February, 1857, was that of the defendant, Thomas Tomlinson, Sr., (the father of the

intestate.) for \$8,000. For reasons stated in the petition, the plaintiffs were greatly surprised at this demand, and resisted the payment both before the commissioner, and in the Circuit Court. Their defence was, that the signature of the intestate to the endorsement was not genuine. Much evidence was offered, but the commissioner concluded that the genuineness of the handwriting was sustained by the preponderance of testimony, and this conclusion was sanctioned by the presiding Chancellor, February, 1858. An appeal was taken from this decision, and pending the appeal, to wit: in April, 1858, this petition for rehearing was filed. The application was at first addressed to this Court; but in conformity with the decision of *Simpson v. Downs*, 5 Rich. Eq., 422, it was directed to be made to the Circuit Court.

It will be perceived, that the ground upon which the petitioners rely, is the discovery of a new fact, constituting in itself a separate and independent defence, distinct from the defence taken at the original hearing, of which the plaintiffs were then ignorant; and the evidence of which has come to their knowledge since the hearing. If, from the affidavits submitted to him, the Chancellor

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conceived that the defence *was material—that a reasonable foundation was raised for further inquiry into the fact; and was furthermore satisfied, that the evidence was not only unknown to the petitioners at the former hearing, but that their ignorance was not in consequence of a want of due diligence on their part, his direction for rehearing was properly granted. The material fact, on which the petitioners press their claim, is, that the endorsement, which is the foundation of the defendant's demand, was an accommodation endorsement of the intestate on a note of William H. Tomlinson, and left in the possession of the latter, many years since—that it had never been used or negotiated by the said W. H. Tomlinson, in the lifetime of the intestate, but was still in his possession as late as 1856, some twelve months after the intestate's death, and that the note was at, or about, that time, transferred, or assigned, or delivered, by W. H. Tomlinson to the defendant, Thomas Tomlinson, Sr., for the purpose of indemnifying him and his son-in-law, Culpepper Watkins, on account of their suretyship for the said W. H. Tomlinson, in the Bank of Wadesborough. If these facts be susceptible of proof, it is scarcely necessary to say that they constitute a new and material element in the defence of the petitioners. As to the existence of the fact, to wit: that the note was in possession of the maker, W. H. Tomlinson, after the death of the intestate; and that it was set on foot subsequently by him, the affidavit of Culpepper R. Watkins, 3 May, 1858, is very distinct; nor is this statement materially affected by his subsequent affidavits of November,

1858, and February, 1859. But, after the petition had been filed, and after the defendant, Thomas Tomlinson, Sr., had been put in possession of the affidavit of C. R. Watkins, of 3 May, 1858, to wit: on 21 October, 1858, he also makes an affidavit in reply. It is very material to observe that, although this affidavit is prepared with great care and caution, and, upon subordinate and collateral matters, is very full and positive, the affiant, in no part, undertakes to traverse the impor-

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tant allegation, *that the note was set on foot by Wm. H. Tomlinson, and was received by him, the defendant, subsequent to the death of the intestate. The apparent reticence of the defendant in reference to this charge may well have influenced the judgment of the Chancellor in giving leave for further inquiry; and, notwithstanding the affidavits submitted on the part of the defence, the Court is satisfied with the conclusion of the Chancellor, that the evidence was not such as the plaintiffs could, under the circumstances, with due diligence, have procured prior to the original hearing.

Then is the objection well taken, that in order to warrant a rehearing, the after-discovered evidence must be in writing? The appellant is certainly sustained by expressions of opinion on the part of more than one Chancellor in some of our reported cases, but we are not aware of any case in which the abstract proposition has been involved and decided. None such has been adduced. The Court recognizes, fully, not only the encouragement to protracted litigation, but the danger of perjury, in permitting an unsuccessful party to bolster up a defective case by suppletory proof, and the Court has no disposition to encounter such hazard. But we think the distinction is accurately stated by Chancellor Harper, in *Cantey v. Blair*, 1 Rich. Eq., 43. "When a party comes into this Court on the ground of newly-discovered evidence, he must shew some tangible and substantial fact, constituting, of itself, a defence, of which the evidence had come to his knowledge since the trial; not particles of testimony, as they are called, or cumulative testimony," &c. And this is sustained by the instructive case of *Baker v. Whiting*, 1 Story C. C. Rep., 218, in which Judge Story says: "The general rule is, not to allow a rehearing upon new-discovered evidence, which is merely cumulative, to the litigated facts already in issue." With this qualification, and for such purpose, we are of opinion that newly-discovered evidence, though oral, may serve as the foundation of an application for rehearing. In this case, the evidence

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pointed to a new *fact, constituting a distinct ground of defence, and was strictly within the distinction thus recognized. The effect of the order of the Circuit Court is not to adjudicate the rights of the parties,

but to remit them to the ordinary and appropriate tribunal for inquiry and determination.

It is ordered and decreed that the appeal be dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

II Rich. Eq. *73

*ROBERT C. GILLAM v. JOSEPH CALDWELL and Others, Executors J. P. Caldwell.

SAME v. SAME.

(Columbia. May Term, 1859.)

[Wills \S 20.]

The testator devised and bequeathed his estate, real and personal, to his executors, in trust, for the sole and separate use of his two daughters, each to take one-half for life, with remainder to her issue, and should one die without leaving issue her surviving, then her share to the surviving daughter for life, with remainder to her issue; "but in the event that both of my daughters should die without leaving issue surviving, then and in that case," he devised and bequeathed his whole estate, real and personal, after some inconsiderable pecuniary legacies, to his brothers and sisters. The two daughters both died unmarried and without issue. *Held*, that the limitation to the brothers and sisters of the testator was valid.

[Ed. Note.—Cited in *Williams v. Kibler*, 10 S. C. 425, 426.

For other cases, see Wills, Cent. Dig. \S 47; Dec. Dig. \S 20.]

[Wills \S 830.]

The will containing no provision for the payment of debts—*held*, that they were chargeable on the corpus of the estate, and not exclusively on the income to which the daughters, as tenants for life, were entitled.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 2139, 2150; Dec. Dig. \S 830.]

[Executors and Administrators \S 271.]

Where a testator gives no direction as to the fund out of which his debts should be paid, they are, as between tenant for life and remaindermen of the estate, chargeable not upon the income, but upon the corpus of the estate as it existed at the death of the testator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. \S 1045; Dec. Dig. \S 271.]

Before Johnston, Ch., at Newberry, July, 1858.

J. P. Caldwell died in October, 1848, leaving a last will and testament, of which the following is a copy:

I, James P. Caldwell, of the District of Newberry, in the State aforesaid, do make the following disposition of my estate, to take effect at my death, as and for my last will and testament, viz:

First. It is my will and desire that my executors, hereinafter named, shall sell my

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plantation lying on Indian creek, *commonly called the Gracy Place, and containing about five hundred and fifty acres, (more or less,) if in their opinion they can obtain a reason-

able price for the same; but if a reasonable price cannot, in their opinion, be obtained for the said tract of land, then the same shall be retained by my executors for the benefit of my estate, until the general division of my estate shall take place between my two daughters, as hereinafter directed.

Second. I also authorize and empower my executors to sell my tract of land, called the Ragland tract, containing about thirty-three acres. Also, another tract of land owned by me, lying adjoining lands of William Prize, Burder Boozer, and others, and supposed to contain between one hundred and fifty and one hundred and sixty acres. Also, another tract of land owned by me, called the John Hall tract, and supposed to contain thirty-five or forty acres, bounded at this time by lands of Thomas Crosson and James Hogg. Also, one other tract of land owned by me, supposed to contain about one hundred and thirty acres, bounded at present by lands of Allen Gibson, James Hogg, Patrick Martin, and others. It is not my intention by this clause to direct my executors positively to sell the farm tracts of land in this clause mentioned, but my intention is to leave it to the judgment and discretion of my said executors to sell the same, or any one or more of them, should it in their opinion be conducive to the benefit of my estate; and should any one, or all of the said tracts of land in this clause mentioned remain unsold by executors at the general division of my estate, then such tract or tracts, so remaining unsold, shall be disposed of as hereinafter directed.

Third. It is my will and desire that the stock of merchandise in my store, at the time of my death, shall be retailed out under the direction of my executors, as heretofore, until the stock shall become so reduced that the profits will not defray the expenses of a

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retail clerk to attend to the business, *at which time my executors may sell the remaining stock of goods at public auction.

Fourth. I give, devise and bequeath to my executors, hereinafter named, the whole rest and residue of my estate, both real and personal, including all my bank and railroad stock, and all debts of every description that may be owing to me at my death, together with the proceeds of the different tracts of land mentioned in the first and second clauses of this will, should the said lands or any part of them be sold, but if sales of the said lands in the said first and second clauses of this will cannot be effected on the terms prescribed, then I give and devise the said lands, or such as may remain unsold, to my said executors, together with the proceeds of any other property, which may be hereinafter directed or authorized to be sold, in trust to and for the following uses and purposes, viz:

The one-half thereof for the sole and separate use and benefit of my daughter, Jane Harriet Caldwell, for and during the term of her natural life, and, at her death, I give, devise and bequeath the said one-half to the issue of her body, absolutely and forever, to be equally divided between them if all living, but if not, the child, or children of a deceased child, shall take among them the share which the parent would have been entitled to if living; and the remaining half of my estate for the sole and separate use and benefit of my daughter, Helen Carew Caldwell, for and during the term of her natural life, and, at her death, I give, devise and bequeath the said last-mentioned one-half of my estate to the issue of her body, absolutely, to be equally divided between them if all living, but if not, the child, or children of a deceased child, shall take amongst them the share which the parent would have been entitled to if living; but if either one of my said two daughters should die without leaving issue her surviving, then, and in that case, I give, devise and bequeath the share in this will given to such daughter, so dying without issue, to my said

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executors, in *trust for the sole and separate use and benefit of the survivor of the said two daughters during her natural life, and, at her death, I give, devise and bequeath the same absolutely and forever to her issue, share and share alike, the child or children of a deceased child, if any, taking among them the share to which the parent would have been entitled if living.

Fifth. But in the event that both of my daughters, above-named, should die without leaving issue surviving, then, and in that case, I give and bequeath out of my estate the sum of four hundred dollars to Mary Ann Glenn and her children; to Harriet Reid and her children, I give the like sum of four hundred dollars; to Rebecca Logan and her children, I give the like sum of four hundred dollars; and to Dr. Joseph Chapman and his children, I give the like sum of four hundred dollars, all absolutely and forever; and, upon the same contingency, I give to the three children of Richard S. Brown, deceased, viz: James L., Sims E., and Martha Brown, each the sums of one hundred dollars, absolutely and forever.

Sixth. And upon the happening of the contingency in the last clause above alluded to, viz: the death of both of my daughters without leaving issue, then, and in that case, I give devise and bequeath the whole of my estate, both real and personal, after deducting the pecuniary legacies in the fifth clause above specified, to my brothers and sisters, to be equally divided between them, share and share alike, absolutely and forever; but should any of my brothers or sisters die before such division shall take place, then the child, or children of such deceased brother or sister, shall take among them the share

which their parent would have been entitled to if living.

Seventh. It is my will and desire that the estate given to my executors, in trust for the uses and purposes in this will specified, shall continue under the control, management and direction of my said executors, until my said daughters shall respectively attain the

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age of twenty-one years or marry, at *which time my said daughters shall have the use, benefit and enjoyment, and possession of all the property and estate which they may be respectively entitled to for life under this will; the legal estate or legal right to the same, however, remaining in my executors during their lives as aforesaid.

Eighth. Should any of the slaves belonging to my estate become so turbulent and unruly as to become difficult of government, either whilst they are in the possession of my executors, or after they shall have been delivered into the possession of either of my daughters, or should the situation of my estate require more funds than my executors may be able to realize from the debts due to my estate, and from the sales of property herein authorized, (provided such necessity for additional funds shall occur whilst said slaves are in the possession of my executors,) in either case I authorize my executors to sell such of my slaves as may become unruly as aforesaid, or to sell a number sufficient to raise such additional funds as may be absolutely necessary for the use of my estate, provided that my executors shall be restricted to the sale of old negroes, in either of the events contemplated in this clause, and shall not be at liberty to sell off young slaves.

Ninth. It is my will and desire that my sister-in-law, Rebecca Logan, have the care, management, control and keeping of my two daughters, Jane Harriet Caldwell and Helen Carew Caldwell, for two years from the date of this will; and, at the expiration of that time, it is my will that my said two daughters shall be sent to the female school in Salem, in North Carolina, and kept at that school for four years each.

Tenth. I constitute and appoint my brother, Joseph Caldwell, and my brother-in-law William W. McMorries, executors of this my last will and testament. In witness whereof, I have hereunto set my hand and seal, this twenty-ninth day of September, one thousand eight hundred and forty-eight, and in the seventy-third year of American Independence.

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*The bill, which was against the executors named in the will, stated that Jane H. Caldwell, one of the daughters of the testator, died on the — day of January, 1855, intestate, unmarried, under the age of twenty-one years, and without issue: That Helen C. Caldwell, the other daughter of the testator, died on the 2d day of July, 1856, intestate, unmarried, under the age of twenty-one

years, and without issue: That letters of administration on the estate of these two daughters have been granted to the complainant, R. C. Gillam. In the one case, the complainant claimed that as administrator of Jane H. Caldwell, he was entitled to an account of one-half of the personal estate of the testator, and to one-half of the rents and profits of the real and personal estate, from testator's death to the death of the said Jane H. Caldwell. In the other case, the complainant claimed that as administrator of Helen C. Caldwell, he was entitled to one-half of the personal estate of the testator; to one-half of the rents and profits of the real and personal estate, from the death of the testator to the death of the said Jane H., and to the whole rents and profits of the real and personal estate of the testator, from the death of Jane H. up to the time of the final settlement. The answers of the defendants insisted that the whole corpus and income of the testator's estate passed over to the brothers and sisters of the testator, upon the death of Helen C. Caldwell, the last surviving daughter.

Johnston, Ch. These cases were heard together: On hearing the bills and answers in these cases, and the argument of counsel, it is adjudged and decreed, that the limitations in the will of James P. Caldwell, deceased, to the survivor of his two daughters, Jane H. and Helen C., and to testator's brothers and sisters are good, and that the two daughters, respectively, took life estates, both in the personality and real estate of testator: That the rents and profits of said life estates, vested in the daughters, and became

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transmissible, *and their respective administrators are entitled to an account of the same.

It is, therefore, ordered that the commissioner do take an account of the rents and profits to which the said Jane H. and Helen C. were respectively entitled; and that in taking said account, the corpus of the personal estate of the testator be charged primarily with the payment of debts, but not in such manner as to disturb the actual profits, the realty and personality having been kept together, and that the rents and profits be chargeable with the support, maintenance, and education of the daughters.

It is further ordered, that the commissioner do take an account of testator's guardianship of his two daughters; and if, upon said accounting, it should appear that the balance due by the executors exceeds the amount paid into Court, they are to be charged with the excess, and if the amount so paid should exceed said balance, they are to have a credit for the excess.

The complainant appealed from so much of the decree as decides that the limitation over of the real and personal estate to the brothers and sisters of the testator is good, and now moved this Court to reverse the same.

The defendants appealed from so much of the decree as directs that the debts of the testator should be charged upon the corpus of the estate, and that the defendants, as executors, account to the plaintiff for the rents and profits, on the grounds:

1. Because his Honor erred in directing that the corpus of the testator's estate should be charged with his debts, when it is respectfully submitted that the debts were properly paid by the executors out of the increase, instead of breaking in on the capital of the estate; there being no portion directed in the will as to the payment of the debts, and his daughters equally entitled to both income and capital.

2. Because his Honor erred in directing the

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debts to be *paid out of the body of the estate, when it is respectfully submitted, that from a fair construction of the whole will, it is evident it was the intention of the testator to keep his whole estate together, for the purpose of paying his debts and defraying the expenses of his children's education, and also to accumulate for their benefit, but not to be enjoyed until their marriage, or attaining full age, and the executors have so managed the estate as to carry out that intention of the testator to the fullest extent.

Wilson, for complainant.

Garlington, Fair, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The plaintiff's appeal appears to be met by the case of *McCorkle v. Black*, (7 Rich. Eq., 407;) and, as counsel have not attempted to distinguish between this case and that, I shall say no more on that ground of appeal.

The principal controversy has been upon the appeal of the defendants.

The effect of the will is to give a life estate to the testator's daughters, (one-half to each,) in the body of the estate;—which, necessarily, vested in them the income attached to the estate given, during its continuance in them. In certain contingencies the remainder is given to their issue, as purchasers, or to the brothers and sisters of the testator. The daughters,—being only tenants for life,—have no interest, whatever, in the remainder given to their issue, more than in that which is given to the brothers and sisters, or more than if it had been given to entire strangers. The life estates and remainders are entirely distinct interests; and the owners of both are equally entitled to the full benefit of what is given them; and to the protection of the law for its enjoyment, undisturbed and undiminished by the claims of each other. In other words, as between

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the daughters, in this case, and *the remaindermen, the same rule must prevail which obtains in ordinary cases between life-tenant and remainderman.

I may observe, by the way, that life estates are so much favored, that in certain cases, by construction of the statute of 1789, the life-tenant's estate is protracted to the end of the year in which he may happen to die, and the income of that year added to his estate. *Leverett v. Leverett*, 2 McC. Eq., 84; and see *Stock v. Parker*, Id., 376.

The testator having given, in this case, no direction respecting his debts, the question is raised whether they are dischargeable out of the income, which was the sole interest the daughters had; or out of the corpus of the estate, so as to throw the burden equitably on all parties, remaindermen as well as life-tenants.

In *McCaw v. Blewit*, 2 McC. Eq., 90, 91, a line of decision was taken up, in relation to intestate estates, which has been followed ever since. In that case it was held that the valuation of advancements, with a view to partition, must be referred to the time of the intestate's death. This was necessary to ascertain the exact amount of each distributee's share, which fell to him at the same time.

In *Morton v. Caldwell*, 3 Strob. Eq., 161, the same principle was applied to the debts of the intestate: and it appears to me that it would be difficult to set aside the reasoning in that case, going to shew that the creditor's interest on the one hand, and on the other hand the right of distributees, attach on the assets as then existing. Id., 164, et seq.

The same conclusion, upon principle, must apply, as respects debts, in cases of testacy; and, indeed, it is remarked in *Duncan v. Tobin*, *Dudley Eq.*, 165, that, substantially, and equitably, the creditors of a testator's estate, own a portion of the estate proportioned to their claims at testator's death, and the residue only belongs to the legatees.

Bearing this principle in mind, let us endeavor to apply it, as it must operate between life-tenant and remainderman. The rule as between such parties, arising from

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debts of the *testator, is well stated in *Warley v. Warley*, *Bail. Eq.*, 398, to the effect, that the life-tenant must keep down the interest:—and, if the debts are to be paid, such part of the estate as is necessary for the purpose,—or, if indivisible, the whole, must be sold, and the surplus, after paying debts, should be invested to the uses of the will. (See, also, what is said, on the same subject, in *Duncan v. Tobin*, *supra*.)

It has been urged that a prudent man would pay his debts out of the income rather than the corpus of his estate: and the same course should be pursued by his executor. I merely ask, does general experience prove that those who prefer to procrastinate and pay out of income are really prudent? Would prudent men generally give such a direction in an exigency such as death? And would it do to depend on ordinary executors

to pursue such a course? But it is sufficient for this case to say that the testator has given no such direction: and the ordinary rule must prevail.

I regard this question as settled, in principle, by the case of *Duncan v. Tobin*. The only apparent distinction between this case and that, is, that in that case the income alone is the subject of the express gift for life, by the testator; whereas in this, the corpus is given for life, leaving the income to accrue as the necessary consequence. But it is not easy to perceive why the benefits actually conferred by the will should be less or more protected on account of the mere form in which they are conferred.

It is ordered, that the decree be affirmed, and the appeals dismissed.

DUNKIN and WARDLAW, CC., concurred.
Decree affirmed.

11 Rich. Eq. *83

*ALLEN KEITH, JR. v. THE EXECUTORS OF WILLIAM L. KEITH.

(Columbia. May Term, 1859.)

[*Bills and Notes* ¶32.]

A promissory note, drawn payable to the drawer or bearer, is void at law as against the drawer, but in Equity the holder may be entitled to recover. (a)

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 46; Dec. Dig. ¶32.]

Before Wardlaw, Ch., at Pickens, June, 1858.

Petition to recover the amount of a promissory note, given by the testator, William L. Keith, to the plaintiff, in place of another note which he had given him for money loaned. The following is a copy of the prom-

(a) With deference, it is submitted, that the cases cited do not, other authorities being considered, fully sustain the decision. In *Glenn v. Sims*, the instrument held void at law was a sealed note, and in *Devore v. Munday*, it was ruled that the instrument sued on was valid. The Judge, delivering the opinion of the Court, in *Devore v. Munday*, does say, that a promissory note payable to the drawer or bearer, would be void, but this was said obiter, and no authority, except *Glenn v. Sims*, is cited in support of the dictum. The law in relation to negotiable instruments contains principles very different from those affecting the validity of sealed instruments. It is not very unusual for merchants to draw bills, payable to their own order, and then transfer them by endorsement, and it is common for banks to take checks, payable to the drawer or bearer, when the drawer comes to receive his own funds. But the authorities would seem to be very strong. In *Chit. Jun.*, on Bills, at page 7, it is laid down as familiar law, that "The bill may be made payable to the drawer or to a third person. It is not essential that either should be named, provided the bill be made payable to the order of the drawer (when in effect it is payable to him) or to bearer," and at page 22, it is said, these observations "are equally applicable to promissory notes." To the same effect, see *Story on Prom. Notes*, § 34, 36, 39; *Chit. on Bills*, 83; *Byles on Bills*, 5, and *Amer. Notes*.

issory note, the amount of which the plaintiff now claimed:

"One day after date, I promise to pay W. L. Keith or bearer, two hundred and nine dollars and fifty-five cents, for value received. This 27th March, 1854. W. L. Keith."

His Honor decreed for the plaintiff.

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*The defendants appealed, and now moved this Court to reverse the decree.

Harrison, for appellants, cited Devore v. Munday, 5 Strob., 15; Tuten v. Ryan, 1 Sp., 240.

Reed, contra, cited Glenn v. Caldwell, 4 Rich. Eq., 168.

The opinion of the Court was delivered by

DUNKIN, Ch. In 1849 or 1850, the petitioner loaned to the late William L. Keith the sum of \$200, for which he gave him his promissory note, payable with interest. The note being unpaid and nearly out of date, the petitioner, in March, 1854, sent his brother to the maker for the purpose of obtaining payment, or procuring from him a renewal of the note. William L. Keith, on this application, gave to the agent of the petitioner a new note, bearing date 27th March, 1854, for \$209.55, payable, with interest, one day after date, to the said William L. Keith, or bearer. Upon receiving this note, the plaintiff's agent delivered up to the said William L. Keith the original note. William L. Keith died in 1856; and the defendants are executors of his will. The note remaining unpaid, and the plaintiff, being advised that, in consequence of the form of the note, he could maintain no action at law, filed this petition to obtain payment, and a decree was made accordingly.

From this judgment the defendants appealed on the grounds:

1. That the note 27th March, 1854, was void in law.

2. That the plaintiff has a plain and adequate remedy at law, if entitled to aid in any jurisdiction.

The first proposition, has the authority of Glenn v. Sims, 1 Rich., 34 [42 Am. Dec. 405], which was also recognized in Devore v. Mundy, 4 Strob., 15, where it was ruled that, on a promissory note, payable to the maker or bearer, the holder could maintain no action at law against the maker. But, in the

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principal case, *(Glenn v. Sims,) the Court, after adverting to the reason of the rule, proceed to say that "in all such cases the proper relief is administered by the Court of Equity, which has power to proceed upon the original contract; while this Court is confined to the written form to which such contract has been reduced." Accordingly, upon application to the Court of Equity, ample relief was afforded to the plaintiff, as will be seen

in the report of the case under the title Glenn v. Caldwell, 4 Rich. Eq., 168.

It is ordered and adjudged that the decree of the Circuit Court be affirmed, and the appeal dismissed.

JOHNSTON and WARDLAW, CC., concurred.

Appeal dismissed.

II Rich. Eq. *86

*JANE E. REES and MAGDALINE REES,
By Next Friend, v. WILSON
WATIES REES.

(Columbia. May Term, 1859.)

[Wills ⚡77.]

A paper writing by a mother, saying, "I wish all I possess in this world to belong to my dear son W., and his heirs forever, both personal and real; and everything in my press and wardrobe to my dear sister M., and to take all she wishes of my things; my diamond ring and little watch to K.; my large watch (that was my dear son's) to my grandson J." Held to be testamentary and void, for want of attestation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 197; Dec. Dig. ⚡77.]

[Descent and Distribution ⚡97.]

The provision in the Act of 1791, in relation to advancements, applies as well to gifts made by a mother as to gifts made by a father.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 397; Dec. Dig. ⚡97.]

[Descent and Distribution ⚡105.]

Where a parent having a son, and a grandson, issue of a deceased child, makes a gift to the son, it will be treated as an advancement in favor of the grand-son.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 398–401; Dec. Dig. ⚡105.]

[Descent and Distribution ⚡99.]

Where a parent holds a bond against her son, and destroys the bond, intending to discharge the debt, it will be an advancement to the amount of the bond.

[Ed. Note.—Cited in Ex parte Glenn, 20 S. C. 70.

For other cases, see Descent and Distribution, Cent. Dig. § 409; Dec. Dig. ⚡99.]

[Descent and Distribution ⚡98.]

Whether property given by a parent to her son shall be considered an advancement, is not a question of intention—no matter what the parent intended, if she leaves no will, it will be considered an advancement, if otherwise proper to be so considered.

[Ed. Note.—Cited in Rickenbacker v. Zimmerman, 10 S. C. 121; Hammett v. Hammett, 38 S. C. 63, 16 S. E. 293, 839; Heyward v. Middleton, 65 S. C. 498, 43 S. E. 956.

For other cases, see Descent and Distribution, Cent. Dig. § 402; Dec. Dig. ⚡98.]

Before Dunkin, Ch., at Sumter, June, 1858.

The decree of his Honor, the Circuit Chancellor, is as follows:

Dunkin, Ch. Orlando S. Rees departed this life in April, 1852, intestate. His heirs-at-law and distributees were his widow, Mrs. Catharine Rees, and his two sons, Wm. James Rees, and Wilson Waties Rees, the

defendant—the last named having become administrator. Early in July, of the same year, Wm. James Rees also died, leaving the plaintiff, Jane E. Rees, his widow, and her co-plaintiff, Magdaline Rees, his only child. By his will he had devised and bequeathed his whole estate to his widow. Soon after the decease of Orlando S. Rees, and probably

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in May or June of that year, Mrs. Catharine Rees, his widow, went to reside with her son, W. Waties Rees, the defendant, with whom she continued to reside until her own death. Prior to 24th January, 1853, a partition was made of the estate, real and personal, of Orlando S. Rees, deceased, among the parties above entitled to the same. On the day last mentioned, the parties executed a formal instrument, confirming the partition, and making a settlement of the estate. In the partition of the real estate, a tract of some one thousand nine hundred and eighty-two acres was allotted to Mrs. Catharine Rees and the defendant, to be held in common. The slaves were allotted to each in severalty. The field negroes of Mrs. C. Rees worked in common with those of her son, and the house servants were employed in domestic duties. The appraised value of Mrs. C. Rees' negroes was \$8,926. On the 17th December, 1854, she sold a portion of these slaves to her son, the defendant, for \$5,851, (a value fixed by appraisers, called in for the purpose,) and took his bond for the purchase money. On the 22d January, 1855, Mrs. Catharine Rees died intestate, and letters of administration on her estate have been granted to the plaintiff, Jane E. Rees. Her heirs-at-law and distributees are her son, the defendant, and Magdaline Rees, an infant, the plaintiff, being an only child of William J. Rees, who pre-deceased his mother, the intestate. These proceedings were instituted 26th April, 1858. The prayer of the bill is, among other things, for an account of the estate, real and personal, of the intestate, and for a partition and settlement of the same. In reference to the real estate, no doubt can exist as to the right of the infant plaintiff to one moiety of the intestate's interest. But the defendant submits, in his answer, that her interest was not a full moiety of the one thousand nine hundred and eighty-two acres, and he resists any accounts for rents and profits, alleging that he cultivated no more than his proportion. No account is sought prior to the death of the intestate. But, on these matters of the answer, proof must be made before the

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commissioner to whom the subject is referred. The bill states, that for some years prior to the decease of the intestate, her son, the defendant, was her confidential agent, and had the management of her affairs, and at her decease her personal estate remained in his possession. The answer of the defendant is full and explicit. He says, that after his mother sold her own residence, "she re-

moved to his house, and from that time his mother and his family lived in common at his residence, which had been given him by his father, and all the negroes were on his plantation, and under his control. He cultivated a portion of the one thousand nine hundred and eighty-two acres, &c., and he provided for all the expenses of the household."

He admits the possession of the negroes after his mother's death, but says "he knows of no other chattels belonging to the intestate, except said negroes, the contents of her wardrobe, and such articles of value as she made gifts of, in manner thereafter stated." He mentions, that after the death of the intestate, he paid debts of hers to the amount of about \$300. In reference to his bond of \$5,851, he says, "he never expected to pay the principal, for that it was understood between his mother and himself that he should punctually pay her the interest, and she would not exact the principal; and he is informed that she directed the bond to be destroyed, or given up to him, but that he never had possession of it."

The defendant further states, that after the decease of his mother, he retained possession of all her personal property, except the gifts, of which a memorandum had been made, and which were in custody of his aunt; and the defendant submits whether, under the state of facts, (which he recapitulates,) he is bound to deliver the property to the administratrix. His answer thus states these facts on which he relies: "Defendant avers that his mother repeatedly told him that what she had would be his, and his only, and he was informed, and believes, that on one

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occasion when the making of a will was suggested by a friend, and declined, and on another occasion, in the fall before her death, she called upon her sister to bear witness that she meant this defendant to keep all her property." The defendant then adverts to a paper prepared by the witness, Miss Mary Waties, on the day before the decease of the intestate, to wit: 21st January, 1855, and signed by the intestate. The paper is in these words: "I wish all I possess in this world to belong to my dear son, W. W. Rees, and his heirs, forever, both personal and real; and everything in my press and wardrobe to my dear sister, Mary Waties, and to take all she wishes of my things; my diamond ring and little watch to Kate Waties; my large watch, that was my dear son's to my grand-son, William James Rees. January 21st, 1855. (Signed) C. Rees." In reference to this paper, Miss Waties says: "The day before her death, she spoke to me of some of her wishes as to the disposition of some of her property, and I wrote down her wishes as she expressed them—in substance, the same as the paper set out in the answer. She signed that paper. In reference to the bequest to her son, Waties, (the defendant,) she said at the time, 'But what is the use of

'saying that, for everything is his?' While these wishes were being expressed, I asked her if she did not wish to leave something to her grand-child, the daughter of her son, William. She replied, 'Yes,' and designated a desk, which was in the room, but added, 'You can give her that.'" The witness afterwards stated that all the articles specifically mentioned in the paper were in her room, in her wardrobe, desk, &c., of which the witness had the keys. The intestate told her to give the paper to the defendant. The answer of the defendant, the entire testimony of Miss Waties, and the acts of the parties, present the circumstances, upon which the defendant relies to establish a gift of the slaves by the intestate to himself. Putting aside, for the present, the paper, 21st January, 1855, the evidence of gift depends on the declarations of the intestate, as proved by Miss Waties.

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*Such declarations, especially as between parent and child, may be very significant and positive, or they may be wholly equivocal. In *Murdoch v. McDowell*, 1 N. & McC. R., 237 [9 Am. Dec. 684], Judge Nott says: "The consummation of every parol gift is delivery. There must be an actual transmutation of possession and property, and the real question in all such cases is, whether the donor has parted with his dominion over it." The repeated declarations of the intestate to the witness were, that "all she had was Waties'." In speaking to the witness on the above subject, that of everything being Waties', she several times said to her, "You can bear witness to that." Both before and after these declarations, (and they were made in various forms,) the negroes were in the field, or about the house, as they had been, from the time of the removal of the intestate to the residence of her son. Do these declarations furnish evidence of transmutation of possession and property in the slaves, from the intestate to her son? Do they afford evidence that she had already parted with her dominion over them, or was it only another mode of expressing what her son says she repeatedly told himself, "that what she had would be his, and his only." Miss Waties does not fix the time of the declarations, but refers to them as frequently made during the two years and upwards that she was at the defendant's. But the defendant, in his answer, relies on a particular conversation in the fall before her decease, when she called on her sister (Miss W.) "to bear witness that she meant the defendant to keep all her property." This was the fall of 1854, and the intestate died 22d January, 1855. In the fall of 1854, she was the proprietor of all the slaves allotted to her in the partition and settlement of January, 1853. But the defendant says, in his answer, that on the 17th December, 1854, he purchased from his mother eleven of these slaves for \$5,851, took from her a bill of sale, and gave her his bond for

the purchase money. These negroes had been appraised by three gentlemen of the neighborhood, called in for the purpose by

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the defendant *and his mother; one of the appraisers (W. E. Richardson) was examined, and said that he, at the same time, at the request of Mrs. Rees, assessed the hire of Hannah, a negro still belonging to Mrs. R., and in defendant's possession, at \$75. It seems superfluous, then, to say that, until about a month previous to the death of the intestate, no gift had been made, but that the intestate continued to exercise the usual acts of dominion which belong to the proprietor. Between that time and her decease, there is no other material circumstance, except the paper, 21st January, 1855, and the matters which attended it. That paper is wholly testamentary in its character. The witness, who prepared the paper, says the expressions are her own, and not those of her sister—that her sister expressed no wish to make a will, &c. The form of expression is not material; it is the declaration by her sister (the intestate) of the disposition which she desired to be made after her decease. This declaration she had a perfect right to make; but in order to give validity to the act, the law has prescribed particular forms to be observed: "I wish all that I possess, both real and personal, to belong to my son." This is not a gift *inter vivos*—it is not supposed that it constitutes *donatio causa mortis* of the property comprehended with those terms; on the contrary, signed by the intestate, it is a perfectly valid devise and bequest of all her real and personal estate, wanting only the attestation of witnesses: whatever she may have done with the paper after it was signed, it was only for the preservation and safe-keeping of the memorandum of the disposition she desired to be made when she should be no more. She had made no transfer of the property. She declined to make a will. "What is the use of a will, when everything is Waties'," and everybody must know that. The meaning of this is, "no one will dispute Waties' right." The intestate not being sufficiently mindful that the only one qualified to dispute his right was an infant of tender years, who knew nothing, who could consent to nothing, and

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against whose *rights nothing could be presumed. When she ceased to live, the law cast on that child the right to one moiety of her estate. The proceedings are instituted to ascertain the extent of her (the infant's) right. No evidence has been afforded of any valid gift of the land and negroes in the possession of the defendant, and the imperfect effort of 21st January, 1855, while invalid as a testamentary disposition, confirms the inference, that none other had yet been made. The articles of which Miss Waties had the possession and control were never in the pos-

session of the defendant, nor had he the right of possession. It may be that they have been very properly delivered to the several parties for whom they were intended. It is only necessary now to determine that the defendant is in no manner accountable for them.

The evidence of Miss Waties shews very satisfactorily, that the bond of the defendant to the intestate for \$5,851, was given up and destroyed by her directions. It is a gift to him of so much money. The Act of 1791 provides: that nothing therein contained shall be construed to give to any child of the intestate a share of the estate where such child has been advanced, by the intestate, to an amount equal to the share of another child. But if the advancement is not equal to the share of another child, then so much of the estate of the intestate shall be distributed to such child as shall make the estate of all equal. The rights of the parties are fixed at the death of the intestate. *McCaw v. Blewit*, 2 McC., Eq. 105. It was ruled in *Hamer v. Hamer*, 4 Strob. Eq., 124, that a child who has been advanced, is not compelled to bring such advancement into hotchpot unless he claims some further share of the estate of the intestate. It is ordered and decreed, that the defendant account to the administratrix of Catharine Rees, deceased, for the hire of the slaves of the intestate, from the time of her decease, and that in such accounting he be allowed for any debts of the intestate paid by him, and that the commissioner state the result of such account.

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*It is further ordered and decreed, that the commissioner take testimony and report upon the value of the estate, real and personal, of the intestate, at the time of her decease, with liberty to report any special matter preparatory to a final order for the settlement of the estate. Parties to be at liberty to apply for any other and further order which may be necessary to carry this decree into effect.

Testimony Taken Before the Commissioner.

Miss Mary Waties, sworn on behalf of defendant.—After the death of Col. O. S. Rees, Mrs. Catharine Rees went to her son (the defendant's) to live with him. Col. Rees died in April, 1852, and she went to live with her son in May or June. She had sold her former residence. She carried her house servants with her to her son's.

The defendant lived on a place of his own, adjoining the plantation of his father's estate; and the negroes of Mrs. Catharine Rees were worked by the defendant, together with his own, on the estate place. Her negroes were few in comparison with the defendant's. Her portion of her husband's estate would not have been sufficient for her support, according to her former mode of life, unless she had lived with her son. The negroes of Mrs. Catharine Rees (other than her

house servants) were under the control of the defendant, and worked by him in common with his own, after she went to live with her son. She sold some of her negroes to the defendant. Several gentlemen appraised the negroes, and the defendant executed a bond to her for the amount of the appraised value, which was over \$5,000. That bond was given by Mrs. Catharine Rees to me, she saying as she did so, "This is Waties', give it to him; put it away for him." I did put it away, and she never saw it again. After that, and before Mrs. C. Rees' last illness, she said to me, "You have that bond?" I said, "Yes." She said, "Give it to Waties or burn it." I had kept Mrs. C. Rees' keys and all her papers. I have heard her speak in this manner while

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she *lived with defendant. That she was living with her son. That all she had was his. She never ordered any of her servants about. He exercised control over them. I have heard her speak so often.

In her last illness, Mrs. C. Rees spoke to me about the bond. She asked: "You gave it to Waties, or burnt it?" I bowed my head in affirmation, saying: "I have done as you desired." I had burnt the bond. I was present at the execution of the bond and the bill of sale of the negroes from Mrs. C. Rees to defendant. When Mrs. C. Rees spoke in connection with "Waties," she had reference to her son, the defendant. On one occasion previous to her death, Major Anderson had suggested to her to make a will, which had disturbed her. When I came in, she spoke to me about it, and said: "What is the use of my making a will when everything it Waties', and everybody must know that?" She spoke emphatically. All of Mrs. Rees' property was then in defendant's possession. In speaking to me on the above subject, (as to everything being Waties'), she several times said to me: "You can bear witness to that."

The day before her death she spoke to me of some of her wishes as to the disposition of some of her property, and I wrote down her wishes as she expressed them,—in substance, the same as the paper set out in the answer. She signed that paper. In reference to the bequest to her son Waties, she said at the time: "But what is the use of saying that, for everything is his?" While these wishes were being expressed, I asked if she did not wish to leave something to her grand-child, the daughter of her son William. She replied: "Yes;" and designated a desk which was in her room, but added: "You can give her that." This conversation arose by her expressing a wish to give me those things which were in her room; and, as there was no one in the room, through delicacy I wrote her wishes down. She had said to me: "Everything belongs to Waties;" and, when I wrote that paper, I commenced

it with the request to the defendant. The

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words in that paper were mine; it was written at my suggestion and not hers, and I don't remember that I read it over to her before she signed it. When she signed it, I gave it to her. She said: "Give it to Waties." I said, you do it; and she put it under her pillow. She afterwards gave it to me, and she told me to give it to defendant. That paper contains a correct memorandum of what her wishes were. She expressed no wish to make a will. All the articles specifically mentioned in that paper were in her room,—in her wardrobe, desk, &c., of which I had the keys. When she told me what she wanted me to have, and I suggested writing it down, she said: "What is the use, the things will be done; Waties will do it," or words to that effect. She had often previously and then said: "Everything is Waties'." "I give everything to him." "Everything belongs to Waties."

X.—I burned the bond before Mrs. Rees' death. Mrs. Rees' negroes worked on land of her husband's estate, which had been assigned to her and defendant. The negroes received by Mrs. Rees from her husband's estate, continued to be worked on those lands up to the time of her death, in common with the negroes of defendant. At the time when the paper spoken of was executed, Mrs. Rees said: "I give everything to Waties." "Everything is Waties'." She had often before said: "I give everything to Waties." I told defendant of that paper before her death, but I don't remember whether I gave it to him before her death or not.

XX.—The negroes worked on the plantation, as referred to in the foregoing testimony, were under the defendant's control. All the negroes received by Mrs. Rees from her husband's estate were under defendant's entire control; and it was while they were under his control that she used the expression, "Everything it Waties'," &c.

(It is conceded by plaintiffs that there is no claim in this case for furniture.)

When that paper was drawn up, I had

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no idea, nor do I think Mrs. Rees had, that she was making a will. It was simply a paper indicating her wishes.

The defendant appealed on the grounds:

1. Because the evidence conclusively established a gift, *inter vivos*, of the negroes to the defendant by his mother; and his Honor, it is respectfully submitted, should have so decreed.

2. Because the paper writing of 21st January, 1855, recited in the decree, was not, under the circumstances detailed in the evidence, testamentary.

3. Because the defendant should not be required to account for the bond as an advancement, for the following reasons:

I. Because the law in relation to advance-

ments applies only to fathers and not to mothers: when, therefore, a widow makes a gift to her son, he is not required to bring it in as an advancement.

II. Because, where there is but one child, and the issue of a pre-deceased child or children, such child is not required to bring in, as an advancement, a gift made to him, after the death of the parent or parents of the issue.

III. Because, where a child owes a parent a debt by bond, and the parent destroys the debt by destroying the bond, it is no advancement.

IV. Because the evidence shows, conclusively, that the defendant's mother never intended that he should account for the bond as an advancement; and the decree, therefore, defeats her manifest and oft repeated purpose and intention.

4. Because, if the gift as to the negroes should not be sustained, the defendant should not be required to account for hire before the filing of the bill, there being no demand prior to that time.

Sumter, for appellant.

The evidence of Miss Waties, and the answer of the defendant being taken as true, and the signature of Mrs. Rees as genuine, they present the whole case, under the same

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*impression, as in the Court below, *Gee v. Hicks*, Rich. Eq. Ca., 5; and present two questions, what do they mean in fact? what is their value in law?

The declarations of the witness must refer to the time of the appraisement, the visit of Mr. Anderson, the execution of the bond and of the paper, and cannot be referred back further than the appraisement, and include a period commencing with the Fall, and the words of the gift, importing the consideration of her support, imply that it had been paid, and that she was satisfied with it. The answer, in respect to the time, is precise, and consistent with the evidence. In the Fall of 1854, she communicates the intention of bounty; on 22d November she has negroes appraised to \$5,851; on 16th December she took defendant's bond for that sum, the interest to be punctually paid, the principal remitted. What is said of Hannah turns upon a mistake; is founded on the idea that there was a hiring of one, after a gift of the whole; but Hannah was never hired; the appraisement and sale (as it is called) were not cotemporaneous. The formal transactions between defendant and his mother, the sale (so-called) being made and part of the gift, took place more than three weeks after the appraisement. Mr. S. commented on the probable motives for adopting this mode of gift. Intestate carried out, in her own way, the intention of bounty communicated to defendant, in the Fall, reserving only the interest of the money, and it was to this state of facts that she called her sister to bear wit-

ness, in a conversation with her and defendant, immediately after the visit of Mr. Anderson, and to this state of facts she referred when, through the delicacy of the witness, she was to put in writing some small gifts to her, and said, in reference to the bequest, as it is called, to her son, "what is the use of saying that, for everything is his." The whole intention of that paper, it is submitted, is misconceived; it is supposed to be an imperfect effort to make a will, when in making it she recognized the interest as already vested in him, and confirmed it,

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not only *by the paper, but by getting his assent to the minor gifts, which was the object of its delivery.

The inference, from the "imperfect effort," that no disposition had yet been made, cannot be reconciled with the evidence—the giving again, as a final act, what has before been given, is common, and inconclusive. The words "what is the use of a will when everything is Waties'," are supposed to mean that no one will dispute Waties' right; but, it is respectfully submitted, what is the meaning of this testimony? "When she told me what she wanted me to have, and I suggested writing it down, she said, 'what is the use, the thing will be done, Waties will do it.'" The question was not about disputing Waties' right, which was recognized, but about his assenting to the other gifts; and the paper was put under her pillow, and afterwards given to witness, not for safe keeping, but in compliance with the delicacy of the witness, for delivery to the universal donee, for his assent to the minor gifts; when he assented, as he did, before the death, he accepted his own. There was delivery and acceptance.

Counsel commented on the evidence. Was there a doubt, on the mind of that lady, that all her property was her son's? Why the anxiety to know that the bond was destroyed, and that nothing should remain in evidence? By what hypothesis do counsel, on the other side, account for these declarations and acts?

Premising now, that the possession of the defendant was not that of a servant, or agent, or trustee, or bailee, but that of the master of the house, what do all these declarations and facts amount to in law?

Mr. S. quoted and commented on Reid and Colcock, 1 N. & McC., 603; Spears and Blasinghame and Davis and Davis, 1 N. & McC., 223, 225; McDonell and Murdock, 1 N. & McC., 237; Domat, vol. 1, p. 36, and vol. 1, p. 60; Fowler and Stuart, 1 McC., 504; Caldwell and Wilson, 2 Spears, 77; Grangeac v. Arden, 10 Johns., 293; Yancey and Stone, 7

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*Rich. Eq., 18; Etheredge and Partain, 10 Rich. Eq., 207; Blake and Jones, Bail. Eq., 141; this last, a case of creditors, here volunteers.

Cannot a Chancellor presume a gift, where a jury would? Is a change of forum a

change of fact? If so, we are entitled to an issue, to have our case ground out in that machinery; but, in fact, we ask no more than what has been done and set up in this Court.

The difficulty seems to be in the delivery and transmutation of possession, and McDonell and Murdock is referred to; that was a case of *donatio causa mortis*, and the presiding Judge had said that, in other parol gifts, the evidence would be sufficient, but in cases of this sort, actual manual delivery was necessary, and for that misdirection, and for saying that a jury might give an alternative verdict, the case was sent back.

In other cases, *ex. gr.* in a loan, the obligation is not contracted without delivery. These obligations, where the party is to make restitution, are contracted by the intervention of the thing, although the consent of parties be also necessary. Domat, vol. 1, p. 36.

Our case is not one of loan, or *donatio causa mortis*, where restitution is contemplated; but even in case of a loan, suppose Mrs. R. had loaned a slave to one, having them already in charge, for any purpose, would a *manu traditio* have been necessary to the loan? or if she had loaned, or committed them in charge to anybody, and then sold them to him, would it have been necessary? "Delivery is made, if the buyer had already the thing sold in his custody, by another title, as if it was deposited into his hands, or if he had borrowed it." Domat, vol. 1, p. 60. And so we contend of a gift *inter vivos*, and, I think, this is not, in fact, a question of delivery, but of intention. If the Court see that she intended delivery, they were delivered. The transmutation of possession would have been an idle ceremony; there was a transmutation of property and dominion. "Decla-

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rations of *gift by an owner of a chattel, are to be construed most strongly against him, and are to be defeated only by unequivocal proof, on his part, that a present gift was not made." Circuit *inter alia*, Yancey and Stone, 7 Rich. Eq., 18; and an administratrix for volunteers is in the same position.

It is not to be omitted, in any part of the case, that there was a consideration for the gift, which is fatal to the idea of a testament or of an advancement.

Is the paper of 21st January, 1855, a nullity? or worse?

In Brinkerhoff and Laurence, 2 Sandford, 401, 406, it is said: "Against sustaining donations, either *mortis causa* or *inter vivos*, there are many strong expressions in the books of the common law; the reason of this is, that gifts of both classes are usually claimed upon parol evidence, unsustained by any writing, and the Courts have uniformly set their faces against such claims, on account of the great danger of perjury. When the intent of the donor is proved under his

own hand, there is no such danger, and, accordingly, the Courts have presumed a delivery in support of the gift, on slight evidence."

Here it is not perjury, but the Act of 1824, that frightens my friends on the other side, more in their character as legislators, perhaps, than as lawyers.

In *Fowler and Stuart*, 1 McC., 504, the words were, concerning a horse, that the boy used to ride, "I beg you to recollect, I have given that horse to my son;" suppose, afterwards, in articulo mortis, she had written, I wish that horse to belong to my son, but I wish him to give the silver mounted Spanish saddle to B. and delivered the paper, and he had assented, would that have invalidated the previous gift, because it had not three witnesses?

It was a paper writing delivered, capable of passing, limiting, reserving a use, creating a trust in personalty, by delivery of the writing itself. *Brummet and Barber*, 2 Hill, 517; *Dupre and Harrington*, State Rep., 391; *Jaggers and Estes*, 2 Strob. Eq., 343 [49 Am. Dec. 674].

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*The paper confirms the intention and supplements delivery. "If an instrument can operate in some character which appears to have been intended, it will not be held testamentary, especially not, when it has not the requisite formalities of a will, and holding it testamentary, would be declaring it void." *Carter and King*, 10 Rich.

As to the gift or destruction of the bond being an advancement.

I. This proceeded from the mother, and advancements apply to fathers only. *Holt v. Frederick*, 2 P. Wms., 356; *Toller*, 300; 2 *Williams Ex'rs*, 1287.

The words of the writ, *de rationabili parte bonorum*, are: "In *vita patris promoti fuerunt*." In *Holt and Frederick*, L. King says: The statute of Charles was founded on the custom of London, and he might have said, that it was in conformity to other customs of the Kingdom of Great Britain, and to general custom, and to the law *de rationabili parte bonorum*. However hasty or bad his reasons, he stated the law of advancement correctly, as known in England, time out of mind, and used ever since: he was resisting a novelty, the attempt, by deriving the statute from the *successio ab intestato*, to engraft on it the civil law rule, that advancements might proceed from mothers, who hold estates in that law, in a way different from our laws of Baron and feme.

Upon what could collation proceed in a widow's estate? Upon that portion of her husband's estate distributed to her, and once already subjected to collation upon his death. The words of the third section of our Act are satisfied by applying them to the subject matter, to which, at the time the Act was passed, they could alone be applied, namely: the

estates of fathers; it being then, and before, and always law, that the title, advancement, only concerned father's estates. It is clear that this is an attempt to adopt the civil rule, and I ask for the authority.

In *Daves and Haywood*, 1 Jones Eq., 256, N. C. R., it is said: "It is true that under the

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English statute of distributions, none but the children of an intestate father are bound to account for advancements, because the father only is under a legal obligation to provide for his children; but our statute of 1792, re-enacted in 1836, uses the words he or she, him or her, in reference to the intestate, where children are to account for personal property given to them, or put into their possession in their father's lifetime. Both sexes are clearly embraced by these words, and we do not feel at liberty to repeat them, but are bound to hold that the legislature intended to apply them to an intestate mother, as well as an intestate father."

II. Where there is a child, and the issue of a pre-deceased child, and a gift after the death of the father of the issue, we may look to the reasons, for collation, between children and grand-children, viz: that a grand-child shall bring into hotchpot with a child, because he derives, through his father; he must collate, where the parent would, what the parent received. *Proud v. Turner*, 2 P. Wm., 560; but I think it has not as yet been decided that a gift to a grand-child, the father being dead, shall be collated. "The statute of distributions is restricted to gifts from a parent to a child, and does not include donations to grand-children. This holds clearly where there are only grand-children; is it so when there is a child and a grand-child? Where a grand-child hath received some advancement, not from his father, but from his grand-father, whether or no he shall collate with the brothers of his father, not decided. The grand-child takes, as representative of his father, and therefore, as it seemeth, should not bring his own portion, but only his father's portion into hotchpot." *Duty of Executors*, p. 287.

So, if this bond had been given to complainant, she ought not to collate it, and if so, *ex æquali jure*, defendant ought not to collate with her.

"If the grand-father had endowed his grand-daughter, the father being alive, she would be obliged to bring into the inheritance of her father the portion which the grand-

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father *had given her; it was the same as if the father had given the portion out of his own estate. *Domat*, vol. 1, B. 11, p. 674.

III. The destruction of the bond is not an advancement. The bond constitutes the best evidence of advancement; its destruction, evidence that it was settled.

The synopsis of *Gilbert v. Wetherall*, *Simons and Stuart*, vol. 1, p. 444, (or vol. 2, p.

254,) would seem to decide that the destruction of a debt, (or rather, in that case, of the evidence of a debt) was an advancement; but the case was not so; although intestate destroyed a note, he said: "Now Thomas owes me 11,000 pounds;" afterwards they signed an account. The V. C. said: "The circumstances under which the note had been destroyed, amounted to an equitable release of a debt," but held the account stated, an advancement, and it is clear that he went into the case to see if it was an advancement or not, and if the father so intended it; and

IV. It is respectfully submitted, that the destruction or gift of the bond, or negroes, is not an advancement, because of the intention of the intestate, who did not intend equality, and said so, when the bond was delivered. Can a man give to issue, otherwise, than by way of advancement? Can he, in his lifetime, by any act, segregate a portion from his estate, in favor of a child, as well as a stranger? He may give the whole to one, cannot he give a part, over and above to one; and if he does so, and so says, and so intends, and so conveys, by any means the common law will afford him, how can a legislative will, intended to apply to what is to be distributed, and not to what has been, by himself, forever cut off, override his complete and legal disposition, in his lifetime. Such interference, seems inconsistent, with the true idea of property, and would restrict the *jus disponendi*, among issue, to a mode provided by statute, which is ambulatory, and for various reasons not acceptable to all persons.

The case of partial gifts supposed, is not as in *Youngblood v. Norton*, 1 Strob. Eq., 125,

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an interfering, with distribu^{*tion}, or valuation at the death, but a severance, by a complete act in the lifetime; the intent and quantity of intent, impressed on the transaction at the time; so, in that case, it is said, that "what are advancements, may be absolutely fixed, by the intentions of the parties, at the time, if they can be ascertained," and so in *Domat*, vol. 1, b. 11, sec. iii, p. 692. "The things given to children, or other descendants, that they may have, what is given, as an advantage, over and above what the other children, their co-heirs have, are not brought, into the mass of the inheritance collated, if it is evident, that it was the express will of the donor, that what he gave, should remain with the donee, as an advantage, over and above his equal share, with the rest of the heirs, or that it should not be subject to collation." "Sive quispiam intestatus moriatur, sive testatus, omnino esse collationem, nisi expressim designaverit, ipse, se velle non fieri collationem," &c., Nov. 18, c. 6. The only novelty here, is in the "sive testatus," which we have not adopted. A parent may give, and not advance, or vice versa; otherwise, a father in bestowing absolutely an exclusive

bounty, upon a deserving son, or in releasing an improvident one from jail, with intent to start him even again, with the rest of his children, would have to approach the object of his bounty, with caution, or swear him to secrecy, for if detected, the statute, would defeat his purpose. What a man does with property, belonging to him at his death, is a testamentary act, as in *Youngblood v. Norton*; but the question is, what does belong to him? In that case, the \$600 was to be accounted for in the distribution. Here, the principal of the bond was never to be paid—the interest to end with her life, and "nothing to remain in evidence." Defendant might have said: The negroes I hold by sale-bill, and I settled with my mother for them. *Mitchell v. Mitchell*, 8 Ala., 414, 422, considers this question fully, and looks into the custom of London, where "the father, could by any act, in his lifetime, give away any portion, of his personal estate, to one of his

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*children, provided he divested himself of all property in it," and concludes, "Our opinion, therefore, is, that when either money or property is advanced to a child, it will *prima facie* be an advancement, under the statute, and must be brought into hotchpot; but it may be shewn, that it was intended, as a gift, and not as an advancement." I contend, here, that the destruction of the bond is presumption that it was settled—and the onus to prove it an advancement is on the other side. In Connecticut, where the Act is a copy of Act of Charles II, they go too far, in *Johnson v. Belden*, 20 Conn., 322, where it is held, that there must be satisfactory evidence to make a gift a chargeable advancement. There, as in England, a deed for love and affection, is *prima facie* proof of advancement. *Hatch v. Straight*, 3 Conn., 31. So *Meeker v. Meeker*, 16 Conn., 383; *Phillips v. Chappell*, 16 Geo., 16.

The words of our Act are not when a child shall have received, but when he shall have been "advanced," and remains accountable. The condition in life of the parties, forbids the idea of advancement. Defendant being of age, married, settled, fully advanced by his father, in his lifetime, rich compared with his mother, providing for her, a purchase in his name, by his mother, would have been a trust, and not an advancement.

If defendant is to account, we ask, that he be allowed to account, for the negroes or the bond, at his option, and only, from the filing of the bill or demand.

Fraser, Moses, for appellee.

Spain, Richardson, for appellant.

The opinion of the Court was delivered by

DUNKIN, Ch. It can scarcely be contended that, prior to 17th December, 1854, when the defendant purchased from the intestate slaves to the value of \$5,800, she had already made to him a valid gift of her whole es-

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tate. If the paper *signed on the day before the death of the intestate be not testamentary in its character, but a gift, *inter vivos*, then, if the intestate had recovered, her whole estate had passed from her; for, by that paper, no life estate is reserved, nor is the gift thereby rendered invalid in the event of her restoration. It is true that the language of the paper was that of the witness who prepared it; but, to give it any effect for the benefit of the donee, it must be regarded as adopted by the donor: and, when she says, "I wish all I possess in this world to belong to my son and his heirs forever, both real and personal," and disposes of her wardrobe to her sister, it is a manifest declaration of what she intended to take effect in relation to her estate after her decease, and fulfils all the requisites of a last will and testament, wanting only the attestation of witnesses to give it effect as such.

The remaining grounds present questions not made at the hearing, and, therefore, not considered in the decree; but they are, nevertheless, very properly now submitted to the judgment of the Court. It is contended that the doctrine of advancements is not applicable to the estates of widows; and for this proposition the appellant adduces the authority of Lord Chancellor King in *Holt v. Frederick*, 2 Peere Williams, 356. It is true it was so held, "although," as the reporter says in a parenthesis, "without much debate." His lordship decided that "the statute of distributions was grounded on the custom of London, which never affected a widow's personal estate;" and "that the Act seems to include those within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only." If this course of reasoning could be sustained, it would apply not only to the principle of advancements, but to every other canon in the former statute of distributions in relation to the estates not only of widows, but of married women, and of spinsters. Each clause of that statute (A. D. 1712) 2 Stat., 524, refers to the estate as that of a man; nor is there any provision, as in the

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Act of 1791, that, in the *event of the death of a married woman, leaving a husband surviving her, the distribution of her estate shall be the same as that of his. But the argument of the learned serjeant, in *Holt v. Frederick*, is quite satisfactory. "The word his takes in both sexes, as mankind comprehended both; and homo was hic vel hec homo; that the act of Parliament intended an equality among children, and this favorite doctrine in equity ought to be extended as well in case of a mother as a father."

But the Statute of 1791 was passed in pursuance of the provision of the Constitution directing the Legislature to abolish the right

of primogeniture, and provide for an equitable distribution of the estates of intestates. All the principal clauses refer to the intestate as him, and to the estate as his. The tenth and eleventh clauses provide for the distribution of the estate, "on the death of a married woman," leaving a husband or leaving no husband. But for the distribution of the estate of a spinster no special provision is made; and for the obvious reason above stated in the argument of *Holt v. Frederick*, and that any more restricted construction would fall short of the declared purpose of the statute. But the clauses should be construed together, as in *pari materia*. The Act provides that, in the event of the death of a widow, her estate "shall be distributed among her descendants and relations in the same manner as therein before directed in case of the intestacy of a married man." The subsequent clause in relation to advancements refers to the previous canon for distribution among the children or issue of the intestate, and should be taken, and has always been taken, as part of that canon. No new or additional order of distribution is declared, but provision is rather made for an equitable administration of the prior canon. The estate of the widow must be distributed in the same manner. Although no express adjudication has been adduced from our reported cases, yet such seems to have been the received opinion from a very early period after the enactment of the statute, as

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may *be seen by reference to Grimke's Law of Executors, p. 285 (published in 1797), and *ex parte Lawton*, 3 Des., 201, note.

The remaining grounds in relation to advancements may be considered together. It is true that, while the child is alive, a gift to the grand-child may not be an advancement; but gifts made to the grand-child, after the death of his parent, must not only be brought into the account, but all previous advancements to such parent in his lifetime. Then it is said the release of a debt, or rather the intentional destruction by the parent of the evidence of a debt due to him by his child, is no advancement. On 17 December, 1854, the intestate owned eleven slaves, which she, on that day, sold to her son, taking his bond for the purchase money. If, instead of selling him the slaves, she had made him a deed of gift of them, it would seem clearly an advancement. If, instead of selling the slaves to her son, she had sold them to a stranger, taking his bond for the purchase money, and she had transferred the bond to her son, it would be not less an advancement. And so, when she released, or gave up, or destroyed, his own bond to her, it was an advancement of so much money, and must be so accounted for.

Then it was said that the intestate did not intend that her son should account for the

bond as an advancement. This can hardly be said to be a question of intention. A father may give his son half his estate and declare, by the most formal instrument, that he does not intend it as an advancement; but, if he afterwards die intestate, the law precludes such son from any share in the inheritance, unless he bring such previous gift into hotchpot. What is, or is not, an advancement may depend on circumstances, as in *Murrell v. Murrell*, 2 Strob. Eq., 148 [49 Am. Dec. 664]; *Cooner v. May*, 3 Strob. Eq. 185; and *Ison v. Ison*, 5 Rich. Eq., 15; but the mere declarations of the donor cannot alter the operation of the law either as to the character of the gift, or even the mode of

valuation. See *Youngblood v. Norton*, 1 Strob. Eq., 122.

In reference to the fourth ground of ap-

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peal, it may be *remarked that the infant plaintiff is certainly entitled to an account from the death of the intestate, and, being the sole distributee, the whole object of the administration was to establish her rights.

This Court perceive no error in the decree of the Circuit Court, and it is ordered and decreed that the same be affirmed.

JOHNSTON and WARDLAW, CC., concurred.

Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, NOVEMBER AND DECEMBER TERM, 1859

CHANCELLORS PRESENT:

HON. JOB JOHNSTON,
HON. B. F. DUNKIN,
HON. F. H. WARDLAW,
HON. JAMES P. CARROLL.(a)

11 Rich. Eq. *110.

*In the Matter of the Accounts and Settlement
of the Estate of JOEL W. PINSON.

(Columbia, Nov. and Dec. Term, 1859.)

[*Courts* ⇨244.]

Where proceedings are instituted before the ordinary, against an executor, for account, and a dispute arises between a legatee and his assignees of the legacy, as to the validity of the assignment, an appeal from the ordinary's decision holding the assignment to be invalid, lies, under the Act of 1839, to the Court of Equity.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 739; Dec. Dig. ⇨244.]

[*Contracts* ⇨95; *Deeds* ⇨71.]

A deed is not necessarily void because the party was, at the time, under restraint—the restraint must be illegal.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 439; Dec. Dig. ⇨95; *Deeds*, Cent. Dig. § 183; Dec. Dig. ⇨71.]

Before Johnston, Ch., at Laurens, June, 1859.

This was an appeal from the decree of the

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ordinary. His *Honor, the presiding Chancellor, affirmed the decree of the ordinary, and the appellants, Walker and Glen, appealed.

Sullivan, for appellants.

Simpson, contra.

The opinion of the Court was delivered by

CARROLL, Ch. Before considering the grounds of appeal, there is a preliminary question to be disposed of. The appeal here is from the decretal order of the Circuit Court, dismissing the appeal, there heard, from the decree of the ordinary of Laurens.

In the settlement of the accounts of the executor of Joel W. Pinson, deceased, before the ordinary, a controversy arose between Jabez Pinson, one of the legatees, and Walker and Glen, claiming to be the assignees of his portion of the testator's estate. The decree of the ordinary adjudged that the deed of assignment to Walker and Glen was obtained through duress, and was, therefore, void; and the grounds of appeal, as well to this Court as to the Chancellor on the circuit, impute error to the ordinary for having so adjudged. As the question upon which the appeal depends is one of fact, for the decision of which the Law Court is peculiarly fitted, the doubt arose whether the appeal from the ordinary ought not to have been made to the Court of Common Pleas; and, at the suggestion of this Court, the point has been argued here. The Act of 1839, concerning the office and duties of ordinary, 11 Stat., 42, provides that, "if the appeal should be on a matter of account, the appellant shall docket the case in the Court of Equity for hearing," but, that "in all other cases of appeal from the Court of Ordinary, the appeal shall be to the Court of Common Pleas." The appeal here is not strictly "on a matter of account," in its popular sense, but rather on a matter preliminary and incidental to account. No exception is taken to the statement of the accounts by the ordinary. In-

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*deed, if the executor had been cited before the ordinary, at the instance only of Walker and Glen, claiming as assignees, the ordinary might, at the very outset of the proceeding, have decided against the validity of the assignment, and have declined taking any ac-

(a) Elected during the term.

count at all. It is to be observed, also, that the Act of 1839 appears to assume that the statement of the accounts is necessarily brought to the view of the Chancellor, in the appeals to him from the ordinary; for it enacts that, if he approve the ordinary's decree, the party, in whose favor it may be, may forthwith issue his writ of fieri facias to enforce the same, and if the Court should modify the said decree, it may order the commissioner to re-state the accounts, and, upon his report, made and confirmed, the party in whose favor it may be, shall be entitled "to like final process for its enforcement." It cannot be admitted, however, that the exercise of appellate jurisdiction under the Act, whether by this tribunal or by the Court of Law Appeals, is to depend upon the mere election of the ordinary.

The whole course of procedure of the Law Court is unadapted to the adjustment of the complex and innumerable details and particulars entering into matters of account. The admission into an account of a single item, or its exclusion, ordinarily affects the entire result, and raises other and new questions, unforeseen at the outset. If the determination of appeals from the ordinary, even upon questions incidental to the accounting had before him, be referred to the Law Court, great inconvenience must arise. If cotemporaneously with such an appeal, another appeal on a matter of account, in its popular sense, should occur, in the course of the same proceeding before the ordinary, all the confusion, incident to a divided appellate jurisdiction, would inevitably ensue. Justice could not be effected by the agency of the Law Court in cases of this class, without repeated appeals, and after vexatious delays. To prevent these very evils it was provided by the Act of 1839, that such appeals should

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lie to the Court of *Equity, and that, upon the decree of the ordinary being affirmed, or else modified, and the accounts re-stated by the commissioner, and his report thereupon confirmed, final process should forthwith issue for enforcing the same.

It is not perceived that by this construction violence is done to the words of the Act. The term "account" comprehends a large head of equity jurisdiction, and it is in this latter sense that it should be read when employed in the statute referred to. It follows that the appeal from the ordinary, in this case, was properly entertained by the Chancellor on the circuit.

The deed of assignment to Walker and Glenn is adjudged by the ordinary to be invalid, because extorted from Jabez Pinson by duress. A contract is not necessarily void, because the person of the party bound by it, was at the time under restraint. Meek v. Atkinson, 1 Bail., 87 [19 Am. Dec. 653]. The Court has failed to discover in the evidence

before the ordinary, sufficient proof that illegal constraint was used in procuring from Jabez Pinson the assignment referred to. Whatever presumptions against the deed, upon that ground, may arise from the gross inadequacy of the consideration, they are altogether counter-balanced by the repeated, consistent and peremptory refusals of the grantor afterwards to rescind the contract. It is ordered and decreed that the decretal order of the Chancellor on the circuit, as also the decree of the ordinary, be reversed, and that the cause be remitted to the Court of Ordinary, without prejudice to any equitable defence or claim to equitable relief on the part of Jabez Pinson against the said deed, to be asserted before the ordinary, if he have jurisdiction, or elsewhere, as said Jabez may be advised.

DUNKIN, JOHNSTON and WARDLAW, CC., concurred.

Decree reversed.

11 Rich. Eq. *114

*WILLIAM McCORKLE and Others v.
GREEN B. MONTGOMERY, JR.,
and Others.

(Columbia. Nov. and Dec. Term, 1859.)

[*Fraudulent Conveyances* ⚡295.]

Where there are strong circumstances of suspicion against a judgment confessed by a son to his father, the father, on bill filed by creditors impeaching the judgment for want of consideration, should show the consideration by other evidence than his own oath.

[Ed. Note.—Cited in *Herring & Co. v. Cannon*, 21 S. C. 217, 53 Am. Rep. 661; *Virginia-Carolina Chemical Co. v. Hunter*, 94 S. C. 69, 77 S. E. 751.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 873; Dec. Dig. ⚡295.]

[*Appeal and Error* ⚡837.]

Where a judgment is set aside for fraud and want of consideration, and a reference is ordered for creditors to come in and prove their demands, evidence taken before the commissioner on the reference will not be considered by the Court of Appeals on the appeal from the decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3262; Dec. Dig. ⚡837.]

[*Vendor and Purchaser* ⚡254.]

The doctrine, that the vendor has an equitable lien for the purchase money of land sold, has never, it seems, prevailed in this State.

[Ed. Note.—Cited in *Morse v. Adams*, 2 S. C. 58; *Thomas v. Kelly*, 3 S. C. 212, 16 Am. Rep. 716; *Ex parte Williams*, 17 S. C. 405; *Lavender v. Daniel & Harmon*, 58 S. C. 134, 36 S. E. 546.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 641; Dec. Dig. ⚡254.]

Before Wardlaw, Ch., at Chester, June, 1858.

This case will be sufficiently understood from the Circuit decree of his Honor, Chancellor Wardlaw, the grounds of appeal, and the opinion delivered in the Court of Appeals.

The Circuit decree is as follows:

Wardlaw, Ch. The plaintiffs on record are creditors by decree of Green B. Montgomery, Jr., and they filed this bill May 23, 1853, in behalf of themselves and other creditors, to set aside certain judgments, conveyances and assignments, which obstruct satisfaction of their decree.

In June, 1836, John Guntharp became guardian of the plaintiffs, and for the faithful performance of his office, gave bond, with G. B. Montgomery, Jr., and A. E. Guntharp as his sureties. In June, 1850, this guardianship was revoked, and proceedings were ordered by this Court to be instituted on the bond. Accordingly, a bill was soon after

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filed. And in June, *1852, a decree was pronounced in favor of the plaintiffs against the said G. B. Montgomery, Jr., for divers large sums of money. To execute this decree, a fi. fa. was issued, which has been returned by the sheriff, nulla bona. Before the decree, John Guntharp had died, utterly insolvent, and A. E. Guntharp had died, so much embarrassed in his affairs that, on a bill filed by his administrator to call in the creditors and marshal the assets of the estate, although there has not been yet a final adjustment, it has been ascertained that not more than one-half of the sum of specialty debts can be satisfied out of the assets.

In the fall of 1849, G. B. Montgomery, Jr., bargained with Geo. Doag for the Pickett Mills and thirty acres of surrounding land, and November 16, 1849, procured a conveyance of the same to be made to his son, James B. Montgomery, by the said Doag, at the price of \$3,500. The day before the conveyance, G. B. Montgomery, Jr., paid to David McDowell, who was the grantor and mortgagee of Doag, in money, \$466.34; and James B. and G. B. Montgomery, Jr., and Jonathan B. Mickle, executed their single bill to McDowell for \$833.64, which is still unpaid. At the time of conveyance, G. B. Montgomery, Jr., paid to Doag, in cash, \$2,200—the balance of the purchase money. About a week afterwards, G. B. Montgomery, Jr., bargained with William T. Nichols for twenty-one acres adjoining the mills, for \$230.66, paid him \$40, or more, by discount, and having with his son, James B., secured the balance, (which was paid July 1, 1852,) procured the conveyance to be made to the said Jas. B. About Christmas, 1849, G. B. Montgomery, Jr., with his family, of which the said James B. is an inmate, removed to the mills, and has resided there ever since. He carried with him the remaining merchandise from a country store, and retailed it there. After the removal, a costly dwelling was erected on the premises, expensive repairs made to the mills, and much valuable machinery purchased. Towards these improvements, G. B. Montgomery, Jr., mainly

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contributed by his money and credit and the labor of himself and slaves, and he always exercised the principal control and management of affairs at the mills—so that to all who were unacquainted with the state of the legal title, he seemed to be the owner. The accounts, however, were kept in the name of James B. Montgomery, and he was commonly the organ in paying and receiving money; and he sometimes superintended the saw-mill, and sometimes worked in a harness shop at the place.

June 21, 1851, G. B. Montgomery, Jr., confessed two judgments to his father, G. B. Montgomery, Sr.; one for \$2,514, and the other for \$1,605; a judgment to his mother-in-law, Nancy Bailey, for \$1,189.33; and a judgment to his son-in-law, Jonathan B. Mickle, for \$522.34. About this time, J. B. Mickle obtained assignments of two other judgments against G. B. Montgomery, Jr., namely, of Robert Ford for \$571.14, and of Samuel G. Barkley, for \$786. All these judgments bear interest, and from various dates.

June 11, 1852, G. B. Montgomery executed an assignment of his whole estate and credits to J. B. Mickle, in trust, to sell and collect the same, and from the proceeds to pay, first: the expense for preparing the deed and the commissions of the assignee and his expenses about any suits in collecting the assets and effecting the trust; secondly: the judgments above mentioned and any others of the same creditors, and a judgment of William Montgomery for \$200; thirdly: demands of certain enumerated creditors, not in judgment, to the sum of \$2,622; fourthly: the demands of all other creditors; and lastly, the surplus, if any, to the assignor.

July 1, 1852; J. B. Mickle, the assignee, sold the visible property of the assignor for the aggregate sum, according to the addition in the exhibit, of \$6,586.27—according to my addition, of \$5,997.27. Some items may be omitted from the copy of sales furnished to me. James B. Montgomery is set down as the purchaser of the negroes Terry, Molly and child, Billy, Jim and Sam, at the aggre-

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gate price of \$2,625, *and of household furniture and other articles, \$265.50; G. B. Montgomery, Sr., is set down as the purchaser of Henry Harry, Aaron, Gill and George, for \$2,142; G. B. Wm. Montgomery, of Tom, for \$590; J. B. Mickle, of Dick, \$245, and other articles for \$50; and the sum of the purchases of all other persons is \$79.77. The assignee has received very little of the amount of sales.

The object of the bill is to set aside for fraud the conveyances to James B. Montgomery; the confessions of judgment by G. B. Montgomery, Jr., to his kinsmen aforesaid; the assignment of the judgments of Ford & Barklay to Mickle, the assignment of G. B.

Montgomery, Jr.'s estate to Mickle; and the sale under this assignment.

The bill is taken pro confesso against Nancy Bailey. The defendants, G. B. Montgomery, Sr., and Jr., James B. Montgomery, G. B. Wm. Montgomery and J. B. Mickle, have answered separately; and they severally deny all fraud in their acts as to the matters of the suit, and make statements intended to exhibit the fairness of their conduct; but, with some exception as to J. B. Mickle, they rely entirely upon their answers, and offer no other proof of their defences.

First, as to the conveyances by Doag & Nichols to James B. Montgomery. The plaintiffs charge that the moneys for the purchase and improvement of the lands conveyed were furnished by G. B. Montgomery, Jr., and that he procured the conveyances to be made to his son, a minor without means, in pursuance of an express purpose of fraud to defeat the plaintiffs. As to this express purpose to defeat the plaintiffs, the evidence may have some bearing on various points of the case. G. B. M., Jr., in his answer, states that he has no recollection of having said that he never would pay the plaintiffs, but avows his motive to postpone his liability as surety to debts for which he had received consideration. Robert Ford testifies that this defendant said, before removing to the mills, that he never intended to pay the McCorkle bond, and would sooner rot in jail: Joseph Arledge

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testifies that the defendant said he would not pay the McCorkle liability if he could help it, and Daniel McCullough testifies that the defendant said he could not or would not pay the McCorkle debt. As to the payment made for the mills in money, G. B. Montgomery, Jr., and his son, James B. Montgomery, in their answers, distinctly aver that in the negotiation for the land and in the payment for it, the father acted merely as agent for the son, and that the son furnished the money. They admit that the son did not attain twenty-one years until August, 1850, nine months after the conveyance, but they say that by agreement between them the son was entitled to the earnings of his labor after he was twenty years of age, and that he had made some money in a harness shop, and had acquired a horse and two mules by advantageous trades of a mare given to him by his grand-father, G. B. M., Sr.; that in fact James B. paid \$166.34 from his own earnings, and \$2,500 "furnished or loaned" by his said grand-father: of all this detail there is no proof. G. B. M., Sr., in his answer, says nothing on the subject; and whether he was able to advance such sum of money, or, as was said on the other side, was embarrassed in his affairs, I do not know from the evidence.

The plaintiffs, however, have proved that two mules were purchased by G. B. M., Jr., from Houston, in August, 1849, for \$250, and were afterwards sold by this defendant to

Mathews. They have further proved the admissions of this defendant that he had used of the funds of Westbrook's estate, of which he was administrator, towards the cash payments for the mills, \$1,400 according to the testimony of Robert Ford, or \$1,428, according to the testimony of W. T. Nichols, and this is confirmed by the testimony of Houston, that \$1,000 were paid to the defendant as administrator on November 6, 1849, and that the debts of the estate were left in arrears by the administrator, particularly one to Sibley, upon which he said he would pay interest. Besides this, it is in evidence that he borrowed from various persons several

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*sums of money, shortly before the conveyance of Doag, with the avowed purpose of paying for the mills, namely: \$300 from Robert Ford, \$100 from Andrew McDaniel, \$475 from Joseph Arledge, and \$270 from Robert C. Bailey. These loans, with the sum of Westbrook's estate used for the purpose, closely approximate the sums paid to McDowell and Doag.

For the land conveyed by Nichols, by the confession of the defendants, \$40, at least, were paid by the father, but defendants allege, without proof, that this was repaid by the son. The balance of the purchase money was not paid to Nichols until the assigned chattels were sold by Mickle, July 1, 1852. The plaintiffs charge that this balance and the sums paid for the erection of the mansion, and repairs of the mills, and for machinery, were paid by Green B. Montgomery, Jr., and they show that large sums of money were received by him in 1849, 1850 and 1851, from the proceeds of a tannery and a store conducted by him, and from the sale of a tract of land to Arledge for \$1,700, and of the tannery. G. B. Montgomery, in his answer, admits the receipt of money to a large amount, but alleges, without proof, the disbursement of it in payment of other of his debts.

The substance of the answer of James B. Montgomery in this respect is, that all these payments were made from the profits of the mills of which he was owner; in effect, that his title to both tracts is dependent on the fairness of his purchase from Doag. The plaintiffs, however, show that G. B. Montgomery, Jr., sometimes employed the proceeds of the mills in discharge of his own liabilities; that he bought a circular saw from Aiken for \$300, giving his own note, with Gayden as surety, which he afterwards paid; that he repeatedly said he had bought the mills, that he sought counsel whether a conveyance to a minor was good; instructed the deeds to be made to his son, but became responsible himself for the purchase money. The defendants endeavor to excuse the employment of G. B. Montgomery, Jr., and his

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slaves, in the repair and management of

the mills, on the ground that such services were but a reasonable compensation to James B. Montgomery for the maintenance of his father's family and the education of the infant children; but not a tittle of evidence supports this strange allegation, that an unmarried, infrafamiliated youth had suddenly become the head of his father's family.

The statement of these transactions involves all the argument necessary. G. B. Montgomery, Jr., paid for the lands, and took and retained possession of them as proprietor, and procured titles to be made to his infant son, with the avowed purpose of defeating certain of his creditors. It is a palpable case of fraudulent collusion between father and son. The conveyance to James B. Montgomery must be canceled, and the title to the lots declared to be vested in G. B. Montgomery, Jr.

The parties have entered into an agreement concerning the sale of these lots; which, I suppose, has been executed. If not, it is ordered that the commissioner proceed to sell said lands, according to the terms of said agreement, and the practice of the Court.

Secondly, as to the confessions of judgment by G. B. Montgomery, Jr. All of these confessions were on the same day, all to his kindred, and all, so far as appears, by the mere act of this defendant alone, without the presence or solicitation of the plaintiffs on the records. They profess to be based on notes given at or about the time; but, as the defendants allege, were, in fact, given to secure debts of the confessing defendant of a date long anterior.

The judgment of Nancy Bailey, beyond dispute, cannot stand in the way of creditors. She makes no defence by pleading or evidence. The statement in the answer of G. B. Montgomery, Jr., concerning the consideration of this judgment, (which statement, however, if it were of any value, would not be evidence for Mrs. Bailey,) is, substantially, that Robert C. Bailey, son, and Andrew

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McDaniel, and himself, *sons-in-law of Nancy Bailey, agreed, with her consent, to divide equally between them, a tract of land belonging to her, or the proceeds of it, reserving her use of the land for life, and in the result, the son and other son-in-law paid this defendant the estimated value of his third in remainder; and that the judgment was given to secure the principal sum so paid or advanced, with interest. Conceding the absolute truth of this statement, no debt to Mrs. Bailey grew out of the circumstances. Robert C. Bailey and Andrew McDaniel state that they took the land of Mrs. Bailey by her consent, about fall, 1846, and agreed to pay, and did pay, \$500 each, to Montgomery and wife, for their interest in the land, and received their release of all claim in the

land; no conveyance nor obligation was executed by Mrs. Bailey. It is manifest that this judgment is without consideration, and that it must be put out of the way of creditors. It is proper to state that Mrs. Bailey is enfeebled by age, and that, in all probability, she did not actively co-operate in any fraud of her son-in-law.

In relation to the judgments of G. B. Montgomery, Sr., he and his son state, in their answers, that the indebtedness of the latter arose from loans of money, by the former, between 1841 and 1851, and the sale of some small amounts of bacon, and other articles; and they file, with their answers, separate exhibits of the particulars of loan and sale, and of the notes given and received. These exhibits agree precisely in items sufficient to cover the amount of the judgments, but the exhibit of the father contains additional particulars of indebtedness to him by the son, swelling the aggregate much beyond the sum of the confessions, and the exhibit of the son contains some particulars of credit not set down in the other exhibit, but not to such extent as to reduce his indebtedness below the amount of the judgments. These defendants rest upon their answers, and offer no evidence. I infer, from the discrepancy of the exhibits and the failure to produce any of the notes, or other evidences

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of debt, that there *was no account stated between the parties at the time of the confession, and that the judgments were, at least, taken for conjectural sums. On the other hand, the assailing evidence of the plaintiffs does not directly disprove the consideration of the judgments, and stops with showing general circumstances of suspicion, particularly the kindred of the parties, the confession after the institution of the suit in equity upon the guardianship bond, the determination of the debtor to delay or defeat satisfaction of his debt to plaintiffs, and the fraud of the debtor about the Pickett Mills, and his confession to Mrs. Bailey contemporaneous with the judgments in question. It may be that no special consequence follows from the kindred of the parties. A father has the same right as a stranger to save his just claims, if he can, in the wreck of his son's affairs; yet it is a matter affecting character which is simply the result of the common sense, or the sense of equity of mankind, that he should manifest that his claim is really just, and that he has not improperly yielded to the bias of paternal affection in any effort to screen the property of his son. The fact that the judgments were confessed after the institution of the suit in equity, although not absolutely controlling, presses heavily against the judgment creditor, where the fairness of the judgment is otherwise doubtful. *Hipp v. Sawyer*, Rich. Eq. Cas., 410. The conveyance of property by one sued, or expecting to

be sued, however full may be the price, when the purpose of vendor and purchaser is to defraud him prosecuting, or about to prosecute, a right, is fraudulent and void. *Lowry v. Pinson*, 2 Bail., 324 [23 Am. Dec. 140]. There may be, on this point, some distinction between the conveyance of property, and the creation of a lien upon it by judgment; for one reason for treating a conveyance as fraudulent is, that thus, by the consent of the parties, the property of the debtor is placed in a state in which it may be easily squandered or concealed, and in which it is not subject to the lien of a judgment or execution. Undoubtedly, too, a debtor has the right to make preferences among his

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bona fide creditors, even by confession of judgment. *Holbird v. Anderson*, 8 T. R., 235. Still Chancellor Harper, in *Hipp v. Sawyer*, considers a confession of judgment as coming within the same principle as a conveyance, (*Twine's case* 3 Co., 80); and Chancellor Dunkin, in *Bowie v. Free*, 3 Rich. Eq., 403, approves this conclusion.

In this case, however, the concurrence of the parties in an express fraud on plaintiffs is not satisfactorily proved, if we assume that the judgments were for bona fide debts. From the express resolution of G. B. Montgomery, Jr., to defeat plaintiffs, and from his fraud in the conveyance of the mills, and in confessing judgment to his mother-in-law, and from all the circumstances of the case, the most unfavorable conclusion might well be drawn as to him; but the only evidence of fraud as to G. B. Montgomery, Sr., is his availing himself of the judgments fraudulently confessed by his son. This, I think, he might lawfully do, if he had established his debt. There he founders. He has proved no indebtedness of his son to him, and, under the circumstances of suspicion attending the judgments, and when they were directly assailed, the burden of proof was upon him. *De non apparentibus et non existentibus, eadem est ratio*.

The conclusion, is, that there was no consideration for these judgments, and that they must be put out of the way of creditors.

As to the judgment in favor of J. B. Mickle, the suppletory proof of his answer is not complete, but sufficient. He shows, by the inventory of the estate of Judith S. Montgomery, of which he was executor and principal legatee, that G. B. Montgomery, Jr., was indebted to that estate \$400, with interest from December 29, 1846, by single bill, and as his answer states that the judgment was to secure this single bill, and as the plaintiffs have not established any strong circumstance impugning this judgment, the vacation of it would be harsh and unjust.

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As to the assignment to Mickle, of the Ford judgment, I am satisfied by the evidence of Ford and McDaniel that the assignment was fairly obtained.

The proof of the assignment of Barclay's judgment is not entirely satisfactory; but as the judgment itself is fair, and there is no proof of the satisfaction of it, except by the admission of Mickle's answer, which must be taken altogether, that he paid Barclay from his own money, and took an assignment, this assignment cannot be disturbed.

Thirdly, as to the assignment by Montgomery to Mickle, on June 11, 1852. It is settled, in this State, that a debtor has the right to make preferences among his just creditors, and it follows that his purpose to postpone some creditors is not fraud. There is no reservation of advantage to himself by the assignor in this deed, which would make the assignment intrinsically infirm, and inoperative. It is also clear, that a debtor cannot defeat or injure his creditors by any attempt to disturb their liens, or to give his estate to favored persons, whom he may call creditors, when, in fact, he owes them nothing. At the date of this assignment, the plaintiffs had no lien upon the lands and chattels of the assignor, although they soon afterwards obtained judgment and execution; and as to them, he might assign his whole estate to other just creditors. The judgments of Nancy Bailey and G. B. Montgomery, Sr., have been set aside as to creditors, but they are good between the parties; and these persons, although they have no liens, are entitled, even against creditors, to prove their just claims, and come in for satisfaction, ratably with creditors in the fourth class under the assignment. *Dickinson v. Way*, 3 Rich. Eq., 412. I so greatly doubt the application to this case of the principle, that a creditor controlling two funds must first resort to that fund which will produce satisfaction to him with least injury to other creditors, that I shall not venture to disturb the general scheme of the assignment. The conclusion of my judgment is, that the proceeds of the lands and chattels of G. B. Montgomery, Jr., whether embraced in the assignment or not, and the

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choses assigned, *must be first applied to the satisfaction of the judgments of Mickle, Wm. Montgomery, and other liens not disturbed by this decree; next, the expenses and commissions of the assignee, Mickle; next, the creditors enumerated in the third class of the assignment; next, any residue of the lands and chattels to the plaintiffs' decree; and lastly, all the residue of the estate and credits of the assignor, ratably among all his creditors, including of course, the plaintiffs, and G. B. Montgomery, Sr., and Nancy Bailey, if the last two establish any debts.

Fourthly, as to the sales by the assignee. I am of opinion the purchases by the assignee, a trustee to sell, are voidable, at the option of creditors or any of them. *Ex parte Wiggins*, 1 Hill Eq., 353. I also conclude

that the purchases by James B. Montgomery are voidable, as connected with the fraud in the purchase of the mills. After the sale, the negroes bought by him returned to the mills, and were controlled by G. B. Montgomery, Jr., just as before the sale. It further appears that one of these negroes was sold by G. B. Montgomery, Jr., and the proceeds applied to his debt to Gilliland & Howell. Another, Jim, was sold to Hughes, at a profit of \$150, and Hughes' note delivered to the assignee. As the purchasers of these two negroes were not parties to the suit, no order can be made for their re-sale; but as to the latter, the assignee must account for him at the price of \$595. Moreover, I think the purchases by G. B. Montgomery, Sr., of the negroes, Harry, Aaron, Gill and George, are voidable at the option of creditors.

There is no proof concerning the circumstances of the sale, not even that it was by public auction, or that the creditors had been convoked to appoint an agent to act with the assignee under the Act of 1828, although this Act is referred to in the assignment with reference to the commissions of the assignee. The Act requires the assignee to call the creditors together within ten days after the assignment, for the appointment of an agent, and declares all sales and trans-

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fers of prop^{erty} by the assignee before the appointment of an agent to be void and of no effect. 6 Stat., 366. Of the negroes above mentioned, Harry was returned after the sale to a person to whom he had been apprenticed, and continued just as before the sale; and Aaron, Gill and George returned to the possession of G. B. Montgomery, Jr., and were controlled by him as before the sale. It may be further remarked that the prices of these negroes seemed not to have been paid to the assignee; and that James B. Montgomery had no means of purchasing except from the profits of the mills, to which he has been adjudged not to be entitled, and that G. B. Montgomery, Sr., had an unfair advantage over competitors at the sale, by being ostensibly and not really a judgment creditor. As to the negro Henry, purchased by G. B. Montgomery, Sr., as it does not appear that he returned to the possession of G. B. Montgomery, Jr., there is not sufficient reason for avoiding the sale. So as to the sale of Tom to G. B. Wm. Montgomery, as the possession seems to have been kept separate, the title of the purchaser must stand. I conclude that the plaintiffs are entitled to a re-sale of all the chattels purchased by Mickle, James B. Montgomery and G. B. Montgomery, Sr., except the negroes Henry, Jim, and the one sold to pay Gilliland & Howell; and if the plaintiffs choose to have a re-sale, it is ordered that the commissioner proceed to sell according to the practice of the Court.

The defendants state in their answers that some of the plaintiffs are infants, and should

sue by a responsible next friend. No proof on the point was offered; but the commissioner must inquire and report as to the infancy of any of the plaintiffs, and report suitable next friends for any of them who may be infants.

The defendants further suggest that the creditors interested in the assignment in preference to the plaintiffs should be made parties. This is a creditors' bill, and all that is necessary, is, that the creditors should be called in according to the procedure of the Court. And if this has not been done, it is

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*ordered that the commissioner call in the creditors of G. B. Montgomery, Jr., by advertisement for three months, to present on oath and prove by the rules of evidence, their demands, on or before a day fixed by him, on pain of being barred from any portion in the distribution of said debtor's assets. It is ordered that this opinion stand for a decree, and that the parties have leave to apply at the foot for any orders for the execution of it.

It is further ordered, that the plaintiffs pay the costs of G. B. Wm. Montgomery, and that they be reimbursed for this payment, and be paid their costs of suit, generally, by the defendants, G. B. Montgomery, Jr., G. B. Montgomery, Sr., James B. Montgomery, and Nancy Bailey; and if these defendants be unable to pay, that plaintiffs be reimbursed and paid from the assets in controversy. Let the costs of J. B. Mickle be paid from the assets assigned; and the other defendants, except Mickle and G. B. Wm. Montgomery, pay their own costs.

The defendant, G. B. Montgomery, Sr., appealed from the decrees pronounced by Chancellors Wardlaw and Dargan, (a) on the grounds:

1. Because in said decree of Chancellor Wardlaw, it is held that the judgments in favor of G. B. Montgomery, Sr., against G. B. Montgomery, Jr., mentioned in the pleadings, are without consideration, and must be put out of the way of creditors, when it is respectfully submitted, that, as said judgments were subsisting, it was incumbent on those assailing them to show their want of consideration—that no such evidence was offered—that, although not required to show the consideration of his judgments, the said defendant did show they were bona fide, as complainants in their bill charged that said judgments

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were without consideration, *and confessed for the purpose of defeating their claims, and defendant fully and explicitly denied the same in his answer.

2. Because said decree of Chancellor Wardlaw orders the purchase by G. B. Montgomery, Sr., of the negroes Aaron, Gill,

(a) The Reporter has been unable to procure a copy of Chancellor Dargan's decree. He does not conclude that it is very important to a full understanding of the case.

George and Harry, at the sale made by J. B. Mickle, assignee of G. B. Montgomery, Jr., to be set aside, and said negroes re-sold, when it is submitted that said sale was fair, and should not be decreed and held fraudulent from the fact that the purchaser who bought them at a public sale and paid for them, permitted them, from motives of kindness and good feeling, to return into the possession of the former owner.

3. Because Chancellor Dargan, in his decree, orders said negroes, Aaron, Gill, George and Harry, to be delivered up by G. B. Montgomery, Sr., and sold by the Commissioner in Equity.

4. Because the fact that G. B. Montgomery, Sr., permitted Harry, after said sale, to return to the possession of the person to whom he had been bound as an apprentice by G. B. Montgomery, Jr., it is submitted shows no evidence of fraud, and cannot vitiate the sale.

5. Because it clearly appears, from evidence offered since the decree of Chancellor Wardlaw, that the judgments in favor of G. B. Montgomery, Sr., against G. B. Montgomery, Jr., were founded on bona fide consideration, and said judgments ought not to be set aside.

The defendant, James B. Montgomery, appealed from the decrees of Chancellors Wardlaw and Dargan, on the grounds:

1. Because said decree of Chancellor Wardlaw directs the purchases made by this defendant at the sale of G. B. Montgomery's property, by his assignee, J. B. Mickle, to be set aside for fraud, when it is submitted that, as said purchases were fairly made at a public sale, the fact that this defendant permitted the property he purchased to return to his father's possession, was no fraud

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on the creditors of said G. B. Montgomery, Jr.; no hindrance to them in the collection of their debts; and no evidence of combination between said defendant and G. B. Montgomery, Jr., to defraud complainants.

2. Because Chancellor Dargan, in his decree, orders the said defendant to deliver the property purchased by him, as aforesaid, to the commissioner, and for the same to be sold by him as the property of G. B. Montgomery, Jr.

The plaintiffs appealed on the grounds:

1. Because his Honor erred in holding that the proceeds of the sale of the lands and mills of G. B. Montgomery, Jr., are subject to the preferences contained in his assignment to J. B. Mickle, the same not being embraced in his deed of assignment, and he, in his answer, having stated that he had no interest therein.

2. Because, it being clear from the proof that the voluntary assignment was made to defeat the payment of the claim of complainants, and it being also clear, from the proof, that all the other valuable property, em-

braced in the assignment, was purchased by parties therein preferred, and large claims in said assignment being preferred, which were altogether fictitious, the Chancellor erred in not decreeing said assignment to be fraudulent and void as to complainants.

The defendant, J. B. Mickle, and David McDowell, one of the creditors of G. B. Montgomery, Jr., appealed from the decree of his Honor, Chancellor Wardlaw:

1. Because said McDowell's note was given for the purchase money of the mills, and should have precedence of payment out of the proceeds of the sale of said mills.

2. Because the purchase of J. B. Mickle, at the assignee's sale, was fair, and unimpeached by a shadow of testimony; and, therefore, said purchase should not be set aside.

McAiley, for plaintiffs.

Mickle, Williams, for defendants.

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*[Authorities cited: 5 Johns. Rep., 385; Webb v. Daggett, 2 Barb., 9; Jacot v. Corbett, Chev. Eq., 71; Le Prince v. Guillemot, 1 Rich. Eq., 187; Anderson v. Fuller, McM. Eq., 27; Hipp v. Sawyer, Rich. Eq. Ca., 410; 4 Rich. Eq., 471; Brown v. Postell, 1 Hill, 445; Moffatt v. McDowal, 1 McM. Ch., 434; Hill v. Rodgers, Riley Ch., 7; Bird v. Atkins, Rice, 87; Barton v. Rushton, 4 DeS., 373; 11 Stat., 62; 8 Leigh, 272; Anderson v. Hook, 9 Ala., 70; Union Bank v. Toomer, 2 Hill Ch., 27; 14 Johns. Rep., 493; 3 Johns. Ch., 378; Guignard v. Harley, 10 Rich. Eq., 256.]

The opinion of the Court was delivered by

DUNKIN, Ch. The first and principal ground of appeal relates to the judgment of Green B. Montgomery, Sr. It is true that when the plaintiff seeks to invalidate a judgment on the ground of want of consideration, which is denied by the answer of the judgment creditor, the defendant may, under ordinary circumstances, rely on his answer without further proof. In this case the plaintiffs alleged and proved a fraudulent intention on the part of Green B. Montgomery, Jr., to defeat the claim of the plaintiffs, and that, in pursuance of such intention, he had procured the deed of the lands and mills to be executed to his son, James B. Montgomery. It was charged that the several judgments to his father, Green B. Montgomery, Sr., to his mother-in-law, Mrs. Bailey, and to his son-in-law, entered on the same day, were without consideration, and for the same purpose. It was furthermore charged that at the sales subsequently made, the whole of the property of the debtor (with a very inconsiderable exception) was bid off by his family, and has ever since remained in his possession "and under his dominion and control as before the sale." This was established before the Chancellor, and under the evidence the purchase of four of the slaves by the

defendant, Green B. Montgomery, Sr., as well as other purchases on the same occasion, were set aside, and this judgment has the concurrence of the whole Court. It was

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under *these circumstances, that the Chancellor ruled that, although "a father has the same right as a stranger to save his just claims, if he can, in the wreck of his son's affairs, yet that it was a matter affecting character, and it was simply the result of the common sense, or the sense of equity of mankind, that he should manifest that his claim is really just, and that he has not improperly yielded to the bias of paternal affection in any effort to screen the property of his son." The Chancellor held that "under the circumstances of suspicion attending the judgments, and when they were directly assailed, the defendant should have proved the indebtedness of his son to him." He offered no evidence whatever. It was said for him here this was attributable to the absence of his counsel. This seems a misapprehension. The solicitor, who filed his answer, not only attended the references, but represented another judgment assailed on the same grounds, and took care to adduce evidence of the consideration which was sustained by the Court.

Although the Chancellor set aside this judgment as well as that of Nancy Bailey, (from which latter there is no appeal,) he allowed the defendant, Green B. Montgomery, Sr., to come in among the general creditors. A reference was accordingly had, and it is now asked to review and reverse the judgment upon the new evidence adduced. This would lead to great embarrassment. Evidence was not only given of an indebtedness, to some extent, from Green B. Montgomery, Jr., to his father, between 1842 and 1852, but evidence was also given that, during that time, Green B. Montgomery, Sr., was not in a condition to lend money to his son, or to any one else—much less to extend long credits. The Chancellor has said in his decree, that as to the alleged embarrassment of Green B. Montgomery, Sr.'s affairs he knew nothing from the evidence before him. It is not proposed to comment, in any manner, upon the new evidence, which might have a tendency to pre-judge questions that may arise upon the commissioner's report. In de-

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termining the merits of an appeal, it *would be great injustice to the Chancellor, and, not unfrequently, much greater injustice to the parties, to admit the influence of evidence which might have been adduced, but was not before the Court. In this case the evidence on each side has introduced a very material element to aid the judgment in determining the existence and extent of the defendant's claim as a general creditor of Green B. Montgomery, Jr., but it can have no weight

to strengthen or invalidate the original decree.

Another ground of appeal is, that the note in favor of David McDowell should have precedence of payment out of the proceeds of the sale of the mill tract, because the note was given for the purchase money. In this State the doctrine has never prevailed, that the vendor of land has an equitable lien for the payment of the consideration. While something is due to the vendor who parts with his property, not less, certainly, is due to the subsequent creditor who has trusted the ostensible as well as legal owner of the estate, without any knowledge of a secret incumbrance. Upon this subject the language of Chief Justice Marshall, in *Bailey v. Greenleaf*, 7 Wheat., 46, 50, is instructive. "To the world," says he, "the vendee appears to hold the estate, divested of any trust whatever; and credit is given to him, in the confidence that the property is his own, in equity as well as law. A vendor, relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is, in some degree, accessory to the fraud committed on the public, by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a Court of Chancery, to the exclusion of bona fide creditors."

The only authoritative decision in our own Courts, is that of *Wragg v. Creditors of Andrew Irvine*, which was the judgment of a full Court, and is reported 2 DeS., 509. In

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*that case, Chancellor Rutledge, speaking for the Court, wholly repudiates the claim of "a bond creditor to have an equitable lien on the land he has sold, unless he has taken care to secure that lien by a mortgage;" and such, he says, has been the law of this country for at least sixty years past. More than half a century has elapsed since that decision, and, although, in a note to the case, further examination of the subject may seem to have been invited, the Court is not aware of any subsequent decision of this tribunal arraigning the judgment in *Wragg v. Comptroller General et al., creditors of Irvine*. It may be added, that the Act of 1843, requiring all mortgages of real estate, however formal and perfect, to be recorded within sixty days, may well be regarded as a legislative declaration of the prohibitory policy of the country against any such secret liens.

The Court has said this much in deference to the earnest and elaborate argument submitted by the appellant's counsel. But it is clear on the facts as before us, that, neither in Great Britain, nor elsewhere, in which the doctrine of the vendor's equitable lien is fully recognized, could the claim of the appellant be maintained. According to the re-

port of the Chancellor, the vendor, in selling the premises to Doag, never relied on this evanescent and doubtful equitable lien, but took from him a mortgage of the premises to secure the purchase money. When Doag afterwards conveyed to Montgomery, part of the consideration money was paid in cash to McDowell, and, for the balance, he took from Montgomery his single bill, with two sureties, and gave up or released his mortgage. Under these circumstances it would be vain, according to any of the authorities cited, for McDowell to resort to his original equitable lien, when he had surrendered his legal mortgage for another and satisfactory security, which he was content to receive. It is, perhaps, just to remark, as was suggested at the bar, that this appeal is prosecuted, not so much in behalf of McDowell,

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as of the sureties to the single bill who desire to be subrogated to his supposed equitable lien.

This Court has already intimated a concurrence in the views of the Chancellor, in reference to the re-sales ordered; nor, in relation to the other grounds of appeal, is it deemed necessary to add anything to the reasoning of the decree.

It is ordered and decreed, that the judgment of the Circuit Court be affirmed, and the appeal dismissed.

WARDLAW, Ch., concurred.
Appeal dismissed.

11 Rich. Eq. *135

*ANNA R. STOKES v. G. W. HODGES and Others.

W. L. HODGES v. THE SAME.

(Columbia. Nov. and Dec. Term, 1859.)

[*Mortgages* ¶74.]

An unrecorded mortgage produced by one of the mortgagees, after the death of the mortgagor, *held*, under the circumstances, to be invalid for want of sufficient proof of delivery.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 172; Dec. Dig. ¶74.]

[*Partnership* ¶75; *Principal and Surety*, ¶12.]

One partner, who puts in his proportion of the capital, is not entitled to charge interest because the other partner has failed to put in his proportion; the articles of partnership not stipulating for the payment of interest.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 121; Dec. Dig. ¶75; *Principal and Surety*, Cent. Dig. § 28; Dec. Dig. ¶12.]

[*Joint Tenancy* ¶8.]

Where two persons purchased a tract of land as joint tenants, and gave their joint bond for the purchase money, and one of them paid beyond his proportion, *held*, that, for the amount paid over his proportion, he was surety, and entitled to set up the bond as a specialty debt against the estate of his cotenant.

[Ed. Note.—For other cases, see *Joint Tenancy*, Cent. Dig. § 5; Dec. Dig. ¶8.]

[*Joint Tenancy* ¶8.]

Where one joint tenant used and occupied the land for several years after the death of his co-tenant, and on bill to marshal the assets of the co-tenant, was allowed his demands as creditor, *held*, that he must account for the use of the land, and deduct from his demands a reasonable amount for the use of such proportion as he occupied, over his share.

[Ed. Note.—For other cases, see *Joint Tenancy*, Cent. Dig. § 9; Dec. Dig. ¶8.]

Before Johnston, Ch., at Abbeville, June, 1859.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnston, Ch. The first of these bills was brought by Anna R. Stokes, the widow and administratrix of Joseph H. Stokes; and was filed the 28th of May, 1857. Pending the suit, and after certain proceedings in it, not necessary to be particularly stated here, Mrs. Stokes died, and W. L. Hodges became her administrator, and also administrator de bonis non of Joseph H. Stokes, and filed the second bill to revive her suit, which had abated by her death.

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*Joseph H. Stokes died the 7th of August, 1853. In his lifetime, he, with the defendant, Geo. W. Hodges, who was his wife's father, became the joint purchasers, at commissioner's sale, of a tract of land for farming purposes, which is described in the pleadings. It was sold as the estate of Mays; and, on effecting the purchase, they gave their penal bond, dated the 4th of November, 1850, to the commissioner, conditioned to pay the price (\$3,172) in two equal annual instalments, of \$1,586 each; the first payable the 4th of November, 1851, and the second the 4th of November, 1852, and took titles to themselves jointly. Of this price it appears a considerable part was paid by Geo. W. Hodges.

The parties, each, furnished this land with laborers, mules, provisions, &c., but in unequal proportions. Without any special articles between them, they entered upon the cultivation of the place, and made crops in 1851, 1852 and 1853. Stokes received the proceeds of the crop of 1851, Hodges received those of 1852 and 1853; in the latter of which years, it will be remembered, Stokes died.

After his death, Mrs. Stokes became administratrix of his estate; and there having been a partial accounting between her husband and her father, Mr. Hodges, a division was also made between them of the personalty, (slaves, mules, &c.) of Stokes and Hodges, on the plantation; and the share of Stokes was sold by the administratrix; of which she bought the principal portion. The land remained unpartitioned, by some arrangement, the terms of which do not appear. Mrs. Stokes put in negroes, &c., purchased by her at her husband's estate sale, and the place continued to be planted

in connection with her father, who let his forces remain on it. This enterprise was continued for the years 1854, 1855, 1856, 1857, and till September, 1858. On the bill of Mrs. Stokes, it was sold the 6th of September, 1858, by order of Court, and brought the sum of \$1,997 15; a loss on the original purchase of \$1,174 85. Mrs. Stokes died that year.

At his death, Stokes was much indebted to

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his father-in-law, and to many other persons; indeed, his estate is insolvent. In his lifetime, he had entered into a mercantile partnership with the defendant, James N. Cochran, by articles bearing date the 21st of July, 1852; in which it was stipulated, that Stokes should "furnish such an amount of means as may, from time to time, be agreed upon by the parties to be necessary for the purpose aforesaid," and that Cochran should furnish "an equal amount of means" with Stokes. The partnership "to continue for the period of two years, at least, subject to be discontinued or determined at any time by consent of parties, said parties to participate equally in the responsibilities and profits of said business."

Stokes fell short of contributing as much capital as Cochran. The concern, which was personally attended to by Stokes, until his death, (August 7th, 1853,) proved quite unprofitable. In fact, it did a losing business. On the death of Stokes, Cochran, the surviving partner, took it in hand, paid its debts, and as soon as convenient, brought it to a close.

The object of the bill was to obtain a sale of the land held jointly by Stokes and Hodges, and a settlement between them; also, the sale of a store-house and lot, held in partnership by Cochran & Stokes, and a settlement of their partnership, and of their mutual liabilities to each other.

The sale was ordered, and has been made; an account has been taken, as indicated, and also, as to all the creditors of Stokes, (who were called in;) and now the case is taken up on a report upon these matters, to which exceptions are taken both by plaintiff and defendants.

The defendant, George W. Hodges, and the plaintiff, join in their exceptions, and these will be first considered—

1. The first of them is, "Because the commissioner erred in not giving George W. Hodges a lien, under his demands against Stokes, growing out of the plantation partnership, upon so much of the partnership property as was sold as the individual estate

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of J. H. Stokes. The same was partnership property, which the partner had a specific lien upon, to pay partnership debts."

This is an objection proper for George W. Hodges, and not for the plaintiff; and the

latter has no right to be heard upon the exception.

The exception assumes that this joint planting establishment was a partnership; and that the incidents of a partnership properly apply to it; which is very questionable as a general proposition. I shall not dispute, however, that Mr. Hodges might have a right to set up as equitable assignee the claims of creditors of this concern, discharged by him, and claim payment out of any portion of the joint property. The property out of which such payment is claimed here, was not joint property, but the individual property of Stokes; so acknowledged by Hodges when he voluntarily separated it from his own of the same description, and delivered it up to the administratrix to be sold as the estate of her intestate. This act, was, also, a waiver of the lien he now sets up, if such lien had existed; and he is to be regarded as an ordinary creditor of Stokes' estate. This exception is overruled.

2. The second of these exceptions is, that "the commissioner erred in postponing Hodges' mortgage, covering the debt paid by him to Clinkscales, to the claim of James N. Cochran, who, it is alleged, is not a creditor subsequent to the date of the mortgage."

3. The third is, "Because the Clinkscales money was borrowed by Stokes to pay partnership debts, and James N. Cochran being a partner of the firm of Cochran & Stokes, had actual notice of said mortgage."

4. The fourth exception is, "Because, in March, 1853, the mortgage was executed; and on the 23d December, 1853, the said James N. Cochran himself made an endorsement thereon, recognizing its validity; and it is denied that his claim, now presented, arose, or was due to him, in that interval of time."

5. The fifth exception is, "Because the

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whole of his claim (Cochran's) against the estate of Stokes, without any regard to how or when it originated, must be referred back to the date of the articles of partnership between him and Stokes," (i. e., 21st July, 1852.) The facts are only to be gathered as they are dispersed among the papers before me; and it is no little impediment in performing this task, that frequently there is an omission of dates where they might have been taken down.

It appears that Stokes, desiring to borrow about \$2,500, and expecting to get it from Mr. Dorn, drew up a note for that amount, payable to Dorn, which he procured to be signed, as surety, by one M. C. Zeigler, saying he intended to get it also signed by George W. Hodges and F. A. Connor; and he exhibited to Zeigler, at the time, the following instrument, which has been denominated a mortgage:

"South Carolina,
Abbeville District, March 2, 1853.

"Know all men, &c., that I, J. H. Stokes, of District and State aforesaid, do, now and hereafter, relinquish all claim, right and title to, on four negroes, viz.: Cato, Julia, Charity and Easter, to Gen. G. W. Hodges, M. C. Zeigler and F. A. Connor, their administrator, executor, or assigns, until the consideration, for which the relinquishment is made, is fully gratified. The object of the above relinquishment is to secure G. W. Hodges, M. C. Zeigler and F. A. Connor, from risk in going security to J. H. Stokes for the amount of \$2,500, borrowed money.

"In case said amount is paid, or said sureties are entirely released in twelve months, the above obligation or relinquishment is null and void. Otherwise to remain in full force and virtue. J. H. Stokes, [L. S.]

Signed, sealed and delivered in the presence of

J. H. Connor.

G. M. Connor."

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*Stokes failed to get the money from Dorn. But being still in pressing need of it, he executed a note dated the 10th March, 1853, endorsed by J. F. Marshall, for \$2,500, which was discounted by the Commercial bank at Columbia, and the money "applied to the debts of the firm." This note was payable at sixty days; and when it was about to mature, he, through Marshall, got Clinkscales to loan him \$2,500, to pay the bank, on a note drawn by himself, Hodges and Connor, (Zeigler being accidentally absent.) This bears date 3d May, 1853, and on it Stokes made the following endorsement: "The within note is left with F. B. Clinkscales as collateral security for cash advanced J. H. Stokes, until redeemed by him with another note on F. A. Connor and G. W. Hodges, 4th May, 1853.

J. H. Stokes."

This instrument was never registered; nor is delivery proved except as evidenced by Hodges' possession of it.

On it is the following endorsement, which is proved or admitted to have been drawn up by the defendant, James N. Cochran; and bears date after Stokes' death:

"This instrument witnesseth that I, Anna R. Stokes, administratrix of the estate of Joseph H. Stokes, deceased, do hereby give my consent that the negroes, Cato, Julia, Charity and Easter, specified in the within assignment, shall be sold with the balance of the property of said estate, subject, however, to the provisions of said assignment; and that the proceeds of sale of said negroes shall be exclusively applied, first, to the payment of the debt intended to be secured by the aforesaid assignment. Said proceeds not to be made liable to the creditors of said estate generally, until the aforesaid debt be liquidated. The balance, if any, after payment of said debt, to be subject to the estate afore-

said, as witness my hand and seal, 23d December, 1853. Anna R. Stokes, [L. S.]

Hodges paid Clinkscales, and claims under

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the mortgage. *The commissioner remarks, in his report, "Cochran, and other creditors, whose debts arose subsequent to the date of the mortgage, claim that, as to them, the mortgage is void for want of notice. The earliest notice proved to have been received by Cochran, was December 23, 1853, (evidenced by his drawing up Mrs. Stokes' endorsement of that date, on the paper.) A large part of the debts paid by Cochran was for goods purchased, and debts contracted by the firm subsequent to the date of the mortgage; and between the death of Stokes (August 7, 1853) and the time of the notice of the mortgage, (December 23, 1853,) he paid out debts of the firm to the amount of \$3,000 or upwards. I have not the data to state exactly the amounts received and expended by Cochran during that time on account of the firm, but am informed that the expenditure exceeded the receipts. As to Cochran and such other creditors, whose debts were contracted subsequent to the date of the mortgage, and who had no notice, I am of opinion the mortgage cannot avail. This conclusion I have attained with much doubt"—

And it is to this ruling of the commissioner, the 2d, 3d, 4th and 5th exceptions are taken.

At the hearing I was strongly disposed to support them: and I have striven to do so; but I cannot find grounds of fact or law to sustain me. These exceptions are therefore overruled.

6. The sixth of these exceptions is, "Because the commissioner has erred in charging Stokes with the whole amount (to wit: \$4,300.81) paid him by Cochran in cash and cotton, to be applied to the purposes of the firm; and at the same time, with half the same amounts, by adding the same to the reported excess of payments by Cochran over his receipts; thereby making the final indebtedness of Stokes to Cochran \$4,112.17; whereas it is submitted that (assuming the correctness of the data upon which the report is founded) only the sum of \$4,112.17—2,150.41 (half of \$4,300.81)—\$1,960.76 is due."

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*This exception is founded upon a misapprehension of the report, as will be seen by examining it, and the report on this exception.

This exception is overruled.

7. The seventh exception was abandoned. It was in these words: "Because the commissioner erred in deducting the profits (of Cochran & Stokes) to wit: \$413.46, from the doubtful and bad debts; whereas they should be divided, allowing the estate of Stokes one half thereof, to wit: \$206.73."

8. The eighth exception is, "Because the proof is that Stokes put \$2,500 into the firm

(the money borrowed of the bank) and the commissioner erred in not adding that to his payments, as he did the payment of \$4,300.81 to him by Cochran, to Cochran's payments. Both sums were used for, and in the firm; and if one partner gets credit for his payment, the other should also."

9. The ninth exception, as it now stands, is long and obscure. As originally filed, it was, "Because the commissioner erred in allowing more to J. N. Cochran on his partnership claim than he is properly entitled to receive: especially that he has erred in the following particulars: That he has given Cochran the whole amount of \$4,300.81, said to have been paid into the firm by him—when he should have charged Stokes with only one-half of that sum—that he has not charged Cochran with interest upon the amounts and notes received by him, and in other particulars allowed the said James N. Cochran more than he ought to receive."

This was the form of the 7th, 8th and 9th exceptions as put in and argued before the commissioner. On these he remarks in his report upon exceptions: "As to the 7th, 8th and 9th exceptions it can only be said, that there never were any profits of the firm to divide. There was an excess of sales over purchases, but when the bad debts were taken into consideration, that excess was completely absorbed."

"The \$2,500 applied by Stokes to the firm's debts—the proceeds of the note endorsed by

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Marshall and discounted in *bank—he has been allowed credit for, in the payments credited to him; and he clearly cannot be entitled to credit for the debts paid with that sum, and also claim credit for so much cash contributed to the capital of the concern. The complainant's exceptions are therefore overruled."

The 7th exception was abandoned at the hearing before me; and if it had not been abandoned, I would have overruled it for the reason given by the commissioner.

I overrule the 8th exception, for the reasons given by the commissioner for his judgment upon it.

It will be observed that the commissioner has made no observation on the 9th exception as presented to him; I have nevertheless no difficulty in overruling that exception as presented, and I do so.

But at the hearing, by consent of counsel, the exception was amended, by adding to it: "That he (the commissioner) has erred in allowing Cochran credit for \$447.68, as a payment for freight, appearing by J. F. Hodges' receipt, which in the language of the accountant, Wm. Hill, to whom the books of the firm, by agreement, were referred, is 'vague and indefinite;' and also, in charging the estate of Stokes with \$484.98 as a part of the proceeds of the cotton money (the J. C. Cochran draft) alleged to have gone into

his hands, more than appears by evidence he has received; and further, in charging the estate of Stokes with \$1,300.81 as proceeds of the cotton money, alleged to have been received by him, when, by the showing of Cochran, the net amount of said cotton money was only \$1,249.34."

This part of that exception I cannot understand without a report upon it. I, therefore, recommit it to the commissioner.

Counsel cannot be prevailed on to go into references early enough to allow the commissioner time for a full and deliberate statement of their matters before him; and then they hurry both him and the Court at the hearing. The commissioner might procure time, by assigning early days for references; and, after giving notice of it, if coun-

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sel and parties *thwarted him, he might refuse to make up any other report, except of the course he had taken, and how it had been frustrated. This course, adopted by the late Mr. Miller, of Sumter, proved successful. Nothing short of it is likely to succeed.

10. The tenth of these exceptions, and the last of them, is, "Because the commissioner erred in not allowing a reasonable compensation to J. H. Stokes for his personal attention to the business of the firm, from its commencement to his death. It is insisted that his services rendered in this behalf were worth, at least \$500 per year. He gave his entire attention to the firm, and boarded himself in the meantime."

I suppose the counsel are aware, that it has been repeatedly decided that compensation for such services must depend on the partnership agreement. Parties have an opportunity to agree respecting compensation, if they choose to allow it; and if they make no bargain, they cannot expect the Court to make a bargain for them. This is the uniform rule. No decision to the contrary; and the counsel must be supposed to have put in this exception with the mere desire to impose the labor of hearing and overruling it. It is overruled.

In closing what I have to say on these exceptions I would observe, that confusion is apt to arise from comprehending in the same class of exceptions divers interests.

I am now to consider exceptions put in by "J. N. Cochran, on behalf of himself and others, creditors of J. H. Stokes."

1. The first is: "Because G. W. Hodges has not been charged with rent of the partnership plantation for the years 1854, 1855, 1856, 1857 and 1858, to wit: the sum of \$400, annually, with interest."

The commissioner remarks, that this exception "proceeds as your commissioner conceives, from the confounding of a joint tenancy with a partnership in the land. The purchase was joint; but the land was purchased with no common fund. The partnership appears to the commissioner to have

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*consisted, not in the land, but in the farming operations. It is true, real estate, under our statutes, is made liable for the payment of debts upon the deficiency of the personalty; for that purpose, the creditors had a right to call upon it in aid of personalty. But is the right to rent from a co-tenant incident to this right of creditors?

"Under our statutes, upon the death of a joint tenant, his interest descends, as in tenancy in common, and becomes liable to distribution among heirs and distributees; subject, of course, to the rights of creditors. The *jus accrescendi* is taken away, and the right of partition accrues."

There is no doubt that the *jus accrescendi* being abolished by statute as to lands held in joint tenancy, (which I regard this land to have been,) the necessary consequence is, that the portion of the deceased owner descends for distribution, in the absence of a will.

The operations on these lands for the years indicated, after Stokes' death, were not conducted in privity with him, but with his widow, as an individual, acting for herself and her infant co-distributees.

If Hodges' use of the premises exceeded his share, which I do not see, and was contrary to their interests, for this abuse, he was primarily accountable to them. Though the widow was administratrix, yet as administratrix she had nothing to do with the land, so as to establish a privity in this matter with creditors. The land was liable for debts, and is so still. This liability is created by statute, and the statute creating it is, perhaps, the measure of the liability.

Where is the right to rent given? Besides, there is nothing in these pleadings to raise the point. Must not the creditors resort to a bill for the purpose of claiming this liability?

If the widow and children are liable to creditors for their occupancy—which I doubt, until it is demanded by bill—that is not what this exception claims. Their ancestor's portion of the land descended upon them;

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and in occupying it *they occupied not rented premises, but land legally their own. It would be startling to announce to persons in this condition, which is a very common case, that while occupying their own land, as to which their ancestor was not chargeable with rent, and of whose insolvency, if that made any difference, they might be utterly unconscious, they were all the time accumulating rent upon themselves. The exception is overruled.

2. The second exception is, "Because if G. W. Hodges is not chargeable with the partnership premises for the years 1854, '55, '56, '57, '58, the estate of Anna R. Stokes, administratrix of J. H. Stokes, is chargeable with the same, with interest."

The commissioner remarks, "As to creditors' second exception, the claim of Anna R. Stokes does not seem to come within the scope of the bill," [nor any part of the record.]

"Her authority as administratrix extended to the personalty only; and her possession and enjoyment of the land was, in virtue of the descent, cast upon her by operation of law. The said land was used for the support and maintenance of the family, and I do not think the claim for rent should prevail."

I concur with these observations, and overrule the exceptions.

3. The third exception is, "Because the commissioner should have allowed interest to J. N. Cochran on the amount of his capital, \$4,300.81, from the time of its investment; and also, interest for payments made for the firm from the time of such payments."

The claim for interest upon a partner's stock paid in, in the absence of a stipulation for it in the articles, is, I believe, unprecedented. The capital is risked for profits, which are the substitute for interest on the money. The claim of interest upon the payments made by Cochran, so far as made out of his own funds, is, I think, right, upon principle. He stands, in such case, as a

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creditor of the firm. If, therefore, *the account allows interest to Stokes for his payments, it should be allowed to Cochran. Both parties should be allowed interest.

4. The fourth exception is, that "J. N. Cochran, in addition to half the losses of the firm, should be allowed to go against the estate of his partner, J. H. Stokes, with the full amount of said J. H. Stokes' individual indebtedness to the firm, viz: \$529.75 and \$27.23."

The commissioner has sustained this exception, and I concur with him in the principle, that each member of a firm is liable to it for the full amount of his contracts, as an individual, with it. There is danger, however, of sustaining every part of an exception so sweeping as this. It was unnecessary to the exception to state the amount of Stokes' debts to the firm, or to claim that he should be charged with it, in addition to half the losses. I refrain from sustaining the exception as to these particulars, though they may be right. One cannot be too vigilant.

5. The fifth exception is, "Because the commissioner has not charged J. H. Stokes' estate with \$809.50, the amount of partnership money applied to his private debts."

The commissioner, in his report, speaking of this claim, says: "I have not allowed it, as it appears that he has been charged with the full amounts received by him, and after allowing the proper credits, a balance remains in his hands of only \$27.23."

This appears to be satisfactory. If Stokes

was already charged with all he received from the firm, this \$809.50 is accounted for, and should not be charged again. The exception is overruled.

6. The sixth exception is, "Because the commissioner improperly held the paper dated the 2d of March, 1853, to be a valid and subsisting mortgage of certain slaves to G. W. Hodges and others, to indemnify them as sureties of J. H. Stokes, on the Clinkscates note of \$2,500, dated May 3d, 1852."

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*The commissioner overruled this exception. I cannot concur with him, though I differ from his judgment with hesitation. I am of opinion the mortgage which was created to secure another and prior note cannot be connected with this, which had no existence till two months afterwards.

The want of registration is also fatal to the mortgage. Notice of it in December, 1853, was notice of its defects. And payments made after that time, by Cochran, to which he was obliged by anterior contracts of the firm, or of himself on behalf of the firm, should be referred to the anterior obligations, and not considered voluntary contracts or payments after notice. This view is different from that I strongly expressed at the hearing; but I must be at liberty to correct a hasty judgment.

It was argued that the mortgage should prevail as to creditors who became such after notice, such as Cochran obtained in December, 1853, when he drew Mrs. Stokes' endorsement on the mortgage. As to Cochran, the only creditor affected by such notice, I have stated that his payments after that time should be referred back to the date of the contracts, which compelled him to make them. But I have now to observe, that the mortgage being incapable of being connected with the note to Clinkscates, the only debt claimed under it, is no mortgage; and all the notice in the world could not make it one, as against persons having such notice, more than against other persons who had no notice at all.

It has been said also, that this money being borrowed to replace money borrowed from the bank to pay debts, was gotten for partnership purposes; and so Cochran being a partner was chargeable with notice. But in this matter, the claim being through and in behalf of Stokes, the parties were acting apart, and at arms' length; and the maxim relied on cannot rightfully apply. Stokes had credit for his payments made with the \$2,500 borrowed, and still remains a debtor to the firm; which precludes the idea of subrogating Hodges to his rights under the payments made by him.

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*I, therefore, sustain this exception.

7. The seventh exception is, "that the commissioner has improperly held the \$1,180.92, paid by Hodges on bond to the estate of Mrs. Mays, to rank as a specialty debt; said bond

having been given jointly by Stokes & Hodges for the purchase money of the partnership plantation."

The bond was not produced; but I understand it to be admitted that it was joint, and not joint and several.

The cases of *Pride v. Boyce*, Rice Eq., 286 [33 Am. Dec. 78], and *King v. Aughtry*, 3 Strob. Eq., 156, in which it was held, that such a bond might be reformed into a joint and several obligation, on the ground of presumed mistake, and set up as such against an estate, were cases of sureties applying to have an equity enforced against their principal. This is the case where the applicant was himself debtor along with him whose estate he seeks to affect, and equally bound with him to pay the debt.

But I think the true principle of these cases is, that wherever a party is exposed to pay a sum of money, which (as between himself and his co-obligor) the co-obligor is bound, in equity, to pay, he is entitled to a remedy either by reforming the contract, or otherwise, if practicable, to throw the burden of payment on him.

For his own half of the bond, Hodges, on this principle, is entitled to no remedy. But for the other half, Stokes was equitably exclusively bound as between himself and Hodges; and Hodges was, as between the two, only his surety; and having paid off the bond to the extent it was left unpaid by the proceeds of re-sale, I am of the opinion he is entitled to set up the bond to the extent of his payments for Stokes, (making proper calculations,) against the estate of Stokes. And in this view, I overrule the exception.

8. The eighth exception is intended to apply this ruling, to some extent, to the other side. It is, that "J. N. Cochran, having paid the debts of the partnership (of Cochran & Stokes) to the amount of \$8,224.34, as ap-

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pears by the *account, should be subrogated to all the rights of partnership creditors, and allowed with the whole partnership debt paid by him, to share his pro rata with the other private creditors out of the private estate of J. H. Stokes."

To the extent of the excess of his payments out of his own funds, beyond his half, Cochran is a creditor of Stokes, like any other of his creditors. The payment, per se, made him only a simple contract creditor. But, occupying essentially the position of Stokes' surety, as to the amount which Stokes should in equity have paid, and which he has been obliged to pay out of his own funds, he is, in my opinion (entertained with hesitation,) entitled, as far as he has paid specialty debts, if any, to rely upon them to place himself, as creditor, in a higher rank among Stokes' creditors, limiting that privilege, however, to the extent which his payments have made him a creditor of Stokes. He has no right to come in for the whole amount he has paid.

but only for half his excess of payments; thus leaving himself to sustain one-half the losses of the firm.

In this view, and to this extent, the exception is sustained.

9. The ninth exception is, "Because G. W. Hodges has not been charged with the value of the cotton seed of the crop of 1853 (to wit: about 1,200 bushels,) and also for cattle and other property belonging to the partnership of Hodges & Stokes, and also interest upon the value of the same."

The commissioner says: "The ninth exception is overruled. The testimony of W. N. Munday and Wm. S. Smith proves that the appraisers intended to divide the partnership property equally between Hodges and the estate of Stokes; and though neither cotton seed nor cows appear in the sale bill of said estate, it is probable their value was compensated in some other way."

I shall not undertake to say the commissioner is not right. I overrule the exception.

10. The tenth exception does not appear to

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have been *before the commissioner. It is, therefore, recommitted, with the report, to him.

11. The eleventh exception is, "Because the commissioner has altogether overlooked the individual demand of J. N. Cochran against the estate of J. H. Stokes, viz: to the amount of \$150, and interest thereon; all of which were proved."

It is admitted these demands were overlooked. Therefore let them be recommitted, and let the report be remanded to the commissioner.

The defendant, Cochran, appealed on the grounds:

1. It is respectfully submitted that the Medy Mays tract of land was partnership property, and so treated by the partners. And whether it be regarded as partnership property or a joint tenancy, it is insisted that G. W. Hodges, having the possession and cultivation of it, is bound to account for the rent of the premises, and interest thereon, from the death of J. H. Stokes till the sale of the land.

2. In the event that G. W. Hodges is not bound to account for the rent of the premises, it is respectfully submitted that Anna R. Stokes, administratrix, or her representative, is bound to account for the same and interest.

3. Because according to the partnership articles each partner being bound to advance an equal amount of capital, and J. H. Stokes failing to advance any; it is respectfully submitted that the Chancellor erred in refusing to allow J. N. Cochran interest on his capital, \$4,300 81, from the time of its investment.

4. Because J. N. Cochran, as against the estate of his partner, J. H. Stokes, should have been allowed the whole amount of his

capital, \$4,300 81, and interest thereon, and as to the amount of the partnership debt paid by him, (\$3,923 53,) should be subrogated to all the rights of partnership creditors, and allowed with the sum of his capital (\$4,300 81) and interest, the partnership debt paid by him (\$3,923 53) and interest, and the

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individual indebtedness of *Stokes to the firm (\$556 98) to share his pro rata with other private creditors out of the private estate of J. H. Stokes.

The defendant, Hodges, appealed upon the grounds:

1. The mortgage or assignment to George W. Hodges and others, should have been held valid, and allowed a specific lien upon the negroes Cato, Julia, Charity and Easter, because the proof was clear that the parties substituted for the Dorn note, the note to Clinkscals, and intended the mortgage to secure the "borrowed money" covered by this latter note.

2. Assuming the validity of the mortgage, it is submitted that James N. Cochran is not a subsequent creditor without notice, or entitled to take advantage of the want of registry of the said paper.

Noble, Wilson, for Cochran.

McGowan, Jones, for Hodges.

The opinion of the Court was delivered by

JOHNSTON, Ch. The grounds of appeal in this case, which it is deemed necessary to notice, relate:

1. To the mortgage given by Stokes to indemnify his sureties for money borrowed.

2. To the non-allowance of interest to Cochran on his capital put in.

3. To the advantages decreed to George W. Hodges, in respect to payments made by him beyond his share for the land bought by himself and Stokes from the commissioner; and

4. To the refusal to make Hodges account for the rent of this land after Stokes' death.

1. As to the mortgage. There would be much difficulty in relation to this instrument, if it had been made to appear that it had been put into operation. Among other matters of difficulty, would be the determination of its effect upon creditors, under the circumstances stated in the case. Was Coch-

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*ran a subsequent creditor anterior to the notice which he appears to have obtained on the 5th of December? and many other points. But all these inquiries are superseded by the opinion entertained by this Court, to wit: that the instrument was never delivered, and never went into operation.

No conclusion in favor of delivery should be drawn from the fact, that in the attestation it purports to have been "signed, sealed and delivered." It was in that condition when shewn by Stokes to Zeigler; and it is certain that at that time it had not issued

from the hands of Stokes. It still remained with him when he procured the accommodation of Marshall. Nor would it seem to have been delivered at the time the money was borrowed from Clinkscale; with whom a note was left "as collateral security," until another note could be procured and substituted.

Had the mortgage been registered, that circumstance might have been insisted on as evidence of delivery. But secret, unregistered conveyances or liens are not to be favored, unless there is reasonable proof that, during the time they remained out of the range of public observation, everything that purports to have been done was actually and bona fide done. There is no proof that either of the mortgagees was ever in the possession of the instrument during Stokes' life. The last evidence we have of it leaves it in Stokes' possession: and we are to infer that it remained in his hands at his death, unless the subsequent production of it by George W. Hodges is proof, that he acquired possession by the hands of Stokes. But when we consider his intimate connection with the administration of Stokes' estate, whose administratrix was his own daughter, for whom he acted as principal agent, we hesitate to admit that his possession must have been acquired from the intestate. We disclaim all disparaging imputation whatever, but we think it would be unsafe to presume a delivery under the circumstances.

2. The next point relates to the interest claimed on the capital put in by Cochran.

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The exception was, that the *commissioner, in his report, had not allowed this interest. The Court must confine itself to the exceptions put in; and it expects that they shall be such as to point out the specific errors complained of. The argument here, is, not so much, that interest should be allowed to Cochran on his advance of capital, as that Stokes, the other party, should have been charged for capital which he failed to put in—with interest on what he withheld. That might have been a proper exception to the report; but it was not taken; and it would have been extraordinary if the Court had substituted and sustained an exception omitted, in place of the one put in, as the basis for its judgment.

On the exception actually put in, this Court is of opinion the Chancellor's decision was correct. As between partners the object of

putting in capital is profits and not interest. The profits are the substitute of interest; and without some stipulation in the articles, each partner is only entitled to have his capital back. This is the drift of the case of *Cameron v. Watson*, 10 Rich. Eq., 64.

It is not intended to say that in the account Stokes is not chargeable with the amount of capital he failed to put in. But, as I have said, that is a very different thing from sustaining the claim now advanced.

3. This Court approves the ruling of the Chancellor, in respect to the amount paid by Hodges beyond his own half of the bond; and the point requires no further observation.

4. The fourth point relates to the rent claimed from Hodges for his occupation after Stokes' death.

There has been an accounting as to all other matters beyond this rent. It is not necessary to inquire whether there may or may not be a partnership in land. We are of opinion there was no partnership in this land. The parties were, by the conveyance to them, joint tenants. The land was the mere basis of operations, in which operations slaves and live stock were contributed for the

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purposes of common *profits or losses. As to these contributions there was a partnership; of which the accounts have been taken.

But I am instructed by the Court to announce its opinion that an account should have been taken, charging Hodges, not for rent, *eo nomine*, but in respect to his occupation beyond his just proportion of the land.

The bill is to call in creditors of the estate of Stokes, and to apportion its assets among them. Hodges has come in and has preferred his demands as such creditor, and they have been established. But I am instructed to say that these should not have been allowed, without deducting from them what he owes for undue occupation of these premises. It is conceived that this would not be just to the other creditors. Therefore the direction of this Court is, that for any occupation by Hodges, exceeding the share to which he was entitled (to wit: beyond half the premises) he should be charged with reasonable compensation, to be deducted from the amount allowed him on his demands against the estate of Stokes.

Let the decree be modified according to this opinion; and in all other respects affirmed.

DUNKIN and WARDLAW, CC., concurred.
Decree modified.

11 Rich. Eq. *156

*AMERICAN BIBLE SOCIETY and Others v.
WILLIAM P. NOBLE and Others.

(Columbia, Nov. and Dec. Term, 1859.)

[Wills ⚡691.]

Testator, being the owner of two large estates, each embracing real and personal property, made disposition of the greater part of one estate in the first part of his will, and in a subsequent part, relating to the "disposal" of the other estate, directed his executors to sell "the whole estate," and then proceeded to dispose of the proceeds of the sale: *Held*, that the direction to sell related only to the estate mentioned in that part of the will, and did not embrace some portions of the other estate, which the will did not dispose of.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1653; Dec. Dig. ⚡691.]

[Wills ⚡576.]

Where a testator owned a large real and personal estate, which he had inherited from a deceased brother, and to which he had added a large tract of land, purchased with the proceeds of the crops of that estate, *held*, that his devise "of the estate of my respected and greatly lamented brother," embraced as well the estate he had inherited as the land he had purchased.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1255; Dec. Dig. ⚡576.]

[Wills ⚡573.]

A bequest of a negro woman "and her descendants," will include all her issue born before or after the date of the will; so, also, a bequest of a negro woman "and her children," will include all the children; but a bequest of a negro woman simply, by name, will not include her children born before the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1248; Dec. Dig. ⚡573.]

[Wills ⚡612.]

Testator directed a sum of money to be placed at interest in a bank, "which sum, when thus placed, I do hereby cheerfully give to J. M. And do hereby so settle it, that no person or persons whatever, under any circumstances or pretext whatever, can deprive him of it during his natural life. That J. M., himself, shall not be allowed to touch, or use, or squander one cent of the principal; but only to draw and make use of the lawful interest annually, as may seem to him best." *Held*, that J. M. took an absolute interest in the money, with right to dispose of it as he pleased.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1389; Dec. Dig. ⚡612.]

[Executors and Administrators ⚡138.]

Where there is no charge of insolvency or misconduct against an executor, the Court will not deprive him of the privilege, which the will gives him, of selling lands, and direct the sale to be made by the commissioner.

[Ed. Note.—Cited in *Anderson v. Butler*, 31 S. C. 198, 9 S. E. 797, 5 L. R. A. 166; *Rose v. Thornley*, 33 S. C. 323, 12 S. E. 11.

For other cases, see Executors and Administrators, Cent. Dig. §§ 563, 564; Dec. Dig. ⚡138.]

[Wills ⚡10.]

A devise of lands, to be sold by the executors, with directions to distribute the proceeds among certain religious corporations, is a devise of personalty, and is not prohibited by the

Act of 1733, (3 Stat., 341.) excepting corporations from the objects of the devises of land.

[Ed. Note.—Cited in *McIntosh v. City of Charleston*, 45 S. C. 586, 590, 23 S. E. 943; *Snider v. Snider*, 70 S. C. 557, 50 S. E. 504, 106 Am. St. Rep. 754.

For other cases, see Wills, Cent. Dig. § 19; Dec. Dig. ⚡10.]

Before Johnston, Ch., at Abbeville, June, 1859.

The facts of this case are stated in the report of his Honor, the presiding Chancellor, as follows:

In order to fully explain the situation of

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this case, it may *be proper to look into circumstances which preceded the filing of this bill.

John B. Bull, of Abbeville, died the 6th of January, 1855, leaving neither father, mother or lineal descendant, but leaving a widow, who was an alien, and three first cousins. He was supposed to have died intestate, and a bill was filed in 1855, by the cousins, against the widow and the administrators, of whom she was one, for partition of the estate. A question was raised at the hearing, which took place in June, 1855, whether the widow, under the Statute of 1828, was entitled to a part of the real estate. It was decided against the widow; from which decision an appeal was taken, and resulted in affirming the decree at Columbia, December, 1855.

As respected the personalty, the order of the Court was, that the bill stand until the expiration of nine months from the death of the intestate, and that then a writ issue for the partition of it, and that the commissioner inquire into and report upon the matters of account. At the expiration of the time fixed, a writ of partition issued; and on the 20th of November, 1855, the commissioners in partition having made their return, it was ordered that, after advertising for at least twenty-one days, the commissioner sell the slaves at Abbeville Court House, on the 20th and 21st of December following, or some convenient day or days thereafter, at public outcry.

On the 17th of December, three days before the intended sale, the following order was passed, which explains itself:

"Andrew W. Burnett, and Next of Kin, v. William P. Noble, Administrator, et al.

It appearing, since the writ of partition [was] issued in this case, and the order [was] made for the sale of the slaves for partition among the parties interested, that a paper (which has been exhibited to me,) purporting to be the last will and testament of John B.

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Bull, deceased, has been discovered, *which materially changes the disposition of the slaves and [other] property. On motion of Thomson and Fair, for Mrs. Sarah Bull, Ordered, That the order for sale heretofore

made and directed to the commissioner of this Court, be rescinded; and that he do not sell, as ordered, until the further order of this Court. J. Johnston.

December 17, 1855."

The next order in that case was passed by myself, on the 17th of January, 1856, and I have special reasons of my own for wishing it set out in full, not that it is very necessary to do so for the purposes of the present case, but I prefer that it should speak for itself, as it will serve to correct what it has been represented to contain.

"Andrew W. Burnett, et al., v. William P. Noble, et al.

This morning, Mr. Rhett appeared before me, at chambers, during the Appeal Term at Charleston, and moved a rescission of the order passed by me, suspending the order, which had been previously made by myself, for the sale of the slaves of the estate of the late John Bull.

It will hardly be necessary to observe, that the order of sale was made in conformity to the record and judgment in this case, in which the decedent, Mr. Bull, was, by all parties to the record, stated to have died intestate; and, of course, all the rights of the parties were based on that assumption.

On my return home from the Court of Appeals, [in Columbia,] in which the final decree was made upon the only question carried up for revision, I was met by the son of Mrs. Bull, [by a former marriage,] who informed me that a will of the decedent had just been discovered by himself, which he submitted to my perusal. The day of sale was nearly at hand, and no time was to be lost. But I directed him to go to Columbia, and submit the paper to Mr. Thomson, his mother's counsel, and also to the Faculty of the Theological Seminary, which had an in-

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terest in some of the *legacies created by the will; and, on his return to Abbeville, to present it to the executor named in it, and deposit it with the ordinary. He returned from Columbia as speedily as he could, with a motion, drawn up by Mr. Thomson, for the suspension of the sale until further order. This I granted, and the time of the sale was so near, that there was hardly time left to deposit it, and reach the plantation, so as to stop the negroes from being brought to Abbeville. Of course, I had little time for deliberation. Besides, I may mention the peril of mistake in all business done at chambers. But I ventured on the measure, expecting as a matter of course, that if the suspension produced any injury to any party, a motion would soon be made to rescind the order, and let the sale go on. The suspension was, in fact, made in order to give time to the parties interested in the will to propound it, or take such other course as they might be advised to pursue.

Accordingly, when Mr. Rhett mentioned to me his intention to move before me, I instructed him to give notice to the Rev. Dr. Adger (interested, as I understood, as one of the directors of the Theological Seminary,) to appear with counsel to hear the motion, and oppose it, if he deemed it proper. At the making of the motion, Dr. Adger appeared with counsel (Messrs. Simonton & McCrady) on the one side, and Mr. Rhett on the other.

"Mr. Rhett accordingly moved a rescission of the suspending order, and that the sale should proceed, and stated that he wished Tuesday, the 12th of next month, to be fixed as the time of selling.

"I stated that I was willing to recall the suspending order, and to order that the sale should go on, but that the order to be passed for that purpose could not reach the commissioner for a few days; that, then, time should be given for the advertisement of so large a body of slaves; without which a sacrifice might ensue, and that I should fix upon some time near the 1st of March. This length of time I thought the interest of all parties required; and if the sale were pre-

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cipitated, the sale would be prejudiced. I had offered, also, to make an order leaving the time of sale to be fixed by the commissioner.

"Mr. Rhett immediately withdrew his motion. But I feel disposed to pass the order of my own motion. It appears to me the suspending order was improvident, calculated to create inconvenience on the part of the administrator. He had sold off the provisions, &c., preparatory to the sale; and the preparation to retain and employ the negroes must be expensive, especially as the suspension is not for any certain time, but until further order, and liable to be terminated at any moment. On the other hand, a sale now, when negroes are selling high, will rescue the property from the casualty of depreciation; and if the proceeds be impounded, the fund can be made to answer to all parties, whatever shape their interests may assume under the will. I am not at liberty to decide that the will cannot be established, and I should take care that, if it can be established, those who may take under it shall have an opportunity to protect their interests.

"It is ordered, that the order heretofore made, suspending the sale, be rescinded; and that the commissioner, after advertising the property for a length of time satisfactory to himself, not shorter than the length of time required by the original order of sale, be at liberty to sell it on a day to be fixed by himself, upon the terms set forth in the original order of sale, and that he retain the proceeds of sale, and the securities taken therefor, subject to the further order of Court: Provided, always, that if, in the judgment of the commissioner, (after enquiring into the preparation that may have been made for

retaining and employing the slaves,) the sale hereby permitted to go on, will be prejudicial to the interests of the estate, he may omit to advertise and sell; and in that case he shall report the facts to the Court, and take its further order.

"It is ordered, that whatever expenses may have been, or may be incurred, in consequence of the suspension, be chargeable upon the estate. It is further ordered, that the

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*will, if not already deposited in the ordinary's office, be deposited with the commissioner, until further order, subject to be used by any party desirous to propound the same for probate; and that thereupon the commissioner give notice of its contents, and of this order, (this clause of it,) to the parties interested under it, by advertisement, and that he attend the Ordinary's Court and the Law Court, with the will, when proceedings for its establishment may take place, and he is summoned.

Charleston, at Chambers. J. Johnston.
January 17, 1856."

The sale proceeded, and the proceeds are involved in the present suit. The will before mentioned was propounded in the Ordinary's Court, and was required to be proved in solemn form, and under various appeals was carried before the Court of Errors, where it was adjudged to be a valid will; and being admitted to probate, Wm. P. Noble qualified as sole executor.

This will is the subject of construction in the present case; and as I desire that the view I may take of it shall be open, in the fullest manner, to correction, I prefer that it be read at length. The original, which is an autograph, is in the following terms:

"In the name of our Lord and Saviour, Jesus Christ, the friend of sinners: in the name of God the Father, Son, and Holy Spirit, Amen—I John B. Bull, of the State of South Carolina and District of Abbeville: considering the shortness and extreme uncertainty of this present mortal life, and the certainty of death: do hereby make this, my last will and testament, being the first and only one which I have made, bearing date this 8th day of April A. D. 1843, and now I by this my writing, cheerfully will, that after my decease, my physician's account shall be paid by my executors hereinafter named. Also my funeral expenses.

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*"Item 1st. I do hereby cheerfully give and bequeath unto my dearly beloved and honored wife, Mrs. Sarah Bull, in consideration of her untiring, gentle, christian, dutiful attention to me, her unworthy husband, the following property, viz: All the lands which I at present own; lying on the South and West side of Little River. Which are comprised in the following four separate plats,—The land on which my dear respected and lamented Mother resided. Said land was

purchased from Mr. James McCarter, by my dear and greatly lamented brother Genl William A. Bull. And by him, was after our dear Mother's decease, kindly given to me on the 21st of February, 1833, on which day he settled with me. This tract formerly belonged to the heirs of Mr. William Clark Senr and contained by the old survey 275 acres. But by a late survey it has been found to contain 320 acres. This plat was made by Peter B. Rogers Esqr—

"Adjoining to this tract on the South and West side, lies the small square tract of land which I purchased from John Scott Esq containing 100 acres more or less,—Immediately between these two tracts lies a very small piece of land containing 1 1-4 acres of ground only. Which I purchased this present year (1842) from Mrs. Eleanor Scott. It was surveyed, measured, and the plat made by Mr.—McKinney D. S.—On the East side lies the fourth piece, a small tract of land which I purchased from Mr. William Clark Junr. which belonged to the heirs of Mr. Alexander Clark. I have not had convenient opportunity to have this tract resurveyed. It was said to contain 150 acres more or less. A very small portion of it, lying on the North and East side of Little River, being inconveniently situated, I have disposed of to—

"Item 2d. To my dear and respected wife, I also hereby give, my good and aged servant Doritha (Doll) and all her children, and grand-children, all her descendants who are in my possession on either plantation, and on both plantations. Including the husbands of her daughters.—Pompey the husband of Nelly, I make this kind and earnest request,

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*that during the time of her natural life, Doll be treated with all that humanity, moderation and kindness which her advanced age and her faithful services call for.—also to my dear wife I hereby cheerfully give all the servants on my farm at Little River. Their names as follows, Venus, Sam, Andrew, with his wife Henny and their children Hiram and Sarah, Cumbo, Stella, Statira, Grace, Prince, Sylva, Jacob, and his wife Peggy. Jim and Scipio are Doll's children and included in her family.

"Item 3d. To my dear and respected wife I also hereby cheerfully give all the stock on my farm at little River, horses, cattle, sheep and hogs. Also all the buildings and conveniences, All the plantation tools. All the household furniture, which I own on both plantations.—And as a most particular mark of my affectionate respect and love, I hereby give to my dear wife, the large edition of Scott's Commentary of the Holy Bible; which were given to me by my dear Mother at her death. Also all my religious books.—I hereby kindly and earnestly request of my dear wife, that whatever articles of jewelry, whether of gold or silver, which may be found in our house at the time of my de-

cease, may be faithfully collected, and committed to the care of some trusty pious agent. And that said agent by and with the advice and consent of my dear wife, do without delay sell all such articles, and give the proceeds to the American Tract Society through their Treasurer.——

"The nature of this writing in such, that I wish it distinctly understood, and settled firmly, and known in Law, that the property which I have given to my dear wife, I do, hereby, so secure unto her, that no person or persons whatever, under any circumstances whatever, shall be able to deprive her of any part of it, during the period of her natural life. And at her death that it shall be her privilege to dispose of it as she may in her judgment and conscience think best.—

—Of the estate of my respected and greatly lamented brother Genl. William A. Bull

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Decd., I do hereby will and *earnestly request that my executors herein after named, shall after my decease, make the following disposal viz.: Should my decease occur before the close of this present year (1843) I request that the plantation with its necessary concerns, the field laborers, horses, mules, oxen and plantation tools, may quietly remain together under the charge of my overseer until the close of the year. That my family be permitted to reside where they are until the end of the year. That all the business may be permitted to proceed as usual during the year. That the remainder of the crop of cotton of the year 1842 may be made ready and sent through the agency of Mr. Gollothan Walker of Hamburg to the care of Messrs. Matthews & Bonneau of Charleston So. Ca., and requested to be sold by them as soon as shall be convenient. That they may, forthwith, be honestly paid in full for any and for all advances of money, which they have been so kind as to make for me. That Mr. Gollothan Walker be authorized to draw on them like wise, for as much money as shall be sufficient, honestly and fairly, to pay every debt which I may justly owe in Hamburg and Augusta Ga.—Whatever money may remain after paying these, I request may be devoted to paying my other debts in the country, so far as it will extend. My note given to Alex Houston Esq., I request may be paid among the very first, with all interest due. That every other reasonable and just demand may be fully and honestly satisfied. That my overseer's wages may be paid. And all just accounts properly attested may be paid. Should the crop of 1842 fail to pay everything, as it probably will, I hereby request the crop of 1843 ("If the Lord will") may be strictly devoted towards paying the remaining debts. To Oglethorp University, by subscription, I justly owe \$300. I request that it may be fully paid as soon as possible. That money may be furnished sufficient to pay the rea-

sonable and necessary expenses of James Morrow, Junr, while finishing his Collegiate course—That \$340 (Three Hundred and forty Dollars) may be handed to my dear wife.

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Money belonging *to the Estate of Mr. David Morrow Decd. which I have held, and have endeavored to improve. The interest has been paid up to April 12th 1843. So soon as every just debt can be honestly paid, I hereby request that my executors, proceed without delay, to make correct, lawful and prudent arrangements for selling the whole Estate. That as much as can possibly be sold for cash, be thus disposed of. That the remainder be advertised in due and correct time, and the whole of it sold, on limited credit. My Executors are hereby requested to require safe Bonds and good notes with approved securities. To use every prudent and lawful means to obtain as near the just value of the Estate as may in the nature of the case be practicable. If possible in attending to this business to avoid all litigation. Should any difficulty of any kind occur, that it be referred to the prudent judgment of three or five honest and disinterested citizens, who shall if necessary obtain legal counsel and decide to the best of their mature judgment. Should any doubt arise respecting the meaning and intention of this my last will, in any part or sentence thereof I hereby desire that the difficulty may thus be settled according to the plain import of the words used.—

"As soon as the money can be collected, I do hereby request that the sum of \$5,000 (five thousand dollars) may be placed at interest in the Bank of Charleston. Which sum, when thus placed, I do hereby cheerfully give to James Morrow Junr. And do hereby so settle it, that no person or persons whatever under any circumstances or pretext whatever can deprive him of it during his natural life. That James Morrow Junr. himself shall not be allowed to touch or use or squander one cent of the principal. But only to draw and make use of the lawful interest annually as may seem to him best.—So soon as the remainder can be collected, or as much as possible, I do hereby cheerfully request that my executors immediately proceed to divide the money into four equal parts, and I hereby cheerfully bequeath one part to the American Bible Society, the second to the

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American Tract Society, the *third part to the Presbyterian Board of Publication, belonging to the General Assembly of the Presbyterian Church in the United States of America, O. S. And the fourth part I hereby cheerfully give to the Theological Seminary, which is at present located at Columbia, So. Ca.; and which is at present under the care of the Synod of South Carolina & Georgia. The said four equal sums of money, I hereby request may be given by my ex-

executors for the use and benefit of said above named Benevolent and Christian Institutions, through their respective Treasurer. And if, as is possibly the case, through ignorance, I have failed to use such words as are customary in Law. I hereby plainly and positively desire, that may not prevent, the fulfilment and accomplishment of my wishes in the plain and obvious meaning and intent the words used. But that my executors take such prudent, timely & peaceful measures as may be effectual to secure the lawful and entire accomplishment of every part of this instrument of writing in its plainest sense, however defective in phraseology.—

"And that there may be no litigation or contention concerning my affairs after my decease, or even dissatisfaction in any way.—That my executors may be disposed, graciously directed and assisted by Spirit and Grace of God so as to deal justly, and properly and honestly dispose of my estate is my sincere and earnest desire. And that it may please the Lord in his great Mercy to sanctify and bless this poor offering in His Name given, so that some needy person may be assisted, and some poor soul may be brought to Repentance and Faith in the name of Jesus Christ Our Saviour, is the humble prayer of his unworthy servant.—

"And now into the hands of my Saviour, Jesus Christ, the Son of God, I humbly commit my Spirit in Faith. Unto God, the Father, son and Holy Spirit, the only wise, living and true God, I humbly resign my Soul in the name of Jesus Christ. Amen.

"I do hereby choose and appoint William

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P. Noble, Paul *Rogers, and Edmund C. Martin to be the Lawful Executors of this my last will and testament. Who are hereby solemnly requested faithfully to discharge their trust.—Again I repeat my injunction to avoid all Litigation.—I do hereby declare & acknowledge this to be my last will and testament, in testimony whereof I do now solemnly affix my name in the presence of these three witnesses.

John B. Bull.

"April 8th 1843—

"Wm. H. Davis

"J. L. Bouchillon Seur

"E. C. Martin."

After this will was established, Sarah Bull, the widow of the testator, died in the latter part of the year 1857, leaving a will, by which she devised and bequeathed her whole estate to Dr. James Morrow, her son by her former marriage, constituting him her sole legatee, and executor of her will. The present bill was filed the 13th of May, 1858, by three of the four benevolent institutions mentioned in the will, for an account of their interests under the will; and the other benevolent society, the qualified executor, the next of kin, and Dr. Morrow, are made defendants.

The points raised at the hearing will be understood from the judgment delivered.

Johnston, Ch. In the third clause of his will, the testator provides: "So soon as every just debt can be honestly paid, I hereby request that my executors proceed, without delay, to make correct, lawful and prudent arrangements for selling the whole estate," &c.

It is contended that this direction is confined to the Savannah property; and does not embrace even the whole of that property, but that Berry Hill, a plantation purchased by the testator, contiguous to the body of the lands on Savannah, which he inherited from

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his brother, Gen. Bull, is excluded. *Whether the words be confined to the Savannah estate, or be allowed their natural meaning, and be held to include the whole estate not specifically disposed of in a manner inconsistent with a sale; in either case, both realty and personal property would fall within their operation.

It is not a direction to sell the real estate on the Savannah, apart from the personality appertaining to that estate, nor to sell the whole of testator's real estate, wherever situated, in exclusion of his personal estate; but to sell the whole estate, whether it be real or personal.

The testator had specifically disposed of a large portion of his estate, real and personal; part of it for the life of the beneficiary, and part of it absolutely, but there was no sweeping legacy or devise given of whatever overplus there might be. So that, in any view that can be taken, there was material, without confining ourselves to the Savannah estate, for a sale, if the testator were minded to order one, in order to raise funds to meet special or general purposes.

As the testator manifestly intended to dispose of his whole estate, and has not done so unless the words "the whole estate" be interpreted in their natural sense; and as his bequest of the residue of the proceeds of the sale directed, after the special legacies charged upon them, would, upon the construction contended for, constitute a special residuary disposition, and not a general residuary clause disposing of his whole estate: I am persuaded that such an interpretation of the will would be at variance with the testator's intention.

The construction should be upon the whole will, and not upon detached portions of it; every word and phrase should, if possible, be taken in its full and natural meaning; and the leaning of the Court should be to give such construction to the whole as to prevent intestacy in any part of the estate.

It is argued that the words here used are employed with exclusive reference to the estate which the testator had fancifully designated, not as his own, but as the estate of

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his *brother, from whom he inherited it. But I do not find enough to convince me that

when he directed the sale of the whole estate, his attention was tied down to that special property.

The only use to which I perceive he directed his executors to put that property, was to complete the crop of 1812, which was growing when he executed his will, and out of the proceeds of that crop, and what remained on hand of the preceding crop, to pay his debts—a purpose which he lived to accomplish himself. Now, if he had adopted the ordinary method of providing for his debts, in the beginning of his will, this direction for the employment of this plantation, for that purpose, would have been found at the head of the will; and not in the middle of the third clause, which embraces subjects of a somewhat miscellaneous character: some of which undoubtedly relate to other portions of his estate, and others as certainly relate to his whole estate, without respect to location. If, then, we transpose that portion of the third clause, of which I am speaking, to the head of the will, the whole becomes harmonious, and there would remain no doubt that the direction to sell the whole estate would mean the whole; and would have no such confined operation as that contended for. Then it would be followed by the devise of the Little River lands to his wife for life, with a power of further appointment in her; by the gift of certain slaves and their issue, and of other slaves. But still there is, as yet, no disposition of Berry Hill, nor of the lands formerly owned by Gen. Bull; nor any disposition of the remainder in the Little River lands, supposing his wife should make no disposition under her power.

If the testator intended to confine his direction to sell, to the land formerly belonging to Gen. Bull, then he intended to die intestate as to Berry Hill—or he casually omitted one thousand acres of his own lands; in addition to a possible intestacy in the remainder of the Little River lands, which is scarcely credible.

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*If he contemplated Berry Hill as parcel of Gen. Bull's estate, the principal support and object of the narrow construction, now contended for, is taken away.

On the whole, I conclude, with confidence, that the order for sale should be, and was intended to be, general; and the effect of it is to dispose of every portion of the estate not disposed of by provisions inconsistent with such sale. It could not take in the negroes given by the testator to his wife, nor the estate for life given to her in the Little River lands. But it takes in the lands formerly belonging to Gen. Bull, and reaches to Berry Hill, and to every subject in his whole estate that would otherwise have been intestate; and would have included the remainder in the Little River lands, had not his wife (who, though an alien, could take and hold the life

estate till office found) executed her power of appointment.

I will not enlarge on this point, for I conceive it to be very plain. I will merely add that, upon the evidence, I should have held, had it been necessary, that Berry Hill was included in the order to sell, were that order confined to what the testator called his brother's estate. The evidence taken by the commissioner shows, I think, that he so planted the estate, including Berry Hill, and so marked the cotton, whether raised on the one place or the other, as to show that he regarded them as one establishment. The admirable work of Sir James Wigram, (*Wigram on Wills*), has done much to reduce to fixed principles the rules which should govern in such cases; much to restrain that license of construction that too much prevailed formerly and still prevails to an undue extent. When descriptive words find a subject that satisfies them in their natural and primary meaning, other subjects shall not be forced under their cover, though, otherwise, they might be accommodated to them in a less natural or secondary sense. But there is no primary, or natural, or legal sense, in which either parcel of these lands could be

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denominated by the testator "the estate of his brother." The lands he inherited had no name, and, for convenience, he must speak of them by some description. In his fancy he called them his brother's estate, by way of description. When he added Berry Hill to them, and afterwards spoke of them, did he not do what is very common?—did he not regard the addition as a constituent portion of the old establishment? I think he did. I think the evidence shows this. He has one overseer for both places. He allows the dividing fence to become extinct between them. He throws their productions, corn and cotton, together; and marks the cotton with one brand, which was on the place in his brother's time. We have a case, somewhat similar, somewhere in our own books, relating, I think, to some wharf property in Charleston, in which the view I am intimating was taken; and I concur in the remark of Sir James Wigram, (*Wig. Wills*, 22.) that in the case referred to (in argument) of *Doe ex dem. Oxenden v. Chichester*, (3 Taunt., 147, s. c., 4 Dow, 65,) "the principle now under consideration was carried to its full extent." In that case, the testator devised my "estate of Ashton" to Oxenden, and had an estate which he used to call by the name of his "Ashton estate," the accounts relating to which were kept in his steward's book under that name. Part of this estate only was locally situated at Ashton. Only so much as was thus situated was held to pass. This, I conceive, was a strained construction. But the view I have taken renders it unnecessary to pursue this further. The direction to the executors to sell extended to Berry Hill as

otherwise intestate, whether regarded as embraced in the land inherited from Gen. Bull or not.

The order to sell, also took in, as intestate, a portion of the slaves.

Part of the second clause of the will is in these words:

"To my dear and respected wife, I also, hereby give my good and aged servant Dorethea, (Doll,) and all her children and grandchildren, all her descendants, who are in my

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possession, on either plantation, and on both plantations, including the husbands of her daughters."

So far, there can be no difficulty. Whether the testator referred to his possession, at the date of his will, or at his death—which, under the general rule, in all cases, he must be held to have done, (*Garret v. Garret*, 2 *Strob. Eq.*, 283,) can make no sort of difference: for the gift is of all the issue of Dolly, and on both plantations: and supposing him to have referred to the date of the will, yet, as I shall hold hereafter, the gift will extend to after born descendants on either plantation.

But he proceeds: "Also, to my dear wife I hereby cheerfully give all the servants on my farm at Little River:—their names as follows: Venus, Sam, Andrew, with his wife Henny, and their children, Hiram and Sarah, Cumbo, Stella, Statira, Grace, Sylva, Jacob and his wife Peggy. Jim and Scipio are Doll's children, and included in her family." I apprehend that the testator intends here to speak of negroes on the Little River plantation, at the date of his will, as is evidenced by his proceeding to name them: and that he did not intend to refer to such negroes as might be on that plantation when his will began to operate at his death. The bequest will carry all those slaves named by him; and if there were any coming within the description, whom, in his enumeration he accidentally omitted, these would pass with the rest.

Among the rest, he gives Andrew and his wife Henny, with their children. I am not sufficiently put in possession of the facts to know, whether in naming those who in his list immediately follow those two, he has not attempted to name these children. If he did, then it follows, I think, that he has given none of the children of Andrew and Henny, but those whom he names as such. But if he did not attempt to enumerate, I think he must be held to give all their children, born or to be born.

When I speak thus, I do not forget that it

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has been held *that a legacy of a negro woman with her increase, (*Seibels v. Whatley*, 2 *Hill Ch.*, 605,) does not include existing, but only future progeny. There is a distinction, however, in my mind, which I fear I should be incapable to convey, were I elaborately to attempt to impress it upon others.

It may be sufficient to say, that the Court in dealing with the subject of increase, while it might have admitted that the term might be well applied, not only to after, but to prior increase, and so it might have doubted upon the subject of excluding the latter; yet it conceived that by long and pretty uniform usage in this State, the term increase, without more, had obtained a fixed meaning. It meant the progeny which was to proceed from the stock slave from the date of the instrument. But has any such restricted meaning been imposed on the term children or its equivalent? Has this been done by the cases: or does such a meaning exist in popular language? Not to my knowledge. The cases are numerous and uncontradicted, that when property is limited by will to children of A. or B., all their children will take, whether born before or after the date of the instrument, provided they are born before the limitation comes to operate; and so, if the limitation be to the children of C. or D. to take effect upon a contingency, the existing children will take, as well as others to come in esse, upon the happening of the contingency. The instrument takes in the existing children without difficulty. The difficulty would rather have been whether after born children should be entitled. But the point is decided that after born children are children—come within the description—and the instrument shall open and receive them, as persons described, until the event happens compelling a distribution, and thus rendering it impossible to receive more. For examples of this kind, I refer to the cases of *DeVaux v. DeVaux* [1 *Strob. Eq.* 283], and *McNish v. Guerard* [4 *Strob. Eq.* 66], decided in this Court. These cases, and others innumerable upon the import of the word children, show that it has not received a restricted meaning in law confining it to post

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nati. I regret that the *decision in *Seibels v. Whatley* was different as respects the import of the word increase: but I do not feel bound to carry it beyond its letter, and apply it to children, especially as in so doing, I should violate not only the popular understanding, but a uniform current of decisions. When the gift is of children, why should the meaning of the word differ from what it is when the gift is to children? As to the other negroes given in the last passage I have quoted, they are given by name or individual description, but without the accompaniment of their children, issue or increase, which amounts to no more than a gift of the existing and named or described negroes; and does not carry the post nati issue. Such issue is, therefore, in my opinion intestate, and falls under the direction to sell.

We approach now one of the most important parts of this cause.

Out of the proceeds of sale, when collected, the testator directs that the sum of \$5,000 be placed "at interest in the Bank of

Charleston. Which sum, when thus placed, I do," he proceeds, "herely cheerfully give to James Morrow, Junr. And I do hereby so settle it, that no person, or persons, whatever, under any circumstances or pretext whatever, can deprive him of it during his natural life. That James Morrow, Junr., himself, shall not be allowed to touch, or use, or squander, one cent of the principal, but only to draw, and make use of, the interest, annually, as may seem to him best."

The sum as placed at interest is, in the first instance, bequeathed to Dr. Morrow, in general terms, sufficient to vest the property in him. If we are to construe the legacy in parcels, the words which follow, forbidding himself, or other persons, from touching the thing given, as liable to the incidents of absolute property, are nugatory and void. I am much inclined, however, to construe all the words together, and to regard this as the gift of an annuity for his life; the gift of the annual interest of the \$5,000 for his life,

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and not *the gift of the \$5,000. This Court—all Courts—should look to substance, and not merely to forms.

The direction of the Court upon this subject is, that the commissioner enquire for and report a suitable trustee, to hold the fund upon the terms I have just indicated; and that the executors, after making the investment, hold it on those terms until a trustee be reported and appointed, and then transfer it to such trustee.

When, by the death of Dr. Morrow, the corpus of this \$5,000 annuity falls in, it will be time enough to enquire where it is to go; and that question is reserved.

Then, subject to this legacy of \$5,000, the testator directs that the remainder of the proceeds of sale be divided into four equal shares, one of which he bequeaths to the American Bible Society, another to the American Tract Society, another to the Board of Publication belonging to the General Assembly of the Presbyterian Church in the United States of America, (Old School,) and the remaining share to the Theological Seminary, at Columbia, under the care of the Synod of South Carolina and Georgia.

But objections are raised under the statute of the 9th April, 1734, 3 Stat., 382; the second section of which reads thus:

"That from and after the ratification of this Act, all and singular, every person and persons having any estate or interest in fee simple," &c., "of and in any lands," "shall and may have free power," "to give, dispose, will or devise to any person or persons, (except bodies politic or corporate,) by his last will and testament, duly executed," "as much as in him of right belongs, is, or shall be, all his said lands," "at his and their own free will and pleasure," &c.

This is the only statute of mortmain known, it is believed, to the legislation of

this State. None of the English statutes on that subject were ever made of force here. But it is very proper to enquire what effect this statute, if still of force, has upon the devise in this case. It is plain, at the outset, that its effects, whatever they may be, are

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limited to the proceeds *of the real estate. There is no prohibition as to personalty in this statute.

Justice Blackstone (2 Bl. Com., 268, et seq., Lib. 2, cap. 18) tells us, that alienations in mortmain (in mortu manu) are transfers of land to a corporation, whether sole or aggregate, ecclesiastical or temporal; in consequence of which the lands became perpetually held in one dead hand.

By the common law, he says, any man might dispose of his lands to any other private man at his own discretion, especially after the feudal restraints were worn away. Yet, in consequence of those, it always was and still is necessary (F. N. B., 121) for corporations to have a license of mortmain from the crown, to enable them to purchase lands. For, as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheat, and other profits, by the vesting of land in tenants that can never be attained or die. Besides the license from the king, it was also requisite, where there was a mesne or intermediate lord between the king, the lord paramount and the alienor, to obtain his license also, (upon the same feudal principles,) for the alienation of the specific land. And if no such license was obtained, the king, or other lord, might respectively enter on the lands so alienated, in mortmain as a forfeiture. To obviate this forfeiture, however, when no license was obtained, the religious houses, (who set themselves to circumvent the law,) inasmuch as the forfeiture accrued, in the first place, to the immediate lord of the fee, contrived that the alienor should convey to the religious house, and instantly take back again, to hold as tenant of the monastery; the instantaneous seisin in which, probably, was held to occasion no forfeiture; and then, in virtue of some other pretended forfeiture, surrender or escheat, the society entered on their newly acquired seignory, as immediate lords of the fee.

The consequence, when such donations became numerous, was, that the feudal serv-

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ices ordained to the defence of *the kingdom were daily visibly withdrawn; the circulation of landed property from man to man began to stagnate; the lords were curtailed of the fruits of their seignories, their escheats, wardship, relief, and the like. This state of things occasioned the second great charter, 9 Henry III, (A. D., 1225,) by which, and by that printed in the common statute books, it was ordained that all such attempts should

be void, and that the land should be forfeited to the lord of the fee.

This prohibition extended only to religious houses, and not to sole corporations, and being evaded by the bishops, the abuse was attempted to be corrected by the statute de religiosis, 7th Edw. I, which provided, that no person whatever, religious or other, should buy or sell, or receive under pretence of a gift, any title to lands, or by any contrivance appropriate them to himself, in mortmain, upon pain that the immediate lord of the fee, or if he should make default for one year, the lord paramount, and in default of all of these, the king might enter on the lands as a forfeiture. The statutory prohibition as yet only extended to gifts and conveyances inter partes, and the device was adopted of bringing an action under a fictitious title against the tenant, who collusively abstained from defence, and thus the lands were recovered by law; thus originating the assurance of common recoveries. This abuse was met by the statute of Westminster the second, 13 Edw. I, ch. 32, which enacted that in such cases the true right of the plaintiff should be tried by a jury; and if the religious house, or corporation, be found to have it, they shall recover seisin, otherwise the land shall be forfeited. To this statute others were added, not necessary to notice here. These were all frustrated by contriving that the lands should not be granted directly to the corporation, but to nominal feoffees to their use, distinguishing between the possession and the use, and giving to the corporation the actual profits, while the seisin was in the nominal feoffee, who was accountable as trustee; thus originating uses and trusts, the foundation of modern English convey-

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ancing. *This was met, again, by the 15 Rich. II, chap. 5; which statute ordained that lands so purchased to uses should be amortized by the license from the crown, or sold to private persons; and that, in future, uses should be subject to the statutes of mortmain, and forfeitable like the lands themselves. Moreover, large tracts of lands, which were purchased and fraudulently consecrated as graveyards, were declared within the scope of the statutes; and civil as well as ecclesiastical corporations were declared to be within the mischief contemplated by the statutes of mortmain. By statute 23 Henry VIII, ch. 10, it is declared that all grants of land, though not to corporations, yet for superstitious uses or charges erected for such purposes, should be void if granted for more than twenty years.

The Mortmain Acts were suspended for twenty years by the 1 and 2 Philip and Mary, Ch. 8.

Then this general policy was further relaxed by the 7 and 8 Will. III, ch. 37, which empowered the crown to grant license, at its discretion, to alien or take in mortmain of whomsoever the tenements may be holden.

It having been held, (1 Rep., 24,) that the statute 23 Henry VIII, ch. 10, before mentioned, did not extend to charitable but only to superstitious uses, and therefore land might be given to maintain a school, a hospital or other charitable institution; and it being apprehended that persons on their deathbeds, might make large and improvident dispositions, even for charitable purposes, thus defeating the political end of the statutes of mortmain, it was therefore, enacted by the 9th Geo. II, ch. 26, (A. D. 1736, set out 1 Bac. Abr. Title charitable uses and mortmain, G.) two years after our own statute quoted by me, that no lands, or tenements, or money to be laid out therein, shall be given for, or charged with any charitable uses whatsoever, unless by deed, indented, executed in presence of two witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six

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months from execution, and made to *take effect immediately, and without power of revocation; and that all other gifts shall be void; (except that stocks in the public funds may be transferred within six months previous to the donor's death).

It will be seen from this statement of the great commentator, that if these English statutes were of force in this State, as they are not, there is not one of them that in terms avoids gifts to corporations, except when land itself is given, or when money is given to be laid out in land. The principal reason assigned for the statutes of mortmain, such as the vesting of land in corporations incapable of feudal services, the loss of escheats, wardships, reliefs, &c., and the perpetual stagnation of such property in the hands of those not liable to attainder or to death, apply only to the permitting lands to be conveyed, directly or indirectly to, and held by, such bodies.

The motive to the statutes is not so much to place a restraint on the alienor, (except for his protection, for example in the statute of 9th George II,) as upon the holding of the thing given by the alienee, i. e., on account of his legal and political unfitness to be the owner of lands; the mischief to the State of its lands being perpetually monopolized by those in whose hands it is not subject to the usual incidents of ownership.

The Theological Seminary, to which one-fourth of the residue of the proceeds of sale is given by Mr. Bull, is by its original charter, (8 Stat., 376, statute 1832, No. 2,574, § 1-3,) especially licensed and "empowered to retain, hold, possess and enjoy all such property as it" "may now" "be possessed of, or entitled to, or which shall hereafter be given, or bequeathed to, or in any manner acquired by" it, "and to sell, &c., the same," "to the amount of \$300,000." Which charter is renewed (Acts of 1854, p. 347,) "with all powers, privileges and conditions heretofore, by

the Act of incorporation, conferred upon

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said body corporate, with ability, power *and capacity to receive, hold and enjoy property, real and personal, to the amount of \$300,000."

These enactments are sufficient to say nothing of the Constitution of 1788—not only to license this corporation to take the land itself, had that been given, but to repeal the statute of 1734—so far as this particular body corporate is concerned—if that stood in the way.

This corporation is, therefore, clearly entitled to the fourth given to it out of the fund involved in this discussion. It was contended, indeed, that should the other corporations interested in the same fund fail to make good their claim, the Seminary would be entitled to come in for the whole. But this is not an improper place to remark, that no such consequence can obtain under this will. The fund is not given between and among the beneficiaries, but it is given in parcels; to each, one-fourth, and no more.

The charter conferred by the State of Pennsylvania upon the trustees of the Presbyterian Board of Publication, authorizes the corporation "to purchase and receive, take and hold, to them and their successors, forever, lands, tenements and hereditaments, goods, moneys and chattels, and all kinds of estate which may be devised, or bequeathed, or given to them."

This is a foreign corporation, and it has been decided, (*Bank of Augusta v. Earle*, 13 Pet. 519; s. c. *Decisions of Supreme Court United States*, 277 [10 L. Ed. 274],) that though the corporation of one State may sue in another, it can make no contracts, nor enforce any liability in any State which is not within the terms of its charter; nor any of those which are against the laws of that other State. Chancellor Kent informs us, (2 Kent. Com., 283,) that the English statutes of mortmain are in force in Pennsylvania, so far as they are applicable to her political condition—so held by her Courts, which declared, that in virtue of them, "all conveyances by deed or will, of lands, tenements or

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hereditaments, made to a *body corporate, or for the use of a body corporate, were void, unless sanctioned by charter or Act of Assembly."

I have not access to the authority cited by this eminent commentator, so as to discover whether in the statutes intended to be included is that of 9th George II, nor is it necessary to know; for in the charter of this corporation there is the very license and privilege required by the law of Pennsylvania as expounded by her Judges. Nor shall I enquire here, whether the law of Pennsylvania, whose office, so far as mortmain is concerned, would seem to be to protect her own lands from improper alienations, would be offended

by an alienation in mortmain, in another State, of lands lying in that other State.

The true inquiry for me is, is it an offence against our own statute, which prohibits devises of lands to bodies corporate, for the testator, not to devise his lands to them, but to direct them to be sold, and bequeath the proceeds to such body;—a body, by the way, expressly authorized to receive the legacy.

It appears to me impossible to deduce from any of the statutes anterior to that of 9th George the Second, or from any decisions made upon them, a legal conclusion, which, applied to our statute of 1734, would make it an offence to raise money by the sale of lands to be given, as money, to a corporation, either domestic or foreign. That statute is not of force here, and how then is it, or any decision upon it, to be applied to this case?

Curtis v. Hutton, 14 Ves., 541, referred to in the argument, if I understand the case, which is obscurely stated, was a case where money was to be raised from sale of lands, and, in connection with other personality, was to be laid out in other lands for the support of a Scottish charity, and so expressly within the statute of 9 George II, under which the adjudication was made. The master of the rolls, in his observations, says it is settled by construction, though the statute contains no express prohibition against the bequest of money arising from sale of real es-

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tate, for charitable purposes; that such a bequest is within the spirit and meaning of the law. I have not been referred to the current of authority, and cannot discover it. But it is enough for this case that the case of *Curtis v. Hutton* was decided on the statute of George, which is not of force here. It is not said any where, so far as I can discover, that such a bequest would have been void as an offence against any other of the statutes, at all resembling our statute of 1734. If it would have offended them—if the law was as now contended for, upon the other statutes, where was the necessity of enacting that of George II? I would ask, under our own statute, which merely prohibits the giving the land to a body corporate, what offence is created by a provision that it be sold and go to others? Whatever objection may exist to a corporation holding lands, here or elsewhere, is not the objection obviated by a disposition which carries them to the possession of others, to be held by them upon the same terms as apply to all the other lands in the State? There was a minute objection raised to the title given in the will to this corporation. It differs slightly from that by which it was incorporated. But this error will not vitiate the bequest. (*Angel & A.*, 178.)

And so I conclude that this corporation is entitled to the bequests made to it. The American Bible Society takes its charter

from New York, and is empowered "to hold, purchase and convey real and personal estate" to produce "a net income not exceeding \$5,000 annually."

The English statutes of mortmain are not of force in that State; and no impediment exists except that by their statute of wills, as I understand, no lands can be devised to a corporation; and by revised statutes, it can only take what it is specially authorized by its charter to take. This corporation is authorized to purchase real estate; but in *McCarter v. The Orphan Asylum Society*, (9 Cowen, 437.)—a New York case—and we are bound by the New York decisions, as binding authority, as to the rights of her corpora-

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tions under her laws—it is said to have been held that the word purchase did not include a devise, although devise falls under title by purchase. The American Bible Society may buy and may hold and convey lands. But they can take no direct devise of real estate. They may take personality. But in the *Theological Seminary of Auburn v. Childs*, (4 Paige, 419,) it was held that prior to revised statutes a pecuniary legacy payable out of the proceeds of real estate, which the executors were directed to sell, was valid, although the corporation was not authorized by its charter to take real estate by devise; and the question is seriously put, with a leaning to the affirmative, whether such a bequest is not good even after the revised statutes.

Chancellor Walworth says: "I am not prepared to say that the devise of a power in trust to executors to sell lands for the payment of a legacy, charged thereon, in favor of a corporation, would be invalid, even under the revised statutes." "But I am satisfied that, at the time this will was made, and at the death of the testator, in 1826, he had the legal right to devise his real estate in trust for a corporation; and that the devise of such estate to his executors to sell the same for the payment of this and other legacies charged thereon, was valid. The feudal policy having changed the ancient common law of England, and deprived the owners of lands of the power of devising the same at their deaths, the statute of wills was an enabling statute; and the exception as to corporations was strictly only an exception, and not a prohibition. The decision of this Court in the *Orphan House Asylum Society v. McCarter*, is conclusive on this question. Although the decision of Chancellor Jones, in that case, was reversed, it was solely on the ground that the devise to the corporation was direct, and not to the executors in trust. Indeed, Mr. Justice Woodworth, who delivered the opinion of the majority of the Court, * * * admits that if the legal estate had remained in the executors in trust for the corporation, and they

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had refused to pay over its portion of the proceeds of the property on a sale thereof, the complainant would have been entitled to relief.

"The cases referred to by the defendant's counsel," he proceeds, "are founded upon the prohibitions of the statute of 9 George II, ch. 36, (1 Evans statute 324,) under which statute, although it contains no express words prohibiting a bequest of money to be produced by the sale of lands, for charitable purposes, it has been settled by construction that such a bequest is void, as being within the spirit and meaning of the Act—(14 Ves. Rep., 541.)"

I have no better indication of the law of New York under the revised statutes than the intimation of Chancellor Walworth in this extract. I have not access to the judgment of Chancellor Jones, referred to. But as both these are favorable to the view I entertain myself, I conclude that this corporation is entitled to its legacy. It will be observed that I have left untouched the fact that the testator has directed a sale out and out of realty and personality indefinitely, which, of itself, equitably impresses the character of personal estate on the proceeds.

The last charter is that of the American Tract Society, which is also from New York. It is also authorized to "hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter," the net income of which "shall not exceed \$5,000 annually."

This corporation stands upon similar legal principles with the American Bible Society, and is entitled to its legacy.

It is ordered, that the accounts in the case be referred to the commissioner, and that he state and report them.

That the commissioner be authorized to make sale, upon such credits as he may fix, (not differing from such as are usual in such cases,) of such portions of the estate, real or personal, as according to the foregoing opinion are subject to sale, and yet remain unsold, giving at least three weeks' public notice thereof in the Abbeville newspapers, and

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in some one of the Charleston newspapers, and requiring bond, with at least two good sureties, and a mortgage of the premises, where land is sold, to secure all sums of and over twenty dollars and cash for all sums under that amount.

And let the parties have leave to apply for any further necessary order.

The costs to come out of the estate.

The heirs-at-law appealed on the grounds:

1. Because, the will of John B. Bull, properly construed, does not dispose of the plantation called "Berry Hill," which, having been purchased by the testator in his lifetime, does not pass under the words "Of the

estate of my much respected and greatly lamented brother, Gen. William A. Bull, deceased, &c."

2. Because, there is no general residuary clause in John B. Bull's will, sufficient to carry any part of his estate not covered by the direct gifts, all the directions in the will after the words "of the estate," &c., having manifest reference to that property and no other.

3. Because, the post nati children born of the negroes given to Mrs. Sarah Bull, in the second clause of the will, and the provisions, crops, and all articles at Little River, not mentioned in said clause, are intestate—the terms of the direct bequest being limited to the negroes in esse at the time the will was executed, and there being no general residuary clause sufficient to dispose of said negroes, and other property.

4. Because, the exception in the Act of 1734 constitutes a positive prohibition against devising any estate or interest in land to bodies politic or corporate; and the device to defeat the law and accomplish the same purpose indirectly—by ordering the lands sold, and proceeds given—should have been declared void, as opposed to the spirit of the express law, as well as to the principles of equity and sound morality.

5. Because, the charter of the three foreign corporations—being laws of foreign States—cannot repeal the South Carolina

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*prohibition, nor enable said corporations to take anything from South Carolina not allowed by the laws of South Carolina. Charters of foreign corporations cannot give license to dispense with our law in regard to them.

6. But if otherwise, then neither the Bible Society nor the Tract Society, chartered by the State of New York, can take any part of the provision made for them, even according the Revised Statutes of that State, which declare that corporations shall exercise no powers which are not expressly given. The right to "purchase and hold" does not necessarily include the right to take by "devise," or even "bequest."

7. The trustees of the "Presbyterian Board of Publication," chartered by the State of Pennsylvania in 1847, cannot take the fourth claimed by them under Bull's will, executed in 1843—because the gift, made before the corporation had any existence, is not to the corporation chartered or in the terms of the charter; and also, because of the statutes of mortmain, which are of force in that State.

8. The Theological Seminary cannot take the one-fourth of the lands intended for them, because its charter, although a license to the extent it goes, does not conflict with the Act of 1734, or expressly confer the right to take by devise.

9. Because, it is respectfully but earnestly submitted that there is no law or principle of

equity which requires the Court to decree the whole of this large estate away from the heirs-at-law, and give it to irresponsible, soulless political corporations, some of which are foreign to our jurisdiction, alien to our policy, and under the control of persons, and the exclusive government of States inimical to our institutions.

James Morrow, one of the defendants, appealed on the grounds:

1. Because his Honor held that the negroes born after the making of the will, are not embraced in the bequest to Sarah Bull, in the second or other clause of said will.

2. Because said slaves, if not embraced in

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said bequest, are *intestate; and two-thirds of them, or their value, should have been declared the right of James Morrow.

3. Because his Honor should have held the bequest of \$5,000 to James Morrow, his absolute property; or declared fully what his estate was; with interest on the same from testator's death.

4. Because the pleadings made the question, whether the executor should pay to James Morrow, the debt acknowledged by the testator, in his will, as due the estate of David Morrow, deceased; which the executor declined to pay without instruction, and was claimed by the defendant, James Morrow.

The executor appealed from so much of the decree as orders the commissioner in equity to sell Berry Hill, on the ground:

Because the will directs the sale to be made by the executor, and it is his right and privilege to make it.

McGowan, for the heirs-at-law, cited on first ground: *Lawton v. Hunt*, 4 Rich. Eq., 247; *Willis v. Soyers*, 4 Mad., 209; 8 T. R., 375; 4 Maul. & Sel., 550; *Gilb. on Dev.*, 84; 1 Jarm. on Wills, 720; on third ground; 1 Jarm. on Wills, 693; *Buist v. Dawes*, 3 Rich. Eq., 281; *Tydiman v. Rose*, Rich. Eq. Cases, 294; 1 Rep. on Leg., 188; on fourth and following grounds: Act 1789, 5 Stat., 110; Act 1734, 3 Stat., 382; 2 Brev. Dig., 335; *Hill on Trustees*, 1, 65, 84, 196, 691, 705; 10 Ves., 540; 9 Ves., 399; 2 Vern., 387; *Brown v. Leigh*, 7 Ves., 501, note; 3 Meriv., 19; 2 Story Eq., § 1183; *Fountain v. Ravenel*, 17 How., 369; *Attorney General v. Christ's Hospital*, 4 Beav., 74; 2 Keen., 150; *Mayor of S. B. v. Attorney General*, 5 H. L. C., 1; *Haskel v. Rowe*, 3 Brev., 242; *Thompson v. Gaillard*, 3 Rich., 418; 2 Ves., 179; *Sug. on Pow.*, 115; *Burnett v. Noble*, 10 Rich., 530; 1 Wms. on Ex'ors, 554; *White and Tudor*, L. C., 594; *Dud. Eq.*, 212; *Lindsay v. Pleasant*, 4 Ired. Eq., 321; *Craig v.*

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Lester, 3 *Wheat., 560; *Baptist v. Hart*, 4 Wheat., 40; 1 Bro. Ch., 503; 2 Fonb., 212, note; *Amb.*, 20; *Maggs v. Hodge*, 2 Ves., 52; *Shelf. on Mortm.*, 87; *Grant on Corp.*, 128; *Ang. & Ames on Corp.*, 168; 1 M. & K.,

368, note; Hobart, 136; Porter's Case, 1 Coke, 22; 4 Kent, 250; 4 Paige, 419; Ang. & Ames on Corp., 138; Wilbank v. Martin, 2 Harrington, 18; Roper v. Radcliff, 9 Mod., 167; De Coste v. Dupass, Amb., 228; Woodman v. Woodruff, Amb., 636; 9 Ves., 399; Dwar. on Stat., 31; 2 Rev. Stat. N. Y., 2; 1 Rev. Stat. N. Y., 720; Watson v. Child, 9 Rich. Eq., 129.

Fair for Morrow, cited: Garret v. Garret, 2 Strob. Eq., 272; Roberts v. Leslie, 9 Rich. Eq., 35; Jasper v. Maxwell, 1 Dev. Eq., 357; Perry v. Logan, 5 Rich. Eq. 215; Mathis v. Griffin, 8 Rich. Eq., 79.

Noble, for the executor, cited: Osborn v. Black, Sp. Eq., 435; Thompson v. Palmer, 2 Rich. Eq., 36; Gist v. Gist, 2 McC. Ch., 474; 2 Story Eq., § 1060; Crossland v. Murdock, 4 McC., 218; 1 Wms. on Ex'ors, 451; 2 Wms. on Ex'ors, 687; Drayton v. Grimke, Bail. Eq., 392; 5 Stat., 15; Britton v. Lewis, 8 Rich. Eq., 271; Sug. on Pow., 167, 172.

Perrin, for corporations, cited: Chapman v. Brown, 3 Bur., 1634; Gore v. Langdon, 2 B. & Ad., 680; 22 Eng. C. L. R., 285; Bodenham v. Pritchard, 8 Eng. C. L. R., 150; Goodtitle v. Southern, 1 M. & S., 299; An. & A. on Corp., 134; 1 Kyd on Corp., 104; Bac. Ab. Corp., F. 2; 2 Lord Ray., 1532; 1 Stra., 612; 2 Kent, 285, n.; Augusta v. Earle, 13 Pet., 519; 1 Bro. C. C., 497; Dougald v. Ball, 2 P. W., 320; Trelawney v. Booth, 2 Atk., 307; Craig v. Leslie, 3 Wheat., 564; Austis v. Brown, 6 Paige, 448; Perry v. Logan, 5 Rich. Eq., 202; Attorney General v. Jolly, 1 Rich. Eq., 99; Gibson v. McCall, 1 Rich., 174; Shelf. on Mortm., 73; Gerard v. Vidal, 2 How., 127; 3 Pet., 99; 7 Serg. & Raw., 320; 2 Kent, 283; 1 Watts, 218; Perd. Dig., 350.

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*McCrady, for American Tract Society:

To purchase lands and hold them for the benefit of themselves and their successors, (1 Black. Com., 475, 478,) was incident to every corporation at common law. It is not, therefore, any incapacity in the corporation to take and hold which can prevent the devise, but some disability, created by our own statutes, must be shown. Mortmain Acts did not affect the colonies, 2 Merivale, 143, 160; Attorney General v. Stewart. This disability, it is said, is to be found in the A. A. 1734, entitled an Act for making more effectual and for making valid all former wills in this province, &c., sec. 2d, 3 Stat. at Large, p. 341, 382, in which "bodys politick and corporate are excepted from being devisees." That is, it is a disability in the deviser, and not the incapacity or disability of the corporations. If the power, liberty, or privilege, to devise lands in this State were derived entirely from the Act of 1734, the exception would certainly make any devise to corporations void. But if this power, liberty, or privilege, need not be derived from them, it need

not be subject to the exception. I, therefore, will endeavor to maintain these two propositions:

1. That lands in this province were, long before the passage of the Act of 1734, devisable without any restraint.

2. That this Act did not curtail or restrict the right of devise before enjoyed by the citizen.

As to the first; that lands were devisable before the Act of 1734. We go back to what must be considered by us as the fountain head of all property and right of property in our soil, that is, to the charters granted to the lords proprietors, dated respectively 15th March, 1663, and 30th June, 1665. By the fourth clause or section of the first, (1 Stat. at Large, pp. 22, 23,) and third of the second, (Ib., 31, 33,) the whole territory was granted to the proprietors and their heirs by their king, "to be holden of us, our heirs and successors as of our manor of East Greenwich in Kent, in free and common socage, and not in capite or by knight's service."

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We *do not positively know how this manor of East Greenwich was held, but as it was in Kent, we may fairly presume it was gavelkind. "All the lands in Kent are presumed to be in gavelkind, because it is morally impossible now to show to a certainty what lands were disgavelled." Bac. Abr., 2 vol., tit., Gavelkind, B, marginal note. "The lands in Kent, generally, are of the nature of gavelkind, which custom there is like the common law elsewhere." Com. Dig., 4 vol., title, Gavelkind, II.

If this holding intended by the charter was in the nature of gavelkind, then the lands in this province were devisable by the grantees, the lords proprietors; for, says Lord Bacon, "all gavelkind land is devisable, for the allodial property doth follow the rules of the civil law, which permits any person to make his will and to dispose of his estate; and this notion the clergy seem to have brought over unto all those allodial possessions, and the custom hath continued ever since." Bac. Abr., 2 vol., title, Gavelkind, A.

So Gilbert on Devises, p. 84: For the people of Kent, where the custom of gavelkind most prevails, happily secured their land from any innovation of the Conqueror, so that after the conquest, they still continued free, and not subject to the feudal duties, &c.; therefore, that people still continued their old power and custom to dispose of their lands according to the natural notion of property, by will or alienation." And so it was decided in *Lauder v. Brookes*, Cro. Car., 561.

The mere fact that the manor of Greenwich was in Kent, is, therefore, almost conclusive, that the grant enabled the grantees, the lords proprietors, to devise without restriction, and that they so took and held all the lands of the province. In fact the statute of Frauds,

sec. 5, recognizes the power of devise as a Kentish custom, and not as gavelkind—"according to the custom of Kent" is the language—and thus we have, as it were, a de-

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claration of the meaning of the charter, to give the power to devise, by the grantor himself, as well as by his parliament.

But this is put beyond question by the provision of the seventh clause or section of both charters, 1 Stat. pp. 25 and 35, that "all the subjects and liege people" of the king, transported to the province, should be considered still liege, faithful people, and may inherit or otherwise purchase and receive, take, hold, and buy, and possess any lands, tenements, or hereditaments, within the said places, and them may occupy and enjoy, sell, alien and bequeath. Both the proprietors and their grantees then took the lands in this province as lands devisable, and devisable according to ancient, lawful customs of England, before the statutes of 32 and 34 Henry VIII.

In addition to this, we have very conclusive proof that it was so understood by the people of the province themselves, in the remarkable and otherwise unaccountable omission to adopt either of the statutes of Henry VIII, authorizing devises, when in 1712 they adopted so many other statutes, together with the criminal law, and intended to frame their code; and that they had no fear of corporations appears from the fact, that none of the statutes of mortmain were ever made of force.

We are then next to inquire whether this right of devise, coeval with the right of property, was at any time before the Act of 1734, abolished or restricted. Nothing can be suggested as affording any possible ground for such a supposition, unless, perhaps, the adoption of the common law, or the surrender of the charters by the proprietors; neither, however, could have had such an effect.

1. As to the adoption of the common law. It would be clearly against the intent of the statute, which, it is to be observed, cautiously adopted only such parts of the common law as were not "inconsistent with the particular constitutions, customs, and laws of

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this province." But even with*out this cautious limitation, the Act of 1712 could not, consistently with decisions in England, then not long before made, have been construed to have such an effect.

In the case of *Wiseman v. Cotton*, decided in 1663, *Hardres Rep.* 325, see *Thos. Raymond*, 59, 75 and 76, and also in *Bac. Abr.*, 2d vol., *Tit.*, Gavelkind, B. the question was, whether certain lands in Kent, disgavelled by certain Acts of Parliament in Henry VIIIth's time, "to all intents, constructions and purposes whatsoever; and that they should descend as lands at common law, any custom to the contrary notwithstanding," thereby lost their devisability, and it was resolved

that notwithstanding the generality of the language, the said lands lost only their partibility, and might still be devised. The case was made expressly to try the question on a wager whether the lands could be devised. was carefully considered, and is also reported in *Lev.* 79, 1 *Sid.* 77, 135, and 1 *Keble*, 288, 372, 492, 505.

The adoption of the common law, then, (if the manor of Greenwich had not been disgavelled in this way prior to the charters,) could only have changed the descent.

Then, as to the surrender of the lords proprietors to King George II. Did that destroy the custom of devise, and deprive our lands of their devisability? We have never seen any copy of the surrenders, but the Act of 2 George II, ch. 34, A. D., 1729, entitled, an Act for establishing an agreement with seven of the lords proprietors of Carolina, for the surrender of their title and interest in that province, to his Majesty, is to be found in 1 Stat., p. 60, in which the agreement is recited and the confirmation enacted. The patents or charters of Charles II are both recited at length as to the grant of the lands as already quoted, and the title and interest of the proprietors thus described was to be surrendered; but "all such tracts of land, tenements, and hereditaments as have been at any time before 1 January, 1727, granted or conveyed by, or comprised in any grants, deeds, instruments or conveyances, under the

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common seal of the *said lords proprietors, either in England or in the provinces aforesaid," were expressly excepted, (*Ib.*, p. 65.) so that as to lands granted before 1 January, 1727, this surrender had no effect; and if the lands after granted by the king were not devisable, there certainly would have been great confusion, and we should have to look to the dates of the grants to resolve the question. Possibly a vague apprehension of this might have induced the passage of the Act of 1734. But it must be observed that this surrender made to the king was of that estate or title which the proprietors held, that is, as of lands in Kent, and such lands would not have lost their qualities by such a surrender. 2 *Danv. Abr.*, 441. If gavelkind lands are held in socage, and the tenure is after changed into knight's service, yet the custom is not altered, for that goes with the land and not with the tenure. See *Lushington v. Slendorff*, 5 *Bos. & Pul.* 506, 728. *Com. Dig.*, 4th vol., Gavelkind, 533. (A.) So, if it descend to the king, though it be privileged in the hands of the king, the custom is not thereby destroyed.... So, if the king be seized of lands in nature of gavelkind, and dies having several sons, the whole descends to the king, his successor, and the younger sons shall have no part, for the custom is suspended in the hands of the king. Upon these authorities we are justified in maintaining that although the custom might have been sus-

pended while the lands were in the king, it was not destroyed; and that upon being granted to private individuals, the right of devise went with the land, and that, therefore, that all lands, whether granted by the proprietors or by the king, were devisable previous to the A. A. 1734, and up to the time of the passage of that Act, and if so, then we proceed to our second proposition.

2. That the Act of 1734, did not take away this right of the citizen and quality of the land. It is at the worst no more than the statute of 32 Henry VIII, which has the same exception, but it has constantly been held in England, that wherever lands were

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devisable by custom before the statute *of Henry, they were not affected by it. Gilbert, in considering what circumstances are necessary to a will, says on devises, p. 83, 84, that lands of gavelkind tenure in Kent, "are not subject to the circumstances required by that statute (32 Henry VIII) because they were devisable before." And in the Butler & Baker's case, 3 Rep. 35, a, 4, it is said, and as to the case in Dyer, 155, that if lands in London, or lands which were devisable by custom, are held in capite, yet the whole may be devised. To that it was answered, that was not by force of the statute, but because the lands were devisable by custom before the statute, and the statute is in the affirmative, and doth not take away any custom. So Lord Coke says again. For an affirmative act doth not take away a custom to devise lands, as it hath often been adjudged. Co. Litt., 115, a.

And this has been allowed even against the mortmain Acts in London. Bac. Abr. (vol. 1, Title, Customs of London. A.) By the custom of London, a freeman or citizen might, even before the statute of wills, devise his lands and tenements, of which he was seized in fee simple, to whom he pleased, and may at this time devise the same in mortmain, notwithstanding the statutes of mortmain, &c. Here we have no mortmain Acts to prevent.

But, whatever might have been the intent or the effect of the Act of 1734, we contend that the Act of 1789 was intended to remove all restrictions from the power of devising except those of form imposed by the statute of frauds, and therein re-enacted. This appears from the fact that nothing is said about the devisees; exceptions are made as to those who may devise, but as to those who may take, the statute is silent, and as there is nothing to restrict the devisor, the only question is as to the capacity of the devisee to take at common law, which capacity we have shewn, corporations have. And this enactment, although affirmative only, being intended to regulate wills, the

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same matter as the Act of 1734, must *repeal it, as the exception in the Act of 1734

is inconsistent with the unlimited power of devise given in the Act of 1789.

So, if a subsequent Act be contrary to a former, in matter, it shall be a repeal of the former, though the words are affirmative. Com. Dig., 5 vol., foot page 317, Tit., Parliament, R., 9, a.

Every affirmative statute is a repeal, by implication, of a precedent affirmative statute, so far as it is contrary thereto. For, *leges posteriores priores abrogant*. Bac. Abr., 4 vol., Tit., Statute, D., 14.

Then we have the uniform practice ever since the Act of 1789, in favor of this construction, for there is no vestige of a doubt of the power to devise to corporations, or of the ability of corporations to take under a devise, to be found in any of our reports, and such a doubt has been unknown to the bar, as I verily believe, until raised in this case. But, if this be the first time this Act comes to be construed, being a statute in favor of public right, it ought to be construed liberally to carry out its intent, more especially as those feudal rights which were sought to be protected by the restriction upon devise, were never of force in this State.

Thomson, for Morrow, cited: 1 Rep. on Leg., 248, 249, 257, 260, 262, 268; 2 Rep. on Leg., 1507, 1683; 1 Bro. C. C., 482; 1 Jarm. on Wills, 277, n., 698; Sayer v. Sayer, 2 Vern., 688; 2 Rep. on Leg., 1475, 1476, 1478; Rawlings v. Jennings, 13 Ves., 39; Allen v. Crossland, 2 Rich. Eq., 68.

The opinion of the Court was delivered by

WARDLAW, Ch. The circumstances under which this opinion is prepared, prevent that full discussion which the importance of the interests and principles involved makes desirable, and enable me to do little more than to announce the judgment of the Court.

We are all agreed that the direction of the will to the executors to sell the whole estate, applies only to the "General Bull estate," and that the religious societies have

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no interest *beyond this portion. The direction to sell is in the midst of dispositions relating to that special subject, and it is a forced construction to change its collocation with cognate dispositions, and make it applicable to the whole of testator's estate. It is manifest, from a careful reading of the will, that while the testator intended to dispose of his whole estate, he made very different dispositions as to the two parcels of it: his estate proper, and the "General Bull estate." The former he gives to his wife, and the latter he devotes to charity. That he should make the proceeds of the latter liable to his debts generally, and to a pecuniary legacy to his step-son, is not inconsistent, for he had added to this parcel a very valuable estate. In life, he kept the

two parcels distinct and apart, and although we cannot resort to parol evidence, independently of the will, to ascertain the testator's intention, it is allowable to receive information of his past conduct, and all the circumstances which surrounded him, to point and determine the application of the words used in the will. The intention of the testator must be ascertained, and the construction of his will made, from the terms of the will itself, but we may be aided in fixing the meaning of his terms by his *usus et norma loquendi*. The direction to sell, of course, could not apply to the estate given to his wife, even for life, and could not, therefore, include his whole estate. In relation to his estate proper, the testator, so far from giving his executors power to sell, as to the only portion directed to be sold, prescribes that the sale shall be made by an agent of his wife.

There is no general residuary clause in this will, and if the testator has died intestate as to any subject not appurtenant to the General Bull estate, which is directed to be sold and divided, this subject must proceed to his next of kin. It is true, that the word remainder occurs in the directions to the executors for sale, but it is too obvious to need illustration, that the term applies only to the residue of the General Bull estate not sold for cash.

The next question is, whether the Berry

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Hill tract is included, as an incident and increment of the General Bull estate, within the power of the executors to sell; and on this point we concur with the Chancellor. In a devise, if there be found two sorts of property, one technically and precisely corresponding to the description of the subject in the devise, and another not so completely answering thereto, the latter will be excluded, although had there been no other property on which the devise could operate, it might be held to comprise the less appropriate subject, 1 Jarm., 720. This is sound doctrine, and for myself I think it was rightly applied in *Oxender & Chichester*, 3 Taunt., 147, as I have elsewhere said in *Lawton v. Hunt*, 4 Rich., 258. But under John Bull's will no subject whatsoever technically and precisely corresponds to the terms of description in the will, nor any which can be brought within its operation, except in a popular and secondary sense. Usually, and not including cases where, by imposing conditions, testators may create instances of election, a testator can dispose only of his own estate, and not of the estate of another, even of a deceased brother, however respected and lamented; but one may designate his plantation by any appellation he chooses, and devise it by that name. If the testator had said, I devise the estate derived by inheritance from my brother, probably the rule cited would have been applicable, but in

fact he says, the estate of my brother, I will, &c. He had the right to denominate, and he did denominate his Savannah River property as the General Bull estate, including Berry Hill, which was mainly paid for from the crops of the plantation inherited from his brother, and the proceeds of the sale of some of the negroes belonging to that plantation. It is unnecessary to add more to the circuit decree on this point.

The next question is, as to the negroes born after the date of his will from the bodies of the females primarily given to his wife. Two sets of post nati are involved in this inquiry. As to the descendants of Doll, we concur with the Chancellor, and cannot profitably add to

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his reasoning. As to the servants on the Little River farm, I am instructed to deliver the opinion of the Court, (I reserve my own,) approving the conclusion of the Chancellor that the post nati do not pass, and in this particular the decree must stand on its own reasons. The distribution of the fund from this source, however, must be different from that provided in the decree, as our conclusion concerning the effect of the power of sale, excludes the religious societies, and leaves the fund as intestate property to the succession of the next of kin.

Another question is, as to the bequest of \$5,000 to testator's step-son. On this point we differ from the Chancellor. The testator, in the first instance, cheerfully gives this sum of money absolutely to the legatee, and then proceeds to express the desire that no person shall be allowed to deprive him of it during his natural life, and that the legatee himself shall not be allowed to squander the minutest portion of the principal, and be only allowed to use the annual interest. An absolute gift can be reduced in effect only by the clearest expression of the donor's purpose in the context to limit its effect. Here there is no limitation over of the principal fund, and yet there is distinct manifestation of testator's purpose to dispose of his whole estate. In similar terms the testator expresses his desire to secure the estate given to his wife, so that no person shall be able to deprive her of it during her natural life. In both instances, we understand the testator as attempting to give the property exempt from its necessary incident of liability for debt, which is impracticable. As to his step-son, probably the counsel or advice not to exceed the annual interest in the use of the legacy, was intended; but we do not perceive any sufficient indication to restrict his right to use it as he pleases. In general, pecuniary legacies bear interest from a year after testator's death, and we see nothing as to this legacy to justify departure from the general rule.

As to so much of the appeal as relates to the debt of testator to the estate of David

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Morrow, we decide nothing, *except that there shall be no presumption from the appeal or otherwise that the matter was decided against the appellant. The Chancellor intended that this matter should be embraced in the inquiries directed to be made by the commissioner, and we think it safer to reserve judgment until, by report and exceptions, the matter may be more distinctly presented for adjudication.

We may next consider the appeal on behalf of the executor, that he, directed by the will to make the sale, and not the commissioner of the Court, as ordered by the decree, should make the sale of Berry Hill. We consider this appeal to be well taken. When the order for sale of the estate was originally granted, John Bull seemed to be intestate as to his whole estate, and this Court having custody of the estate, properly directed the sale to be made by its own officer; and so far as the order has been executed, it must be supported, and if the executor is dissatisfied with his compensation for trouble and management, his remedy is in the Law Court for extra compensation under the Act of 1789. But as we understand the facts, Berry Hill is still unsold, and as we have adjudged this tract to be parcel of the General Bull estate, which the executors were directed by the testator to sell, and as there is no charge of insolvency or misconduct made as to the executor, we adjudge that it is his privilege to make the sale of Berry Hill, and that so much of the decretal order as directs it to be made by the commissioner, be rescinded.

The remaining and most important question in the case is as to the capacity of the testator to give the residue of the proceeds of sale of the General Bull estate, to the religious corporations which are the objects of his donation. The right of these corporations to take personalty is not seriously contested, but it is insisted that, as the statutes of wills, 32 and 34 Henry VIII, and our Act of 1733 or 1734, (it is twice printed, in 3 Stat., and of these successive years, at the pages 341, 382,) except corporations from the objects of

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*the devises of land, it is unlawful to bequeath the proceeds of land to corporations. Minute distinction might be made between exceptions in enabling statutes and positive prohibitions, and between the capacity of a testator to give, and of a legatee to take, but I have not leisure to dwell upon them. It was argued for the corporations, that before the statute of wills, by special custom in Kent, retained from ancient Saxon laws, proprietors of lands held in gavelkind, had the right to devise lands; and that, as by the charters of King Charles II to the lords proprietors of South Carolina, lands were to be held of the king as of the manor of East Greenwich, in Kent, all lands in South Carolina are devisable, independently of the stat-

utes of wills and of the Act of 1733. But we have no proof that this special custom authorized devises to corporations; and if this were conceded, the surrender of the charters to the king about 1727, brought lands here under the general common law of England: and such persons as claim privilege beyond the common law, must prove their right to be excepted from the operation of the system. Hence arose the necessity of passing the Act of 1733, briefly after the surrender of the charters. Again, it is urged that the Act of 1789, prescribing the formalities according to which wills of land may be made, but making no mention of the devisees, and, of course, omitting the exception as to corporations, amounts to a repeal of the Act of 1733. But there are no inconsistent provisions in the two Acts, and repeals by implication, are little favored, and affirmative statutes, in relation to the same matter, are properly construed in *pari materia*. We, therefore, assume, that devises of lands to corporations, are inhibited generally, and that particular corporations, claiming right to take lands by devise, must establish their right by their charters, or some other special law proceeding from the legislative authority of this State. But the inhibition, in terms, extends only to devises of lands, and the burden is on the heirs, or next of kin, to demonstrate that a bequest of the proceeds of lands is equiv-

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alent to a *devise of lands specifically. The English statutes of mortmain are not of force in this State, and our only Act which can be denominated a statute of mortmain, is this Act of 1733. So, too, the statute of 37 Eliz., concerning charities, (which was greatly modified by the statute of 9 Geo. II, commonly called the statute of mortmain,) is not of force here.

The whole issue, therefore, hangs on the extent of the exception in the Act of 1733. There are reasons of policy, which might induce the legislature to enact that lands should not be held in the dead clutch of those who owe no allegiance, and where there is no liability to escheat, which are inapplicable to money or other personalty. It is incident to corporations at the common law, to take personalty by bequest, and this power is not totally or generally recalled by any statute, and it may be conceded, for the purposes of this argument, that they cannot take devises of land without license from the crown, in England, or here without grant from the legislature. Equity considers to be done that which should be done, and regarding the substance rather than the form of a will, considers land to be converted into money wherever testator directs the land to be sold, and nothing intervenes to prevent the execution of the direction on principles of equity. A testator has the power to change the nature of his estate as from realty to personalty, so as to preclude all questions between

his heirs and personal representatives. 1 Wms., 551, 554. It is quite true, that if the testator direct the conversion for a purpose, which fails in whole, or in part, the heir is entitled to the whole, or residue, as land. *Ackroyd v. Smithson*, North v. Valk [Dud. Eq. 212]. And that if the conversion be not actually effected by sale, and be not necessary, the beneficial legatee may take, at his option, the land or the proceeds. But these apparent exceptions in no respect limit or qualify the general doctrine of equitable conversion, where it is directed absolutely, or, as the phrase is, out and out, and the conversion is necessary to fulfil the purposes of

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the testator. *Craig v. Leslie*, 3 *Wheat., 563 [4 L. Ed. 460]. It is argued that this doctrine of equitable conversion applies only between the objects of gift, and not as to the donor; and thus far I approve and follow the argument, and it is further urged that it has no application to the instrument of gift. If no more be meant by this than that there must be, first, a devise established before a conversion can be effected; this too may be admitted as sound doctrine, and established by this very case in the Court of Errors. The vice in the decision of *Griffin v. Matthews*, following *Wilkins v. Taylor*, 8 Rich. Eq. 291, was, that the Court applied the doctrine of conversion to the frame or structure of the instrument, and seeing that the will directed a sale of land, and distribution of the proceeds, allowed the will to be admitted to probate on proof adequate to a testament, yet insufficient to a devise. Here, however, the will has been admitted to probate as a will, and the only question is as to the effect of a devise directing conversion. It is further urged, that as our Act forbids the direct devise of lands to corporations, it forbids what is the same thing in substance, a bequest of the proceeds of lands; and that we tolerate evasion of the policy of the State by allowing bequests of the proceeds of lands. This view is plausibly supported by the decisions in the English Chancery on the statute of 9 Geo. II, which are collected in a note, 2 Fonb., 210. That statute, in express terms, only inhibited gifts of lands and of charges and incumbrances on them, and of money to be laid out in lands, to religious corporations, but in *Attorney General v. Lord Weymouth*, Amb., 20, Lord Hardwicke determined that a gift of the proceeds of the lands was likewise prohibited on a construction of the enactment in connection with the preamble; and his judgment was followed afterwards in several cases. Unquestionably this construction was attained by considering the spirit and policy of the Acts; and one stiff in his notions of construction might well doubt of the propriety of the decision. Yet the terms of that are much more extensive

than those in the statutes of wills and our

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Act; *and the decisions proceed expressly on the terms of the statute. 14 Ves., 541. A like conclusion has been attained on the large words of the statute 11 and 12 Wm. III, as to gifts to Papists. *Roper v. Radcliffe*, 9 Mod., 167; 10 Mod., 89. So, too, in Delaware, on a statute of 1787, declaring all devises to religious corporations void, a like result was attained. *State v. Wiltbank*, 2 Harris, 22. But no case in England on the exception in the statute of wills, nor in New York, where the same exception prevails, nor elsewhere, has been cited to show that the inhibition of a devise of lands also inhibits a bequest of the proceeds. On the contrary, the prohibition of direct devise of lands has been held not to inhibit the devise of a trust in lands. I regret that I have not time to pursue this investigation further, but *Chancellor Jones* has fully examined the cases in *McCarter v. Orphan Asylum*, 9 Cowen, 437, and a fair summary of the doctrine may be found in *Angell & Ames on Corporations*, 137, 150.

It may be granted that the corporations to whom the bequests are made must be competent to take not only by the laws of the States which chartered them, but also by the laws of this State. We have endeavored to show that there is nothing in our law which hinders them to take bequests as corporations, and on looking at their charters by the foreign States, we find nothing to obstruct this capacity. All of them, in substance, are authorized to purchase, hold and convey estate. It may be that the term purchase, although usually including all modes of acquisition, except by descent, should be interpreted as to direct devises of land in a popular sense, so to embrace only acquisitions of land by payment of the price or value; but this is altogether unimportant where the gift is considered a bequest of personality.

It is ordered and decreed that the circuit decree be modified according to this opinion, and that in other respects the decree be affirmed and the appeal dismissed.

DUNKIN, Ch., concurred.

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*JOHNSTON, Ch., said: I concur throughout, except as to the right of the executor to sell; as to which, I apprehend that much inconvenience and perplexity will arise in future cases, where the executor is authorized to make partial sales. Sound practice (and this is only a question of practice) requires, that where an estate is to be administered by the Court, the whole fund should be in the hands of its officer.

Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, JANUARY TERM, 1860

JUDGES PRESENT:

HON. JOHN B. O'NEALL, *Chief Justice.*
HON. JOB JOHNSTON, *Associate Judge.*
HON. F. H. WARDLAW, *Associate Judge.*

11 Rich. Eq. *205

***MILBERRY S. MARTIN, Executrix, v.
JAMES B. CAMPBELL.**
(Charleston. Jan. Term, 1860.)

[*Evidence* ⇨208.]

Defendant contended that an agreement had been repudiated, and to prove it offered his own answer in another cause between the same parties:—*I. e.*ld., that if defendant could make proof in this collateral way, still the answer did not prove the fact, as the matter was not distinctly alleged.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 715; Dec. Dig. ⇨208.]

[*Attorney and Client* ⇨130.]

A solicitor who has an interest in attending to a cause, cannot, it seems, charge for his services, there being no express agreement to pay.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 292; Dec. Dig. ⇨130.]

[*Evidence* ⇨265.]

[A defendant's answer in a former action between the same parties is only *prima facie* evidence in a subsequent action as to the facts therein alleged.]

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1036; Dec. Dig. ⇨265.]

Before Dargan, Ch., at Charleston, February, 1858.

The decree of his Honor, the Circuit Chancellor, is as follows:

Dargan, Ch. Benjamin F. Hunt many years ago became the purchaser of a plantation on the Pee Dee river, in Georgetown district, called "Richfield," and of the ne-

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groes *thereon, for the sum of \$120,000: one-sixth of the purchase money was paid in cash, or its equivalent; the rest of the purchase money was payable in five equal annual installments of \$20,000 each, secured by bond and mortgage of the plantation and negroes: the bonds all drew interest. Two of these bonds, the subject matter of this suit, came into the hands of William Aiken by assignment, and were his property in his

own right, and were negotiated and assigned by him, as hereinafter stated.

The late Robert Martin, with the intent of becoming the purchaser of said bonds from William Aiken, and having engaged James B. Campbell as his agent in the negotiation for the said purchase, on 28th August, 1849, paid to said Campbell the sum of \$30,000, the receipt of which the said Campbell acknowledged in the following manner: "Charleston, August 28th, 1849. Received of Robert Martin, Esq., the sum of thirty thousand dollars, in trust, to be paid this day to the Hon. William Aiken, for purchase money of his bonds of Col. B. F. Hunt, and all the securities thereto, consisting of mortgage of Pee Dee plantation and negroes, judgment in Common Pleas for Charleston district, and an order for foreclosure in the same Court, which bonds and securities, with interest to this date, amount to upwards of sixty thousand dollars." (Signed) "James B. Campbell."

A few days afterwards, the defendant, James B. Campbell, executed an instrument which he delivered to the plaintiff's testator, Robert Martin, in which the terms of the contract were very fully and clearly stated as follows: "Broad street, September 1st, 1849. The assignment of William Aiken to myself, dated this day, of his claims upon Col. B. F. Hunt, consisting of two bonds for \$20,000 each, with interest, and a mortgage of Richfield and negroes, with a judgment, and an order of foreclosure in Common Pleas to secure them, which assignment is herewith enclosed, is in trust for Robert Martin, Esq., who furnished the sum of thirty thousand dollars, which I paid to Mr. Aiken as

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the consideration for *said assignment. Mr. Martin has my receipt for the money, which will show that this declaration is correct, and he is fully authorized to write over my

signature on the margin of said assignment, whatever may be deemed necessary to confirm or establish his right to said claims, bonds and securities. The agreement between Mr. Martin and myself is, that after paying him in full thirty thousand dollars, with interest from the 28th of August, 1849, the balance which may be collected on said claims upon Col. Hunt, is to be equally divided.

"I am to contribute my professional services to collect said claims free of charge. (Signed) James B. Campbell. This declaration is made in consequence of the weather preventing me from seeing and settling with Mr. Martin this afternoon." (Signed) "J. B. C."

On the first day of September, 1849, there was a still further declaration on the part of J. B. Campbell, of the terms of the agreement, in an instrument signed by him, and which is as follows:

"The State of South Carolina, }
City of Charleston. }

"Memorandum of an agreement, made and entered into by and between Robert Martin, Esq., and James B. Campbell. The Hon. William Aiken having this day executed an assignment to James B. Campbell, in trust, of his claims upon B. F. Hunt, Esq., and Robert Martin having on the 28th day of August, ultimo, (1849,) advanced the sum of thirty thousand dollars in cash, being the full amount paid by the said James B. Campbell for said claims, and the said assignment being in fact in trust for the said Robert Martin alone: Now, be it remembered that the said Robert Martin and James B. Campbell have agreed, and it is hereby agreed between them, as follows:

"The said James B. Campbell has undertaken the entire management of said claims,

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and agrees to prosecute the collection and security of the same, and to devote thereto his best professional services without fee or charge.

"And the said Robert Martin is to take and receive the first money or monies collected thereon, and as fast as the same shall be collected from time to time, until the said sum of thirty thousand dollars, with interest thereon from the 28th day of August, 1849, shall be paid in full; and then after the said sum, principal and interest shall be paid in full, whatever other or further sums shall be collected, received or paid on said assigned claims, shall be equally divided between the said Robert Martin and the said James B. Campbell, one moiety to each, share and share alike; and in case of the death or other disability of the said James B. Campbell before the final close and completion of his duties under this agreement, then the said Robert Martin shall be at liberty to select and employ such counsel or attorney in the place of the said James B. Campbell, as

he shall prefer to complete his said duties and the costs and fees and reasonable charges consequent thereon, shall be paid and deducted out of and from the share and interest of the said James B. Campbell, under and by virtue of this agreement. Witness our hands and seals, this first day of September, A. D. eighteen hundred and forty-nine.

(Signed) James B. Campbell, [L. S.]

In the presence of Virgil Maxcy."

The whole principal and interest due on the two bonds of B. F. Hunt, assigned by William Aiken as aforesaid, have been received by Campbell, or are subject to his order; and this bill is filed by Milberry S. Martin, executrix of Robert Martin, deceased, against Campbell, for an account of said moneys so received by him, in pursuance of the agreement which has been recited, and which, so far as they have not been received, are subject to his order, and for general relief.

The only controversy between these par-

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ties is, whether in respect to the Aiken bonds, the plaintiff's testator was the owner of said bonds, and Campbell, the agent and trustee, with the right to one moiety of the balance realized after Martin was reimbursed for his advances and interest, or whether Campbell is the owner of the bonds, with only a pledge of the same to Martin, to secure him for the money he had advanced for their purchase. If we accept the defendant's version of the transaction, he is entitled to the whole of the clear profits of the speculation, amounting to \$34,000 or \$35,000, and Martin is only to be reimbursed for his advances of money and interest. But by the plaintiff's statement, the defendant is only entitled to one-half of the profits, and Martin to the other half.

If we are governed by the original contract, reduced to writing by the defendant himself, there can be no ground for any difference of opinion. In that view of the case, the plaintiff's interpretation is the correct one. The language is peculiarly felicitous and significant to express the meaning and intention of the parties. In the receipt for the \$30,000, of the 28th August, 1849, the defendant acknowledges that he has received that sum, not as a creditor or borrower, but in trust. In the defendant's statement of the contract of 1st September, 1849, he acknowledges that the assignment of the bonds, and the securities, is in "trust for Robert Martin, who furnished the sum of thirty thousand dollars, which was paid to Aiken, as the consideration money for the assignment." He authorizes Martin "to write over his signature, on the margin of the assignment, whatever may be deemed 'necessary to confirm and establish his right' to said claims, bonds and securities." "The agreement between Mr. Martin and myself is, that after paying him in full 'thirty thousand dollars,

with interest from 28th August, 1849, the balance which may be collected on said claims upon Col. Hunt, is to be 'equally divided.' "

"I am to contribute my professional services to collect said claims free from all charge."

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"Can anything be plainer? If there be any significance in language, this means that Martin was to be reimbursed for his outlay of money, with interest on the same, and that he and Campbell were to be partners in equal shares or proportions as to the balance—Campbell contributing his services free of charge. He contributes his services as an equivalent for an equal share of the profits. If the speculation was entirely Campbell's, and the money advanced by Martin to be only a simple debt from Campbell to him, where was the necessity, or meaning of the provision, that Campbell was to contribute his professional services free of charge for attending to his own business! The same terms and stipulations are iterated in the memorandum of the agreement of 1st September, 1849, and the terms of the contract are made so clear and explicit, that the most ingenious sophistry cannot distort them into any other meaning than that which the language imports. In truth, this is so unambiguous, that I suppose it cannot be the intention of the defendant to deny the contract as it originally stood, and as I have construed it; and I suppose him to have meant simply, that the contract was afterwards abandoned or modified, though I am not authorized to say, from anything that occurred in the trial, that this concession was made.

The contract then stood originally as I have stated it. If this be true, it will hardly be disputed that the onus is upon the defendant to prove such modification or abandonment.

I will proceed to consider the only evidence bearing on this question which has been submitted: One of the bonds for \$20,000, given by B. F. Hunt to Charles T. Brown, for the Richfield plantation and negroes, had fallen into the hands of the late William Mathews, and was bequeathed by him to his grandchildren, namely: Wm. M. Hunt, B. F. Hunt, Jr., and Mrs. Mootry, together with the mortgage and other securities. John H. Tucker also held sundry bonds of B. F. Hunt, Sr., secured by a mortgage of Richfield and the negroes thereon, which he claimed to have an

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equal liens with *that of the Mathews and Aiken bonds. On the 16th of February, 1852, (a) Tucker filed a bill against B. F. Hunt, to foreclose his mortgage on Richfield and negroes, and with the view of having the rights of all the parties who claimed to have liens up-

on this property adjudicated, he made the aforesaid legatees of Mathews parties defendants. He also made parties defendants to the bill, James B. Campbell and Robert Martin, as assignees of the Aiken bonds. Among other things, the plaintiff, Tucker, sought from Campbell and Martin a discovery, "whether the transfer of the Aiken bonds was for his (Aiken's) own use or that of Robert Martin, or any other and what person, or for both, and for any other and what use or uses, and what were the terms thereof." Martin, in his answer responding to this part of Tucker's bill, says, "that some time in the summer, A. D. 1849, James B. Campbell, one of his codefendants, being engaged in a negotiation with the Hon. William Aiken, for the purchase of certain bonds of Benjamin F. Hunt, secured by the mortgage of a plantation called Richfield, with the negro slaves thereon, applied to him to know if in case he should make such purchase, whether he (the defendant, Martin,) would advance and loan him a large sum of money to aid him in said purchase; to which this defendant assented, first informing Mr. Aiken of his intention to aid Mr. Campbell in case he should sell said bonds and mortgage to him. This defendant had previously known of said bonds and mortgage by reason of his confidential relations with Mr. Aiken, and had formed some opinion of their value, which, together with his reliance upon the confident opinion of Mr. Campbell, induced him to believe them to be ample security for the amount of the loan Mr. Campbell desired. Accordingly, on the 1st of September, A. D. 1849, this defendant advanced and loaned to Mr. Campbell a large amount of money,

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which was paid by Mr. *Campbell to Mr. Aiken, and his purchase completed; very soon thereafter, Mr. Campbell deposited with this defendant the assignment by William Aiken of said bonds and mortgage for the said loan. Subsequently, and since that time, this defendant and Mr. Campbell have had sundry understandings and agreements about the loan and the said bonds and mortgage; all of which have been entirely satisfactory to both parties, and are of no interest or concern to the plaintiff." This is the language of Martin in his answer to the bill of John H. Tucker v. B. F. Hunt and others. I speak in the strictest conformity with the facts when I say, that this is the only evidence that tends to show that the contract, as expressed in the instruments which I have recited, was in any respect modified or changed, from what it was expressed to be in those instruments. While there it is represented in the plainest language, that the assignment of the bonds and the securities was for Martin's benefit, that the assignment to Campbell was in trust for Martin; that the first money realized from Hunt's bond was to be paid to Martin, in reimbursement for the sum

(a) This is an error in the decree: the bill was filed December 27th, 1851; Mr. Martin's answer was filed February 16th, 1852. S. & D.

that he had advanced in the purchase; that the clear balance was to be equally divided between Martin and Campbell, and that Campbell was to contribute his professional services free of charge: it is represented in this answer, (Martin himself speaking,) that the \$30,000 was a loan to Campbell, and Campbell a debtor to Martin for the same; that the assignment was to Campbell for his own benefit, and that Martin had no other interest in the assignment by Aiken, and the deposit of the same with Martin, except that it was to be considered as a pledge for payment of the \$30,000 due by Campbell to him.

There is a discrepancy certainly, and an incompatibility between the statement in Martin's answer, and the only possible construction of the terms of the contract as given in the instruments which have been recited. The conflict cannot be reconciled. It only remains for us to enquire, what was

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*the contract, and whether in fact it was afterwards modified or changed.

In the first place, it would be difficult to assign a rational motive to Martin for vesting \$30,000 of his cash in hand in this operation, with no other expectation than to get back his principal and interest—to get back that which he had in hand. To adopt the defendant's version of the matter would be to make Martin advance his money to a large amount in the purchase of Hunt's bonds, to incur the hazard and trouble of collecting them by a course of vexatious and protracted litigation, with a view only to Campbell's benefit, and without the prospect of a contingent profit to himself to the amount of one cent. Martin may have done this, but it would be very different from what a man would be likely to do under like circumstances. When the purchase of the bonds was made, there was due on them, of principal and interest, \$60,000, and upwards; and to be repaid his advances of money and the interest, and to realize that amount of profit, even if it was to be shared equally between them, was a tempting speculation to the capitalist, and one which we may readily suppose he would embrace.

But to go back to the answer of Martin, to the bill of Tucker v. Hunt and others. This answer makes Martin admit, not only that the \$30,000 paid to Aiken for the bonds was a loan by Martin to Campbell, but that Aiken's assignment was deposited with Martin as only a security for the loan. Now, what are the undoubted facts as proved by documents under the signature of Campbell? When he receives the money from Martin, (\$30,000,) he says: "received of Robert Martin, the sum of thirty thousand dollars," (not as a loan, but) "in trust, to be paid this day to William Aiken," &c. When he delivers the assignment to Martin on the 1st September, 1849, he takes no acknowledgment from Martin that the assignment is deposited

with him to secure the payment of his debt to Martin, as he would have done if such had been the understanding between them.

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but he accompanies the delivery of it with a formal and written declaration, that the assignment "is in trust for Robert Martin, Esq., who furnished the sum of thirty thousand dollars, which I paid to Mr. Aiken as the consideration money for said assignment." The rest of this document, and the whole of the instrument which is entitled "Memorandum of an agreement," &c., and bearing the same date, are full and explicit to the same effect. These contemporaneous documents conclusively show that, whatever may have been the motive or cause of the misrepresentation, the statement in Martin's answer is not true. The facts are not what they are there represented to be. In the defendant's version of the affair, there is one circumstance or feature that it is impossible to explain or reconcile. We are called on to believe that Martin, a man of experience and sagacity, and acquainted with all the forms of business, loaned to the defendant the sum of \$30,000, without taking from him a bond, note, receipt, or any memorandum in writing, or evidence of any kind, to show the indebtedness, or the time and manner of its payment. This would be strange, and it would be equally strange that Campbell should borrow from Martin \$30,000, and therewith purchase well secured bonds, then worth \$60,000, and immediately execute and deliver to Martin instrument after instrument, acknowledging that the bonds were purchased with Martin's money, and in trust for Martin, and for his benefit, and that he (Campbell) had no interest in the bonds, except ultimately to share with Martin, equally, the profits of the speculation.

There is another fact, entirely subversive of the defendant's version. It was his own act, and shows that he then had impressions entirely different from those he advances at the present time. The plaintiff charges in her bill, "that the said James B. Campbell, on the 13th June, 1851, had a settlement with the said Robert Martin, under the agreement hereinbefore recited, and that on a calculation of what had been paid by the

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said Robert Martin, on the said several matters, and what was due on the Aiken bonds, and supposing them to be likely to be paid in full, at the request of the said James B. Campbell, the said Robert Martin agreed to advance to him what he would then have been entitled to receive, if the Aiken bonds had then been paid in full in cash, and thereupon paid to the said James B. Campbell the sum of seventeen thousand four hundred and thirty-five dollars, or thereabouts, being the sum agreed upon in their account stated, in full of all further claims, interest or demands on the part of the said James B.

Campbell; and the said James B. Campbell gave to the said Robert Martin a receipt for the said sum, expressed to be in full for all his claims, in respect to the said agreement, which said receipt, and the statement accompanying it, the said James B. Campbell subsequently obtained from the agent of your oratrix, alleging that it was necessary to enable him, the said James B. Campbell, to make up a statement of the claim for the Master; and which receipt and statement he has never returned, although repeatedly requested so to do."

Jos. D. Aiken, a witness who was and is the agent of the plaintiff, and who was examined on the part of the plaintiff, deposed that the receipt and statement here spoken of went into the possession of Campbell in the manner charged in the bill, and that he has never returned them, though often applied to for that purpose. Campbell, in his answer, indignantly denies the possession or suppression of the receipt, or that he ever had possession thereof since it was executed and delivered to Mr. Martin. But he says, "he has never, at any time, denied making and giving such a receipt, or the receipt of the money it called for, or the original bargain and agreement under which the money was received," but on the contrary, has expressly admitted the same, as it is charged in this bill, and his said admissions were placed on the file, and are of record in this Court since the——day of February, 1857. In another part of his answer, speaking of this lost receipt, he says, "whether it is in ex-

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istence, and where it is, is unknown to this defendant, and is of no consequence whatever, because he readily admits, and has always admitted its full purport and original intention as charged in the bill," but he denies that it is of force except as an acknowledgment for the amount of money received by him.

I am unable to perceive why this receipt, and the statement accompanying it, should not be considered "of force" for what they purport. I have read with care and attention the defendant's statement of this transaction, as set forth on the fifth page of the printed copy of his answer, and see nothing there that should have the effect of invalidating them; on the contrary, I feel surprised that, admitting these facts, the defendant should imagine that he could successfully resist the plaintiff's version of the transaction. Here, as late as the 13th June, 1851, we have the parties making a computation and statement, in exact conformity with the terms of the contract, as set forth in the instrument bearing date September 1st, 1849; and assuming that the Aiken bonds were fully secured and would eventually be paid in full, they make a calculation of the amount that would be coming to Campbell, according to the terms of the contract; and finding

that it would be \$17,435, or thereabouts, Martin paid that sum to Campbell, and became the purchaser of all Campbell's share and interest, and took a receipt for that sum from Campbell, "expressed to be in full of all his claims in respect of the said agreement." Though on this occasion Campbell was content to take one-half of the profits of the speculation, according to the express terms of the agreement, yet in his answer to this bill, he contends that the written statement of the contract prepared by himself does not contain the true stipulations between them, and that he (Campbell) was the borrower of the \$30,000, and the true owner of the bonds, and that the assignment was deposited with Martin only as a pledge for the debt due to him by Campbell.

But it is said that this settlement, as well as the terms of the contract, were repudiated

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by Martin. It is to be remarked, that this idea of repudiation is inconsistent with the other ground assumed, that Campbell was the owner of the bonds, and Martin only the lender of the purchase money. But where is the evidence that Martin repudiated anything; either the terms of the contract, or the settlement? It is said, he held on to Bennett's guaranty. But that was given as a security to Martin for his endorsement of Campbell's note in bank. But he still held possession of it, after the note in bank was paid. Still, where is the evidence that Martin ever refused to deliver it up? What witness has said that Martin's continued possession of it was anything more than an accidental and involuntary detention? But suppose it was otherwise; I cannot conceive what bearing it has on this question.

The evidence, then, in support of the defendant's views, has narrowed down to Martin's statement in his answer to Tucker's bill. But why should Martin be unwilling to occupy so favorable a position as that which he held as the true owner of the Aiken bonds, and take the position of the lender of money on the security of these bonds; and that too just at the time when he was about to realize the fruition of his speculation? The answer to Tucker's bill was posterior to the settlement of June 13, 1851. It was then reduced to a certainty, that these bonds of Hunt would be paid, and if so, Martin would realize a very handsome speculation. What Campbell has said in his answer to the plaintiff's bill, in reference to this transaction, must be born in mind. "In June, 1851, he (Martin) was endorser of this defendant to a considerable amount, which had been discounted in bank. On or about the 13th day of that month, as stated in the bill, this defendant being about to leave the city for the North, and desiring to cancel said letter of credit (that of Bennett) by discharging Mr. Martin from his said indorsements; and the claim against Col. Hunt having been finally

adjusted so that there appeared no reason to expect litigation or difficulty in receiving payment from Col. Hunt's property; in due course of time, he suggested to Mr. Martin

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to become the purchaser of "his whole interest in said bonds and securities." At this time, when the profits of what had heretofore been a rather hazardous speculation were in his grasp—his claim being based upon the most palpable basis of a written contract, with no uncertainty about it—we find him repudiating all this, and taking the position of a creditor who has loaned out his money at interest. His statement of his relations with Campbell, in that answer, in my judgment, was incidental, without deliberation and attention. It was not the direct question at issue there. He was answering what he and Campbell both seemed to consider the pragmatic interference of Tucker. His attention was directed not to the question, what were his relations with Campbell? but to what were his relations with Tucker? His answer was prepared for him by one in whom he reposed the most implicit confidence. There is no evidence (and Campbell himself does not say) that Martin gave instructions for the preparation of his answer. Nobody but Campbell says that it was read to him, and Campbell is not a competent witness on this point. There is pretty strong negative evidence that it was not read to him. Under these circumstances, and without considering the imbecile state of Martin's body and mind at the time the answer was sworn to, (to which I will presently advert,) I would say that the statement in the answer would not be sufficient to invalidate or destroy the evidence of a contract otherwise so clearly proved.

But Martin was, at the time of his signing the answer, ill in body and mind. Campbell himself says he was in feeble health. Dr. Geddings and Dr. Bellinger, his physicians, were examined in reference to the state of his mind. His disease was ramollissement, or softening of the brain. The effect of the disease is gradually to undermine the understanding. His, eventually, became totally prostrate. But at the date in question his mental faculties, though not entirely in ruin, were very much impaired. He would certainly not be able to comprehend any complex matter of busi-

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ness. He could *have been imposed on. He would not have been able to give strong attention to any transaction.

My opinion is, that Martin's mind, at the time he signed his answer to Tucker's bill, was impaired to such an extent, that he did not comprehend the full import of the language of the answer, if it was read to him. If this be a correct conclusion, it removes every seeming difficulty in the way of granting the plaintiff the relief which she seeks.

The judgment of the Court is, that the con-

tract between the defendant and the plaintiff's testator was, and is, that which is embodied and expressed in the receipt of the defendant to the plaintiff's testator, bearing date the first day of September, 1849, and the memorandum of the agreement, bearing the same date; that is to say, the assignment of Aiken of the two bonds of B. F. Hunt was in trust for Robert Martin, and that Campbell became invested with the legal estate in the said bonds as trustee of Martin, and for his benefit; that by the terms of the agreement, Martin was to be reimbursed for his money advanced, with interest thereon from the 28th August, 1849, that the balance of money which should be collected on said bonds after all expenses were paid, in other words, the net profits, were to be equally divided between Martin and Campbell. And it is further adjudged that there is no sufficient reason to believe that this contract was ever cancelled or modified; that it is still binding upon the parties, and that the account between them is to be taken accordingly. It is ordered and decreed, that an account be taken before one of the masters, for the monies that have come into the hands of both Martin and Campbell from the Richfield plantation, before the same was sold, according to the agreement between B. F. Hunt and James B. Campbell, dated 1st October, 1849.

It is further ordered and decreed, that from the receipts of money arising from the sale of produce from Richfield, and from the proceeds of the sale of Richfield and the negroes thereon, the said Robert Martin in the

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account to be taken, is *entitled to be reimbursed for the money which he advanced and paid on the debt due to Mary Legare, and interest thereon till the time of such reimbursement; and in like manner the said Robert Martin in the account to be taken, is entitled to be reimbursed for the money advanced and paid on the debt of Byrd, Savage & Byrd, with interest on the same from the time of its being paid and advanced, till the time of its reimbursement.

It is further ordered and decreed, that the said Robert Martin, or his legal representative, from the proceeds of the sale of Richfield, and the mortgage of negroes thereon, is entitled to be refunded the sum of thirty thousand dollars, which he advanced in the purchase of the said bonds, with interest thereon from the 28th August, 1849, according to the agreement as hereinbefore adjudged.

It is further ordered and decreed, that the receipt of Campbell of the 13th June, 1851, is a bar to any claim on his part to his moiety or share of the profits, stipulated for by the said agreements, he having for valuable consideration sold and assigned to the said Robert Martin all his claim, interest and share in the said bonds, assigned by Aiken as afore-

said. It is ordered and decreed, that the sum of \$17,435, paid by the said Martin to the said Campbell was in full, and intended to be in full of all his claim and share in the said bonds; so that the whole amount of said bonds became the property of the said Robert Martin, and so far as the same was not paid to him in his lifetime, it is now due and payable to his legal representative, the plaintiff in this suit.

It is further ordered and decreed, that in stating the accounts, all charges and fees, or compensation for services rendered by the said Campbell in and about the prosecution and collection of the said bonds, are disallowed; first, because such was the stipulation in the original agreement as expressed in the instrument bearing date the 1st September, 1849, and, secondly, because the payment and receipt of the 13th June, 1851, is a bar to any such account or claim.

It is further ordered and decreed, that

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James B. Campbell *do account for all the money which has come into his hands on account of the assignment by William Aiken to him of said bonds, at any time from the date of said assignment to the present time, whether the same be from the proceeds of the sale of produce from Richfield under the agreement between himself and B. F. Hunt of the 1st October, 1849, or from the proceeds of the sale of Richfield and the negroes, and that so far as the same have come into his hands, he do on an account stated upon the principles of this decree, pay to the plaintiff the balance so found to be due to her, and that so far as there be any balance due to the plaintiff in the hands of the master arising from said bonds, upon an account stated according to the principles of this decree, the said master do pay the same to plaintiff.

It is further ordered and decreed, that the defendant pay the costs of this suit.

The defendant appealed upon the grounds:

1. The Chancellor has entirely misconceived the issue made by the pleadings, and upon this misconception the decree is predicated; the same will appear by comparison of the pleadings with the following extract from the decree:

"The only controversy between the parties," says the Chancellor, "is whether, in respect to the Aiken bonds, the plaintiff's testator was the owner of said bonds, and Campbell the agent and trustee, with the right to one moiety of the balance realized after Martin was reimbursed for his advances and interest; or whether Campbell is the owner of the bonds, with only a pledge of the same to Martin, to secure him for the money he had advanced for their purchase.

"If we accept the defendant's version of the transaction, he is entitled to the whole of the clear profits of the speculation, amounting to \$34,000 or \$35,000, and Martin is only

to be reimbursed for his advances and interest. But, by the plaintiff's statement, the defendant is only entitled to one-half the profits, and Martin to the other half."

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*The defendant humbly submits that, by an inspection of the pleadings, the version of the transaction here above charged upon him will nowhere appear, but the contrary that he claims exactly that which the Chancellor erroneously puts down as the plaintiff's statement of the case.

2. The defendant, so far from meaning or claiming, as the Chancellor supposes, that the contract of September 1st, 1849, was afterwards abandoned or modified, on the contrary, throughout the pleadings, insists that it is subsisting and binding, while the plaintiff claims that it has been abandoned, and that defendant has no longer any rights under it.

3. The Chancellor entirely misconceives the purpose of the defendant, in supposing that Mr. Martin's answer to the bill of John H. Tucker was introduced, or relied upon, to show that the original agreement of September 1st, 1849, had been modified, changed, or abrogated, or for any other purpose than to establish said agreement, and to show that Mr. Martin did not, at that time, consider himself as is now claimed by the complainant, the sole owner of the Aiken bonds; and that Mr. Jos. D. Aiken, the son-in-law of Mr. Martin, who, as a magistrate, procured his signature and oath to the answer, and was Mr. Martin's general and confidential agent, at that time, did not consider Mr. Martin as the sole owner. That if Mr. Martin had considered the inchoate agreement of the 13th June, 1851, as existing at the time, he could not have answered as he did, nor could Mr. Jos. D. Aiken, as a magistrate, have taken his signature and oath to the answer, if he had then taken the same views, either of Mr. Martin's imbecility, or of Mr. Campbell's relations to the bonds, which he now testifies to.

4. The only controversy in issue between the parties, made by the pleadings and tried, was, whether the agreement of September 1st, 1849, between Mr. Martin and the defendant, is of force. The defendant claims that it is, and that at the proper time, when called upon, he ought to account accordingly.

The complainant denies this, and claims

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that the defendant sold out on the 13th June, 1851, and from that date had no interest in the Aiken bonds. That the money then received by the defendant is to be considered as a payment in full, and not as a loan or advance.

5. If the complainant's view is adopted, and the agreement of the 1st September, 1849, is to be considered extinguished, then the defendant is entitled to reasonable compen-

sation for his services from June, 1851; and the defendant, also, appeals from that part of the decree which disallows such compensation, and also excludes him from participation in the profits derived from his services; he is entitled to one or the other.

McCrady, Richardson, for appellant.
Simons, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The issue between these parties was not, as the Chancellor seems to have conceived, whether the purchase of Aiken's bonds was made by Campbell, for his own benefit, by means of money borrowed from Martin. It was never denied by Campbell, that though the purchase made in August, 1849, was in his name, and ostensibly to his use, it was made on the joint account of himself and Martin. This he took pains to put beyond doubt, in September, 1849, in an unequivocal declaration, that the speculation was in trust to reimburse Martin for his outlay, and then to divide the net profits between the two: Campbell's services to be gratuitous.

Nor was it denied that in June, 1851, Campbell sold his share of the profits to Martin, at a stipulated price; or that he gave a receipt for the sum paid.

This bargain is not denied by Campbell, though he does deny that he got at the receipt—a matter of very little consequence, since, its loss or disappearance could not, under his fair admissions, occasion any material injury.

The real contest between the parties is,

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whether, after the *bargain of June, 1851, was made, it was repudiated by Martin, as Campbell inferred from his conduct.

There is no proof of this repudiation. It would not do to say, had Campbell expressly avowed the fact, that it should be assumed without proof.

It is contended that the proof is to be found in Campbell's answer to Mrs. Martin's petition, which is said to have been given in evidence in the present cause. But supposing proof can be made in this collateral way, out of the defendant's answer in another cause, such answer is only *prima facie*, and not conclusive, and is evidence according to the meaning to be obtained by a proper construction of it: and Mr. Campbell's answer is not, substantially, in the nature of a positive averment of the fact of repudiation, but rather that from Martin's equivocal conduct, Campbell understood him to intend to repudiate, and concluded, as it would not materially vary their relative interests, to make no opposition.

We are to conclude, then, that the contract of June, 1851, remained of force; and that being the case, we do not perceive that

the results attained by the Chancellor are erroneous.

Mr. Aiken (Joseph D.) proves that in the receipt given by Campbell, he agreed to continue his services in winding up the business gratuitously. The same result, it appears to us, would have followed had that special provision been omitted in the receipt. The concern must be wound up: Campbell had an interest (being accountable for what he had received, and for his contracts with third persons) in winding it up; to say nothing of his claim of the Mathews' bonds; and, therefore, was under a necessity to continue his attention to the business.

It is ordered that the appeal be dismissed, and the decree affirmed.

O'NEALL, C. J., and WARDLAW, J., concurred.

Appeal dismissed.

11 Rich. Eq. *225

*JACOB F. MOORER v. JACOB KOPMANN.

(Charleston, Jan. Term, 1860.)

[*Specific Performance* ⚡58.]

A and B agreed as follows: A agreed to make title to B for a certain plantation, and to pay him \$2,000, and B agreed to make title to A for certain lots in Charleston, and each bound himself, in case of his refusal or failure to comply, to pay to the other "\$1,000, with all costs and charges, as damages sustained for non-compliance on his part." A delivered possession of the plantation to B, and tendered him the \$2,000 and interest. B retained possession of the plantation, and refused to comply with his part of the agreement. *Held*, that notwithstanding the agreement to pay \$2,000 as damages, A was entitled to a decree for specific performance of the agreement.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 180; Dec. Dig. ⚡58.]

Before Wardlaw, Ch., at Charleston, February, 1859.

This case will be sufficiently understood from the circuit decree, and the copy of the agreement. The circuit decree is as follows:

Wardlaw, Ch. This is a bill, by the vendor, for the specific performance of defendant's agreement to conclude a trade for the purchase of the plantation called the Mims' tract.

On the fifteenth day of March, eighteen hundred and fifty-eight, the parties entered into an agreement, under seal, whereby Jacob F. Moorer, in consideration of a clear and unencumbered title to certain lots of land, and the buildings thereon, in the City of Charleston, on the west of King street, and north of Rodgers' alley, containing sixty-four feet deep on King, and two hundred feet deep on the north side of Rodgers' alley, to be made, duly executed and delivered to him, by Jacob Kopmann, covenanted and agreed to sell and convey to the said Jacob Kopmann, a tract of land known as the Mims' tract, in St. James Goose Creek

parish, Charleston district, containing about twelve hundred acres, more or less; and, also, to pay the said Jacob Kopmann, on his bond

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*to E. H. Rodgers, two thousand dollars, the said bond being secured by a mortgage of the two houses and lots in King street.

If either party to the said agreement should refuse or fail to make a good and unencumbered title, it is agreed that he shall be bound to pay the other one thousand dollars, with all costs and charges, as damages sustained for non-compliance.(a)

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*The plaintiff, in pursuance of said agreement, made all necessary preparations for the performance thereof; delivered possession of the said tract of land in St. James' parish to the defendant, and tendered him \$2,000, with a deed of conveyance of the Mims' tract. Whereupon, the plaintiff was informed by the solicitors of the defendant, in a note which is in evidence, that the said Jacob Kopmann could not perform his agree-

(a) State of South Carolina.

Articles of Agreement between J. F. Moorer and Jacob Kopmann.

Whereas, I, J. F. Moorer, do hereby agree, and bind my heirs, administrators and assigns, to make the above-named Jacob Kopmann, a clear and unencumbered title to a piece, parcel, or tract of land, known by the name of the Mims' tract, situated, lying, and being in St. James Goose Creek parish, Charleston district, and State aforesaid, containing about twelve hundred acres, more or less; and I further agree to pay said Kopmann, on his bond in favor of E. H. Rodgers, two thousand (\$2,000) dollars, secured by a mortgage on two houses and lots, on the west side of King street, and north and binding on Rodgers' alley, containing sixty-four (64) feet front on King street, and two hundred (200) feet deep, and binding on the north side of Rodgers' alley, be the same more or less; and should I, J. F. Moorer, refuse or fail to comply to make the above-named title to said Jacob Kopmann, I do hereby bind myself, my heirs and assigns, to pay the aforesaid Jacob Kopmann, one thousand (\$1,000) dollars, with all costs and charges, as damages sustained for non-compliance on my part.

Whereas, I, Jacob Kopmann, do hereby agree and bind my heirs, administrators and assigns, to make the above-named J. F. Moorer, a clear and unencumbered title to the above-named lots, with all the buildings thereon, situated, lying, and being in the City of Charleston and State aforesaid, west of King and north of Rodgers' alley, containing sixty-four (64) feet front on King, and two hundred (200) feet deep on the north, binding on said Rodgers' alley; and should I, Jacob Kopmann, refuse or fail to comply to make the above-named title to said J. F. Moorer, I do hereby bind myself, my heirs and assigns, to pay the aforesaid J. F. Moorer, one thousand (\$1,000) dollars, with all costs and charges, as damages sustained for non-compliance on my part.

Given under our hand and seal, this, the fifteenth day of March, in the year of our Lord one thousand eight hundred and fifty-eight, and in the eighty-second year of the Independence of the United States of America.

(Signed) Jacob Kopmann, [L. S.]

(Signed) J. F. Moorer, [L. S.]

Signed, sealed and delivered, in the presence of

(Signed) J. A. Snell,

(Signed) George Addison,

ment to procure a clear and good title to the property in King street, the wife of the defendant having refused to renounce her right and claim of dower; and that the defendant was thus prevented from performing his contract, and refused to pay the penalty imposed upon him for the breach of his agreement.

If a plaintiff presents a case *prima facie* good, as this appears to be, he is entitled to a decree for specific performance, unless the defendant can prove that this would be inequitable. Much less evidence is necessary to induce the Court to leave the parties where it finds them, than to annul an agreement in writing, under seal. And there is a great difference in the position of a plaintiff seeking to set aside a contract, and a defendant resisting specific performance. There is, in this case, no evidence to prove accident, mistake or fraud, affecting the interest of the defendant. This was an agreement for the sale of an old settled plantation, in the District of Charleston, with facility of access to the city. The defendant had all the necessary means of knowledge, and made the contract after he possessed them. There is no evidence of any description of the property outside of that in the agreement. No misrepresentation on the part of the plaintiff has been proved. Nor does it appear that there was any mistake on the part of the purchaser, as to the quality and location of the Mims' tract, which he knew to be a plantation in the low country. He lived for more than a year within a few miles of it. After paying two visits to the place in the country, subsequently to the trade, he re-

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turned *to Charleston and expressed his satisfaction with the purchase.

This Court cannot release the defendant from obligation to perform a lawful contract, because of his carelessness or neglect to use the knowledge in his possession, and to acquire additional information if he desired it.

With the facts in evidence, it is a necessary and natural conclusion, that the vendee acted upon his own judgment in making this trade. The perfect indifference manifested by him to the usual and easy means of information, his neglect to examine the property for himself, or to get a description of it from others, and his anxiety to hasten and conclude the contract, certainly is enough to place him, as to matters within the reach of his own observation, in the condition of one who purchases on his own judgment, without reliance on the statements of the vendor. He might have protected himself from the consequences of his negligence, by exacting explicit and unequivocal warranty or representation from the vendor; but this has not been done. As regards the quality and value of the land, the evidence of several witnesses residing near the place represents it as some of the best high land and swamp in that part of the country, which section is thickly settled,

The overseer, employed by the defendant to occupy and cultivate the plantation during the last year, raised a crop upon it, and testifies to the same effect. The defendant has failed to perform his part of the agreement. He has declared his inability to procure and deliver to the plaintiff a clear and good title to the property in Charleston. He has refused to pay the penalty for the breach of his agreement. He has held possession of the plantation in St. James' parish, and the two houses and lots in King street, since the conclusion of the trade. Since the filing of this bill, he has made a confession of judgment to McKenzie, Cadow & Co., and also executed an assignment for the benefit of his creditors, pendente lite.

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*I am of opinion that the contract of sale is made in proper form, is fair, certain, upon sufficient consideration, free from accident, mistake or fraud, and in every respect lawful and binding at this time; and that the plaintiff is entitled to have specific performance of the defendant's agreement for the purchase of the Mims' tract.

It is ordered and decreed, that Jacob Kopmann, the defendant, shall procure and deliver to Jacob F. Moorer, the plaintiff, a good and clear title to the two lots of land in King street, described in the agreement; and that he shall pay rent for the same to the plaintiff, from the date of the tender of the price; and it is referred to Mr. Tupper, one of the masters of this Court, to report the amount of rent due for the use and occupation of the said premises.

And if the defendant shall fail to procure the renunciation of dower, the master shall report an assessment for the same, as a proper amount to be deducted from the purchase money of the said property. And the plaintiff shall tender to the defendant two thousand dollars, within one month from the date of this decree, on pain of having his bill dismissed; and the defendant shall pay the rent due to the plaintiff at the time of such payment. The deed of conveyance of the Mims' tract, introduced in evidence, shall be delivered to the defendant, so soon as he shall procure and deliver to the plaintiff a good title to the two lots in King street.

The costs of these proceedings shall be paid by the defendant.

NOTE.—A vendor may sustain a bill for specific performance. *Gregorie v. Bulow*, Rich. Eq. Ca., 235. Inadequacy of consideration, without fraud, is not sufficient to prevent the enforcement of a contract. *Sarter v. Gordon*, 2 Hill Eq., 121.

Defendant cannot take advantage of his own carelessness or neglect. *Oldfield v. Round*, 5 Ves., 508; *Ellard v. Landuff*, 1 Ball & B., 249.

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*Equity regards not the form, but the substance of the agreement. 2 Story Eq., § 715,

751; 2 Powell on Contra., 167; *Howard v. Hopkins*; 2 Atkins, 387, [371.]

The intention of the parties is the rule of construction. *Batten on Spec. Perf.*, 270, 271.

In cases of covenants, especially when fraudulent misrepresentations occur in the making or execution of such contracts, the Court of Equity exercises a concurrent jurisdiction with the Courts of Law. 2 Powell on Con., 11.

One of the parties to a contract being by himself incapable of performing it, furnishes no ground for dispensing with specific execution. 2 Powell on Con., 167.

The defendant appealed on the grounds:

1. Because the parties having, themselves, settled the measure of damages, and the method of redress, for the non-fulfilment of the contract of sale, it is not competent for this Court to substitute any other in its place.

2. Because the complainant, having a complete remedy at law under the agreement made, is not entitled to relief in this Court.

3. Because the evidence having shown misrepresentation and fraud on the part of the complainant, the bill ought to have been dismissed.

Rutledge, for appellant.

Flagg, contra.

The opinion of the Court was delivered by

JOHNSTON, Ch. The Chancellor has decided that there was no fraudulent concealment or misrepresentation on the part of the plaintiffs, and this Court has no reason to dissent from his conclusion.

It is objected that the Court was ousted of its jurisdiction to decree a performance of the contract, by the parties having stipulated damages for its non-performance.

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*The Court is of opinion that this point is not unfrequently misapprehended. Whether the sum fixed in case of non-performance is a penalty or stipulated damages, depends on the nature of the contract, (considered in the light of all its circumstances,) and the attitude of the parties under it. If, upon being viewed in this way, a conviction results that the sum was fixed as a penalty to compel performance, the Court should execute the agreement. If, on the other hand, it is persuaded that it was stipulated as a substitute for performance, the duty of the Court is to regard it as a case in which the parties have agreed upon damages to be recovered in place of the performance: and unless there is something special in the case to call for a different conclusion, it should leave the parties to the legal remedy thus provided by themselves.

This abstinence is proper for the most part in cases, however, where there has been no part performance on either side; when nothing has been done to change the original posture of affairs, and where the damages

fixed may be fairly assumed as the fair value of the disappointment experienced.

How should we regard the damages expressed in this contract, in the face of the fact that Kopmann has been let into possession of Moorer's property, and still retains his own? Is he to be allowed to hold all the advantages of this fraud?

Would it be less than a wilful dereliction of duty, on the part of the Court, to hold its hand, unless it were satisfied that \$1,000, the sum stipulated in this case, was the full value of the property acquired by Kopmann from Moorer, irrespective of what he, Kopmann, was to give in exchange for it? This was manifestly not so.

It is ordered that the decree be affirmed, and the appeal dismissed.

O'NEALL, C. J., and WARDLAW, J., concurred.

Appeal dismissed.

II Rich. Eq. *232

JOHN W. ANDERSON v. HUGH K. AIKEN.

(Charleston. Jan. Term, 1860.)

[*Chattel Mortgages* ⚡225, 229.]

A purchaser in Florida of a mortgaged slave, removed the slave to this State, and here sold him to one who carried him beyond the jurisdiction:—*Held*, that the purchaser, who bought with notice of the mortgage, was liable in equity to the mortgagee; and that the mortgagor was a necessary party to the bill.

[*Ed. Note.*—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 469, 483; Dec. Dig. ⚡225, 229.]

Before Dunkin, Ch., at Charleston, June, 1859.

This case was heard upon the report of the master, which is as follows:

I beg leave respectfully to report that I have been attended by the solicitors, and have taken testimony in this case as follows:

On 6th March, 1856, W. E. Chambers, Jr., then a resident of Florida, being indebted to the plaintiff in the sum of \$2,000 on note, executed a mortgage of certain lands and slaves in Florida, to secure the payment of this debt and future advances—the plaintiff being his factor and doing business in Savannah. That at the maturity of the note in January, 1857, the debt had reached about \$4,000, and is still due at the date of this report. This mortgage was duly recorded in the proper office, and within the proper time, as required by the laws of Florida.

Among the negroes mortgaged was one described in that instrument as "a mulatto man named Thomas, aged about twenty-two years." It is in evidence that Chambers owned another negro man named Tom, described as "of a black complexion;" his age is not given. That besides Thomas, to be hereinafter more particularly referred to, two of the mortgaged negroes have been sold by

W. E. Chambers, Jr., viz: one to W. E. Chambers, Sr., with the consent of the

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*mortgagee, but the mortgagor received the purchase money, and one to some person unknown. The value of these negroes and their price have not been proved before me.

The plaintiff is not shown to have consented to any other sale but that to W. E. Chambers, Sr.

It further appears that about the early part of the year 1857, W. E. Chambers, Jr., became indebted to H. K. Aiken & Co., (of which firm defendant is a partner,) in the sum of \$2,300. That in the spring of 1857, defendant visited Chambers on his plantation in Florida, to procure a settlement of his debt, and then or at some other time, as he states in his answer, he saw the mortgage on record, but he alleges that Chambers told him the mortgaged negro was not this Thomas, but another of the same name. That he procured from Chambers a bill of sale of the negro, and brought him to Charleston, and there is no proof that he used any disguise or concealment in doing so. That soon after his arrival he offered him for sale to a witness, who describes him as named Thomas, "a likely brown man, about twenty-two years of age." That Aiken represented to this witness, that he got him from a man in Florida, named Chambers; that Chambers was indebted to parties in Savannah, and had mortgaged some of his negroes to secure the payment, and that he (Aiken) was not certain whether this was one of the negroes or not, and as there was some doubt about it, he would not guarantee the bill of sale. That Chambers had informed him there was no mortgage on this negro Tom; that there was another Tom, who was in the mortgage. The witness took legal advice, and declined the sale. He says Thomas was ruptured, but as he was recommended by Aiken as a good coachman, he would have given \$700 for him, if the title had been good. Immediately thereafter, viz: 9th June, 1857, Aiken sold the negro by public auction, in Charleston, for \$800, to a negro trader—the purchaser receiving Aiken's bill of sale.

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*I report as my opinion that Thomas was worth \$800 when sold, and his hire is worth, annually, \$120.

The proof is that the plaintiff cannot realize his debt from Chambers without the mortgaged property. It has not been shown to my satisfaction whether, after the sale of the negroes referred to, the balance of the mortgaged property would or would not be sufficient to pay the plaintiff's debt.

I further find that H. K. Aiken & Co. have obtained judgment at January Term, 1858, in Charleston, against W. E. Chambers, Jr., for \$1,494 10, being the balance due them after crediting the amount of the sale of

Thomas. In this suit Chambers was held in bail, and W. E. Ellison, S. C. E. Chambers and John Adger, became his sureties, and the bail has been fixed by the return of non est on the ca. sa.

Dunkin, Ch. The facts of this case are presented in the report of the evidence.

If the charge of the bill had been established, that the defendant fraudulently assisted Chambers in the clandestine removal of his property, with a view to defeat his creditors, the suit might be maintained upon the authority of *Pickett v. Pickett*, 2 Hill Ch., 470. But the denial of any fraudulent design, or even clandestine removal, is corroborated and sustained rather than impugned by the testimony.

So, too, assuming the identity of the slave Tom, the plaintiff holding a mortgage from Chambers, of both real and personal estate, might maintain his bill in this Court for account and foreclosure; but in such proceedings the debtor and mortgagor, Chambers, would of course be a necessary party. Nor is this the scope of the bill.

It has been held that, after condition broken, the mortgagee of a chattel is regarded as the owner. *Wolf v. O'Farrel*, 1 Tread. Const. Rep., 151.

Whether he should be considered owner in the sense of enabling him to maintain a bill for specific delivery against the person in possession of the slave, upon the principle of

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**Young v. Burton*, McM. Eq., 256, it is not necessary here to inquire. The bill is filed on the assumption that the plaintiff is "the actual owner of the slave," sets forth the sale by the defendant before any demand made, and the only specific remedy which the plaintiff seeks is, that "the defendant may be decreed to pay over to the plaintiff the full value of the slave Thomas, with interest, &c." If the plaintiff is entitled to this, it may be recovered by an action of trover, according to the case already cited, *Wolf v. O'Farrel*; or, if an action of trespass would be more appropriate, the ordinary tribunal is open for that purpose. See *Montgomery v. Kerr*, 1 Hill, 291.

It is ordered and decreed, that the bill be dismissed.

The plaintiff appealed on the grounds:

1. That the defendant is shown to have acted fraudulently in assisting Chambers to remove his property, with the intention of defeating the plaintiff's claim.

2. That whether Aiken and Chambers did or did not intend to defraud Anderson, "by their conduct, their success, and a fraud upon an innocent creditor, have become inseparable," and this entitles the plaintiff to relief in this Court.

3. That the bill is filed inter alia to compel defendant, a creditor, with two adequate securities, to surrender one to the plaintiff, who had but one; and this is a familiar ground of equity jurisdiction.

4. Because a mortgage, executed in another State, does not confer on the mortgagee the power of seizure, or right to sue at law here, even after condition broken; and if it ever were so, the Act of 1843 has rendered recording necessary to such power. The plaintiff submits, therefore, that he had no adequate remedy at law, his mortgage not having been so recorded.

Martin, for appellant.

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*1. The circumstances of the removal and sale of the slave, and appropriation of the proceeds by Aiken, leave no other possible interpretation but an intention to defeat Anderson's mortgage. This is fraud, and needs not to have been done clandestinely, as the decree assumes. *Pickett v. Pickett*, 2 Hill Ch., 471; *Pettus v. Smith*, 4 Rich. Eq., 198; *Farr v. Sims*, Rich. Eq. Ca., 122; *McMeekin v. Edmunds*, 1 Hill Ch., 288; *Story Eq.*, sec. 333, 349, 395, 396, 397, 400.

2. Anderson has an equity to compel Aiken, who had a general lien on Chamber's property, to release all claim upon the slave upon whom Anderson had only a specific lien. *Bank of Hamburg v. Howard & Garmany*, 1 Stro. Eq., 177.

3. If Aiken has not acted fraudulently, he is a purchaser of the slave subsequent to Anderson's mortgage, and without notice. As to him, the mortgage would, therefore, be void. 11 Stat., 256. Neither could he be sued in trover nor trespass as the decree assumes, unless it was first shown, that the mortgage conferred such right by the laws of Florida. For although remedies belong to the *lex fori*, yet the merits and rights of the parties are controlled by *lex loci contractus*. The right, according to the latter, may be in rem, not in personam. If these positions are correct, it follows, that Anderson could only pursue his remedies in this Court. *Story's Conflict of Laws*, sec. 558 and 568; *Napier and Gidier*, Speer Eq., 215; *Cameron and Wurtz*, 4 McC., 278.

Simonton, contra.

The opinion of the Court was delivered by

O'NEALL, C. J. In this case, it seems that the defendant visited the mortgagor on his plantation, in Florida, and saw the mortgage, under which the complainant claims, on record. This, beyond all doubt, was sufficient notice to him. It is true, his debtor told him that the mulatto man Thomas, then before him, and described in the mortgage as "a mulatto man named Thomas, about twenty-

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two years of age," was *not the man in the mortgage, but that he was another man of the same name. Whether there ever was another mulatto man named Thomas, who belonged to Chambers, does not appear. He had a black man of that name.

The defendant, with the knowledge which the mortgage gave him, purchased the mulat-

to man, named Thomas, in satisfaction of his debt, removed him from Florida, and in Charleston sold him at auction, without a warranty, to a negro trader, for \$800. The question is, who in equity must bear the loss? Beyond all doubt, the complainant's legal title is perfect; but he cannot avail himself of it, inasmuch as the defendant, knowing or believing that the slave would be recovered from him, if he remained in South Carolina, sold him to one who was likely to remove him, and who did remove him to parts unknown. I am clear the defendant is answerable. The cases of *Pickett v. Pickett*, 2 Hill Eq. 471; *Pettus v. Smith*, 4 Rich. Eq. 197, are full and clear authorities to that point. But it may be, as has been suggested, that the other mortgaged slaves which have been sold, and the other property, real and personal, mentioned in the mortgage, may have been, or ought to have been applied to the satisfaction of the mortgage, and that thus the mortgagee has a sufficient remedy without resorting to the slave sold by Aiken. To reach what may be the true state of facts in these respects, and also to ascertain the amount of the complainant's debt, it is necessary that the mortgagor, W. E. Chambers, should be a party.

It is therefore ordered and decreed, that the circuit decree be set aside, and the case remanded to the circuit, with leave to the complainant to so amend his bill as to make W. E. Chambers, Jr., a party, and to set out his mortgage more fully, and the debt secured thereby, and the property therein mortgaged, and what has become of the same; and any other matter which he may be advised is material to his cause.

JOHNSTON and WARDLAW, J. J., concurred.

Decree set aside.

11 Rich. Eq. *238

*F. A. FORD, Deputy Escheator v. W. D. PORTER, Executor.

(Charleston. Jan. Term, 1860.)

[*Slaves* ⚡22.]

A bequest of slaves to four legatees, "and the survivors and survivor of them," "with a request that they will extend to the said slaves all the indulgence, privilege and consideration which the law will allow them, in the character of owners, to extend to them," is not void under the third section of the Act of 1841.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 92-111; Dec. Dig. ⚡22.]

[*Slaves* ⚡13.]

A bequest of money to the same four legatees "and the survivors and survivor of them," "to enable them to support the said slaves, when they, from age or sickness, may become chargeable upon them," is not void under the fourth section of the Act of 1841.

[Ed. Note.—Cited in *Craig v. Beatty*, 11 S. C. 377, 378, 380.

For other cases, see *Slaves*, Cent. Dig. § 59; Dec. Dig. ⚡13.]

Before Dunkin, Ch., at Charleston, June, 1859.

This was a bill by the Deputy Escheator, for St. Phillip's and St. Michael's, claiming that certain bequests in the will of Elizabeth Williman were void under the Act of 1841, and that as she died without next of kin, they had escheated to the State. The bill stated:

That on the _____ day of _____, 1855, Elizabeth Williman, a widow, departed this life, seized and possessed of a considerable real and personal estate, consisting inter alia, of certain slaves, named George, Sam, Francis, Edwin, Sarah and Rose.

That on the nineteenth day of May, 1854, the said Elizabeth Williman duly executed, in the presence of three witnesses, the following paper, purporting to be her last will and testament, namely:

"The State of South Carolina.

In the name of God.—Amen. I, Elizabeth Williman, widow, of the City of Charleston, in the State aforesaid, being weak in body, but of sound and disposing mind, and being mindful of the uncertainty of human life, do make and declare the following to be my last will and testament:

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"I commit my spirit, in faith and hope, to God who gave it. As regards my worldly estate, I give and bequeath to my good friends, Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson, and the survivors and survivor of them, my faithful negro slaves, George, Sam, Francis, Edwin, Sarah and Rose, with a request that they will extend to the said slaves all the indulgence, privilege and consideration, which the law will allow them, in the character of owners, to extend to them. In consideration of his personal kindness to me, and in lieu and satisfaction of his claims for medical services and attentions rendered to me, I give and devise to my kind friend, Dr. John Bellinger, his heirs and assigns, my lot of land, with the grocery store thereon, situate at the North-East corner of Calhoun and Smith streets, bounding to the North on a lot lately sold by me to Mr. Stevens, and to the East on a lot belonging to me, and now in possession of Mr. Chisolm.

I authorize and direct my executor, hereinafter named, to sell, as soon after my death as he conveniently can, at public or private sale, in such manner and upon such terms as he may think for the best advantage, my other lots of land, and all my estate, real and personal, except the negroes, and the lot of land hereinbefore devised; and to apply the proceeds of sale to the payment of my debts, and the legacies hereinafter mentioned.

I give to my kind friends, Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson, and the sur-

vivors and survivor of them, the sum of two thousand dollars, to enable them to support the said slaves, George, Sam, Francis, Edwin, Sarah and Rose, when they, from age or sickness, may become chargeable upon them.

I give to my friend, Mrs. Martha Osborne Matthews, the sum of one thousand dollars.

I give to my friend, Elizabeth Dawson, the daughter of Charles P. Dawson, the sum of one thousand dollars.

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*I give to my friend, William D. Porter, the sum of one thousand dollars.

After the payment of the foregoing legacies, should there be any residue, I give to Clement Bee Stevens, the little son of my friend, Clement H. Stevens, the sum of one thousand dollars.

These legacies I direct my executor to pay out of the proceeds of the sale of my property, as hereinbefore directed, and all the rest and residue of such proceeds, (if any shall remain thereafter,) I give and bequeath to my friends, Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles P. Dawson, and the survivors and survivor of them, in the same manner, and for the same purpose, as hereinbefore expressed, in relation to the legacy to them of two thousand dollars.

I appoint my friend, William D. Porter, executor of this, my last Will and Testament, authorizing him to retain the usual commission as executor.

And I do hereby revoke all other wills heretofore made by me. In witness whereof, I, the said Elizabeth Williman, have hereunto set my hand and seal, this nineteenth day of May, in the year of our Lord, one thousand eight hundred and fifty-four."

That on the twentieth day of July, 1855, the testatrix, in due form, executed the following codicil to the said will:

"I, Elizabeth Williman, do make this codicil to my aforesaid Will, hereby ratifying and confirming the same, except so far as changed or revoked by this codicil. I do hereby revoke the bequest made in said Will, of my slaves Rose and Sarah, and also the provisions therein made, as far as relates to them; and I direct that the said slaves, Rose and Sarah, or the proceeds of their sale, become part of my estate; and I do hereby further direct, that the legacy of two thousand dollars made in said Will, shall enure for the support of my other four faithful slaves, George, Sam, Francis, and Edwin, in the manner stated in said Will."

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*That, upon this paper, William D. Porter, the executor therein named, qualified on the thirty-first day of August, 1855, and he has reduced the personalty into his possession, and has proceeded to distribute the estate, and execute the trusts of the will.

That the said Elizabeth Williman died

without leaving any person or persons entitled to claim—according to the statute of distributions—and without having made an effectual disposition of her slaves, George, Sam, Francis, and Edwin, and of the sum of \$2,000, and the residuum of her estate to Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson; that the bequest of the said slaves was intended for their virtual emancipation, and the sum of \$2,000 and residuum were bequeathed to the legatees aforesaid, for the support of the slaves in a state of freedom, in direct violation of the Acts of Assembly of this State, prohibiting emancipation.

That the said bequests being therefore void, the slaves and money have become liable to escheat, and to be vested in the City Council of Charleston, for the benefit of the Orphan House in the said city. That the said John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson, accepted the trust conferred upon them, and have proceeded to carry into effect the wishes of the testator—the said Charles P. Dawson having since departed this life, and the legal estate thereby vested in the survivors. That sufficient time has elapsed for the executor to pay the legacies which are not objectionable, and the testatrix left few debts of inconsiderable amount, which have been paid; and there has long been in the executor's hands a sufficient amount of assets to meet the debts and legacies.

The joint and several answer of John Bellinger and Clement H. Stevens, stated that they admit that Mrs. Elizabeth Williman departed this life in the month of August, in the year 1855, leaving in full force and ef-

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fect her will and *codicil, a correct copy whereof is, as they believe, set forth in the bill. That William D. Porter qualified on said will, and undertook the execution thereof. And these defendants severally say, that the said slaves named in the will, to wit: George, Edwin, Samuel and Francis, have not been delivered to them, but that they are still in the possession of the said executor, who returns them for taxation as part of the estate, and pays the taxes, and collects wages from them; and that no part of the said legacy of \$2,000 has been paid to either of them; and they are informed and believe, that the estate has been kept together by the executor from a desire on the part of all interested in the will, that a favorable sale of the real estate, which is the bulk of the property, apart from the negroes specifically bequeathed, might be made, so that all the debts and legacies might be paid.

And this defendant, Clement H. Stevens, answering separately, for himself, says, that there was not, and is not any trust or confidence, secret or expressed, accompanying said bequest, to hold the said slaves, George, Samuel, Francis and Edwin, in a condition of virtual freedom or nominal slavery. That

he was well acquainted with Mrs. Williman, was a neighbor of hers, and was in the habit of attending to her matters of business when she was old and infirm.

That he knows that Mrs. Williman did, at one time, entertain the desire to leave the said negroes free, but that she informed him that she had been advised professionally by Mr. W. D. Porter, that she could not do so, and that the best she could do, under the laws of the State, for the said slaves, was to leave them to masters in whose kindness she had confidence, bespeaking for them the indulgence and consideration of said masters. And this respondent believes, from his conversations with her, that she perfectly understood that she could not legally leave the said slaves here in a state either of actual or virtual freedom. That she informed this respondent of her intentions to make said bequest to him, but he denies that she communicated to him, or required

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from him any trust or confidence, secret or expressed, that the said slaves, or any of them, should be held in nominal servitude only. Nor was there any trust or confidence attached to the bequest of the \$2,000, or of the residue of the estate, save and except such as is declared on the face of the will. And this respondent claims the benefit of the bequest of said slaves, intending to hold them as master and owner in subordination to the laws of the State. And he also claims the benefit of the said pecuniary and residuary bequests, to be used in discharge of the duty devolved upon him as master by law, when old age or infirmity shall overtake the said slaves, or any of them.

And the said John Bellinger, answering separately, for himself, says that he was for about years the attending physician of Mrs. Williman. That he knows that she entertained the kindest feelings towards the slaves above named, who were well worthy of it. But this respondent denies that she ever communicated to him any intention on her part to emancipate them, actually or virtually. And he further denies that there was or is any confidence or trust, secret or expressed, between the testatrix and himself, to hold said slaves in a condition of nominal slavery, or virtual freedom. That he claims to hold said slaves when they shall be delivered to him by the executor, as master and owner in his own right, and in full view of his obligations to the laws of the State. And this respondent also claims the benefit of the pecuniary and residuary bequests, to be used in aid of the obligation which the law imposes upon him as owner, to care for them, and support them in time of sickness, infirmity and old age. And he utterly denies that there is any trust or confidence, secret or expressed, accompanying said bequests, other than what may appear on the face of the will.

The answer of W. D. Porter, executor of Elizabeth Williman, stated,

That it is true that Mrs. Elizabeth Will-

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man departed this life on or about the day of August, in the year eighteen hundred and fifty-five, leaving in full force and effect her last will and testament, a correct copy whereof, and of a codicil attached thereto, is set forth in the bill; and that this defendant duly qualified thereon as executor.

That the said testatrix left considerable real and personal estate, and that so far as respondent knows, she did not leave any person or persons entitled to claim under the statutes of distributions and descents.

That he has not yet distributed the estate, nor delivered the said slaves, nor paid the pecuniary legacies. That shortly after the death of Mrs. Williman, real property fell very much in value; and that as all parties interested in the will seemed desirous that all the debts and legacies should be paid, the estate was retained in the hands of the executor, and rents and wages collected, with the view to the accomplishment of this end. That the debts of the estate proved to be much more numerous than was anticipated, and have not yet been all paid off.

And this respondent, further answering, says, that he admits that Mrs. Williman, did, at one time, express a desire that her slaves should be emancipated. But that she was professionally advised that this could not be done under the laws of the State; that she might select their owners, and express any request for such privileges or indulgence towards them as she pleased, and as masters might properly extend. But that they must become the absolute property of such legatees or owners, without any trust for emancipation, express or implied, open or secret; and that they would necessarily be subject to the disposition, and liable for the debts of such parties. And this defendant believes that before, and at the time of, and after making her will, the testatrix acquiesced in these views, and made her testamentary dispositions in accordance therewith.

That the testatrix was further advised that it was legal and competent for her to

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make the bequests mentioned in her will to the intended owners of the slaves, to be applied to the maintenance of said slaves, when they, from age or sickness, might become chargeable upon them, for the purpose of relieving the said owners, to some extent, of the burden which the laws would cast upon them.

And this defendant submits to this Honorable Court, that the aforesaid bequests are good and valid in law; but that if the same, or either of them, be void, then that the debts and other legacies under the will must

be paid and satisfied before there can be any claim on the part of the escheator, and that said claim can only be for any residue after payment of such debts and legacies.

And this respondent, further answering, says, that Charles P. Dawson and Thomas Lehre are dead, and that the said bequests survive to Dr. John Bellinger and Clement H. Stevens; and he is now in treaty for the sale of the real estate; and until such sale is made, he cannot say whether or not the assets of the estate are sufficient to pay the debts and legacies, and leave any residue.

Clement H. Stevens—Examined by consent: "Witness thinks the testatrix, Mrs. Williman, was a native of the State. The men included in the original bequest are able bodied; one of the women was young, the other was elderly, and was said to be sickly; there were four men, all about prime."

In reply to an inquiry, whether he regarded the slaves as his property, witness said: "he did not see how he could, legally, leave out this property in a schedule to be made; would regard it as much his as the rest of his property, except that there is a right of survivorship; would appropriate the wages to his own use; would not generally regard such a bequest as a burthen; would have taken the bequest without the \$2,000; but would be very glad to have the \$2,000 in addition; a part of the original bequest he would not have taken without some such provision."

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*Dunkin, Ch. The facts of this case will appear from the pleadings and the evidence of Clement H. Stevens, one of the defendants, examined by consent.

The first and second clauses of the A. A. 1841, (11 Stat., 154,) are directed against bequests or gifts of slaves, with a view to emancipation. The questions presented in this cause arise under the third and fourth clauses of the Act. By the third it is declared that, "any bequest, gift or conveyance of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave or slaves shall be held in nominal servitude only, shall be void and of no effect." It is further declared that the donee, or trustee, shall be liable to deliver up such slave or slaves, or account for the value thereof, for the benefit of the distributees, or next of kin, of the person making such bequest, gift, or conveyance.

The fourth clause declares that "any devise or bequest to a slave or slaves, or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."

The inquiry is, first, whether the bequest of the slaves, George, Sam, Francis and Edwin, falls within the inhibition of the statute? The original wish and purpose of the testatrix, in relation to these slaves, are apparent from the voluntary admissions in the

answer of the executor. He admits that she had expressed a desire that "her slaves should be emancipated," and that she relinquished her purpose of having them emancipated, upon the assurance of her legal adviser "that this could not be done under the laws of the State." Foiled in this object, the testatrix made the provision now to be considered. The language is as follows: "I give and bequeath to my good friends, Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson, and the survivors and survivor of them, my faithful negro slaves, George, Sam, Francis, Edwin, Sarah and Rose, with a request that they

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will extend to the said slaves *all the indulgence, privilege and consideration which the law will allow them, in the character of owners, to extend to them." After devising a lot of land, with store thereon, to her kind friend, Dr. Bellinger, in consideration of his personal kindness to her, and in satisfaction of his claim for professional services, the testatrix directs a sale of all the residue of her estate, except her slaves and the lot aforesaid, and from the proceeds she, in the first place, bequeaths to the friends aforesaid, "and the survivors and survivor of them, the sum of two thousand dollars, to enable them to support the said slaves, George, &c., when they, from age or sickness, may become chargeable upon them." Certain other pecuniary legacies are then given, and the rest and residue of the proceeds (if any) are bequeathed to her said friends, and the survivor of them, &c., "in the same manner, and for the same purpose, as hereinbefore expressed, in relation to the legacy to them of two thousand dollars." By a codicil to the will, the bequest of Rose and Sarah is revoked, and they are directed to be sold, and it is further declared that "the legacy of two thousand dollars, made in said will, shall enure for the support of my other four faithful slaves, George, Sam, Francis and Edwin, in the manner stated in the said will." Mr. Stevens testified that the four slaves thus bequeathed were "all able bodied men, and about in the prime of life."

In giving construction to statutes like that of 1841, it is the duty of the Court to consider the existing mischief as well as the remedy, and to give such reasonable interpretation as will advance the remedy and suppress the mischief. So, in giving construction to wills, the primary object of judicial inquiry is the purpose intended by the testator to be accomplished. In search of this intention, the Court may look, not only to the entire instrument, but to the condition of the testator and of the property.

Taking together the testamentary provisions in relation to George, Sam, Francis and

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Edwin, was it the intention of the *testatrix to confer a personal benefit upon the parties

in whom she vested the legal title, or was the bequest made for the benefit of the slaves, and (as has been elsewhere said) was "the title intended as a mere power to feed that trust."

It is manifest from the style and language of the will, that the testatrix was not without the advantage of legal advisers. When she intended a personal benefit she said so—without circumlocution—and in apt words to give effect to her purpose. Gratefully recognizing the personal kindness, as well as the professional devotion of Dr. Bellinger, she devises the lot and store at the North-East corner of Smith and Calhoun streets to him, "his heirs and assigns." To the daughter of her friend, Mr. Dawson, she bequeaths one thousand dollars; and the like amount "to the little son of her friend, Clement H. Stevens." But, in the bequest of the four slaves to her four friends, they are left to these gentlemen (by name), "and the survivors and survivor of them." These friends were strangers to the testatrix in blood, and by connexion. They were equally strangers to each other. They enjoyed in common the advantage of high character, and they possessed in common the confidence of the testatrix. "There is no magic in particular words, (says an approved elementary writer, Hill on Trustees, 65,) and any expressions, that show unequivocally the intention of the parties to create a trust, will have the same effect." And Lord Eldon, in *King v. Denison*, 1 Ves. & B., 273, says, "that the word 'trust,' is not made use of, is a circumstance to be attended to, but nothing more: if the whole frame of the instrument creates a trust, for the particular purpose of satisfying which, the estate is devised, the law is the same, though the word 'trust' is not used." Viewed in connection with the circumstances, the words of limitation in the bequest are only less significant than if it had been "to them, and their successors in office." The obvious intent was to establish a fiduciary relation, founded upon personal confidence.

But the bequest is accompanied "with a re-

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quest that they *will extend to the said slaves all the indulgence, privilege and consideration which the law will allow them in the character of owners, to extend to them." "I will lay down the rule as broad as this," said Lord Alvanley, in *Malim v. Keighley*, 2 Ves., Jun., 333, "wherever any person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly, that his desire expressed is to be controlled by the party, and that he shall have an option to defeat it." "If a testator shows his desire that a thing shall be done, unless there are plain express words, or necessary implication, that he does not mean to take away the discretion, but intends to leave it to be defeated, the party shall be considered

as acting under a trust." The owners of slaves may hold them in merely "nominal servitude." The Legislature has not thought proper to interfere, or to restrict the degree of indulgence, which the master may extend to his slave. But they have declared void any gift or bequest of a slave by one man to another, "upon any confidence, express or implied, that such slave shall be held in nominal servitude only." So, the owner of any slave may lawfully remove him to a free State, and there have him emancipated. The first clause of the Act of 1841 declares, that any bequest, &c., of a slave, with such view, shall be utterly void and of no effect, and that such slave shall be assets for the payment of debts, for distribution or to escheat, as the case may be.

But the actual owners of slaves are subject to certain responsibilities. Being entitled to their services in their days of usefulness, they are bound to maintain them in age and infirmity. The subjects of this legacy are four able bodied male slaves, in the prime of life. Looking to the manner in which she had enjoined upon her friends they were to be treated, the testatrix deemed it but just that they should be relieved from this contingent burthen. She, therefore, not only bequeathed to them, or the survivor of them, the sum of two thousand dollars, pri-

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marily charged upon the proceeds *of her estate, "to enable them to support the said slaves, when they, from age or sickness, might become chargeable upon them," but she bequeaths also to them, for the same purpose, the rest and residue of her estate after payment of her debts and legacies. The Court is of opinion, that these pecuniary legacies are void under the fourth clause of the act of 1841, but they serve to indicate the desire of the testatrix that the legal title, with which she had clothed her friends, should not become onerous to them.

The great and leading object of these several bequests was for the supposed benefit of the slaves, and, in order to ascertain the purpose, the several provisions must be taken together, and regarded as one scheme. Nor does it improve the character of the bequest that some incidental advantage might arise to those who held the legal title, and a much greater advantage, if they thought proper to treat the slaves in the manner which their own judgment indicated, independent of the feeble, and, it may be, ill considered request of a weak and aged mistress. The Court of Appeals had occasion recently to examine this view in a case from Laurens, *Belcher v. McKelvey*, Mss. May, 1859 [11 Rich. Eq. 9]. It is the intention of the testatrix, and not the conduct, actual or probable, of the fiduciary legatee, which determines the validity or invalidity of the bequest in reference to the Act of 1841. As Lord Alvanley says, "when a man gives property and under-

takes to point out the way in which it shall go, that creates a trust;" so, when a testator bequeaths slaves and undertakes, by injunction, request, or otherwise, to prescribe that they shall enjoy "all the indulgence, privilege and consideration" which the law allows owners to extend to them, the donee takes them on a trust, or confidence, which he is not at liberty, in good faith, to disregard, and which the policy of the law, never the less, deprecates. Free negroes, or free persons of color, are sometimes very useful in the community—and the better, because they are few. But the greatest nuisances are quasi slaves—stalwart men, who have the

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same moral control over *their nominal owners as, in this case, George, Sam, Francis and Edwin might attempt to exercise, with a copy of their mistress's injunction in their pockets that they should have extended to them "all the indulgence, privilege and consideration," not which the good sense of these gentlemen might deem proper to extent, but all which the law permitted owners to allow to their slaves. It creates an anomaly inconsistent with the simplicity of our institutions and with the policy of the country, and which it was one of the prominent purposes of the Act of 1841 effectually to suppress.

It is declared that the bequest of the slaves, George, Sam, Francis, and Edwin, is null and void; and, in conformity with the principle adjudicated in *Escheator v. Dangerfield*, 8 Rich. Eq., 95, it is ordered and decreed that the said slaves be delivered up to the plaintiff.

It is further ordered and decreed, that it be referred to one of the Masters of this Court to take an account of the transactions of the defendant as executor of Elizabeth Williman, deceased, and that he report thereon, with leave to report any special matter. Parties to be at liberty to apply for such further orders as may become necessary. Costs to be paid out of the estate of the testatrix.

The defendants appealed:

Because the bequest of the slaves, and the legacy in question, were absolute and lawful, and in nowise in violation of the Act of 1841.

Brown, Porter, for appellants, insisted that the words of the bequest were precatory, and not imperative, and that under the Act of 1841, there can be no trust or confidence in violation of the law, where the legatee or donee denies the trust or confidence and claims the property as his own absolutely. *McLeish v. Birch*, 3 Strob. Eq., 225; *Escheator v. Dangerfield*, 8 Rich. Eq., 102; *Skrine v. Walker*, 3 Rich. Eq., 266; *Belcher v. Mc-*

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Kelvey, Col., May, 1859; 1 Am. Law *Reg., 361; *Hill on Trust*, 97; 6 Eng. Con. Ch. R., 300. That under the third and fourth sections of the Act of 1841, the legal estate remains in the legatees, and no person but the

distributee, or next of kin of the testatrix is entitled to claim against them. *Vose v. Hanahan*, 10 Rich., 469.

Martin, contra.

The opinion of the Court was delivered by

JOHNSTON, J. There may be circumstances of suspicion in this case. But it is a very solemn act to set aside the will of a testator and the legal rights of parties; and it should not be done unless strong grounds appear to support such a proceeding.

By the third clause of the Statute of 1841, 11 Stat., 154, it is declared, "that any bequest, gift, or conveyance, of any slave or slaves, accompanied with a trust or confidence, either secret or expressed, that such slave, or slaves, shall be held in nominal servitude only, shall be void and of no effect; and the donee, or trustee, shall be liable to deliver up such slave, or slaves, or account for the value thereof, for the benefit of the next of kin of the person making such bequest, gift, or conveyance."

This law has been supposed to be violated by the following provision in the will of the late Mrs. Williman:

"I give and bequeath to my good friends, Dr. John Bellinger, Clement H. Stevens, Thomas Lehre, and Charles Postell Dawson, and the survivors and survivor of them, my faithful negro slaves, George, Sam, Francis, Edwin, Sarah and Rose; with a request that they will extend to the said slaves all the indulgence, privilege and consideration which the law will allow them, in the character of owners, to extend to them."

The legatees, in their answer, explicitly deny that there was or is any trust or confidence, secret or expressed, accompanying said bequest, to hold said slaves in a condi-

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tion of *virtual freedom or nominal servitude; and one of them, who was examined at the instance of the plaintiff, deposed that he would regard these slaves as much his as the rest of his property, except as affected by survivorship, and would appropriate the wages to his own use.

It seems to the Court that this is a sufficient refutation of the existence of a secret trust or understanding. The case must then be left to depend upon what is expressed on the face of the will. I do not, for myself, see that an intention entertained by the testatrix, but not made known to the legatees, nor participated in by them, would be sufficient to affect their right of property in the slaves bequeathed to them; nor do I see that such a point arises under this clause of the statute, the terms of which do not refer to the intention of the person making the gift. If I remember the cases of *Belcher*, *McKelvey* and *Tucker*, referred to in the decree, they arose under another clause, relating to provisions for removing slaves from the State, with intention to emancipate them.

The case depends not upon the intention entertained, but upon that expressed by this testatrix; and upon this the law was well laid down by Chancellor Dunkin, in *Ford v. Dangerfield*, 8 Rich. Eq. 102: "There is nothing in the letter or the policy of the law, which prohibits a testator, in bequeathing a slave, or slaves, to his son, to bespeak for them, or either of them, his kind treatment, or the mode of treatment. The relation of master and slave remains the same. The rights and obligations of proprietorship are unimpaired."

"Circumstances might induce the son to change his treatment, in consequence of the conduct of the slaves."

And the great authority of Lord Eldon is thus brought out: "He observed that, in the course of the discussion, a doubt had been raised, how far it was competent for a testator to give to his friend a personal estate, to apply it to such purposes of bounty, not arising to trust, as the testator, himself, would have been likely to apply it to. That

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question, *as far as this Court has to do with it, depends altogether upon this: if the testator meant to create a trust, and not to make an absolute gift, but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take, himself, it must be upon this ground, according to the authorities: that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given, and it is the effect of his own will, and not the obligation imposed by the testament, the one inclining, the other compelling him to execute the purpose. But if he cannot be, or was not intended to be, compelled, the question is not then upon a trust that has failed, or the intent to create a trust; but the will must be read as if no such intention was expressed, or to be discovered in it." (Vide also, 8 Rich. Eq. 108-9.)

"Prima facie, an absolute interest is given, and the question is, whether precatory, not mandatory, words impose a trust upon that person?"

To this well established doctrine, this Court agrees; and it is as little satisfied that to bequeath slaves with a request that the legatee shall extend to them "all the indulgence, privilege and consideration which the law will allow them, in the character of owners, to extend to them," takes away their right of property in the slaves, as it is that such treatment is opposed to the policy of the law.

Before leaving this part of the case, it may be proper to say, that it is unnecessary to decide the question whether the escheator is competent to raise this question, or whether

gifts of this description are voidable only by the next of kin. That point was not necessarily involved in *Vose v. Hannahan*, 10 Rich., 469, where it is supposed to have been decided; and I have too much doubt upon it to commit myself until it comes directly before the Court.

The next question arises under the 4th sec.

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of the Act of *1841, 11 Stat., 154, which declares that "any devise" or bequest to a slave or slaves, "or to any person upon a trust or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void."

It has been supposed that this provision is violated by the following legacy of this testatrix:

"I give to my friends, Dr. John Bellinger, &c.," the sum of \$2,000, (increased by a codicil,) to enable them to support the said slaves, George, &c., "when they, from age or sickness, may become chargeable upon them."

Here again the legatees deny all secret trust, and claim the legacy, leaving the question to be decided, whether any trust arises upon the face of the will.

After the authorities, upon the distinction between cases, where a legal benefit passes to the legatee, to be used as he pleases, and cases where the legatee is not intended to have the beneficial interest, it is only necessary to refer to the case of *Benson v. Whitham*, 6 Cond. Eng. Chan. Rep., 304-5, where the very point is decided that a gift to enable the legatee to confer a bounty is not a trust, but a beneficial legacy. How can a gift to the master be a legacy or benefit to the slave, except at the master's discretion?

It is ordered, that the decree be reversed, and the bill dismissed.

O'NEALL, C. J., and WARDLAW, J., concurred.

Decree reversed.

11 Rich. Eq. *256

*JOHN R. TOOMER v. THOMAS W. RHODES and Others.

(Charleston, Jan. Term, 1860.)

[Trusts \hookrightarrow 129.]

A conveyed property to a trustee for the use of the grantor for life, and after his death, "in case he died unmarried and without children," over. A, having married and had a child, filed this bill against the trustee and remaindermen, to have the deed canceled, contending that the contingencies had happened which defeated the limitation over. The Court refused to interfere before the death of A, holding that, in the situation of the parties, it was sufficient that a reasonable doubt, as to the construction of the deed, should be entertained.

[Ed. Note. For other cases, see Trusts, Cent. Dig. § 172; Dec. Dig. \hookrightarrow 129.]

Before Dunkin, Ch., at Beaufort, February, 1859.

Dunkin, Ch. On the 15th January, 1846, John Ralph Toomer, (the plaintiff,) in the presence of William B. Fickling and John J. Dupong, executed the deed, of which a copy is filed as an exhibit with the bill, and which was recorded in the Register of Mesne Conveyance of Beaufort district, on 2d February, 1846. By this deed, the plaintiff conveyed to the defendant, Thomas W. Rhodes, of Prince Williams' parish, a plantation called "Dalton," and thirteen slaves, in trust for the grantor during his natural life; and from, and after his decease, in case he died "unmarried and without children," then to pay over one-half the annual income or profits to Mrs. Mary E. Toomer, (plaintiff's mother,) if she should be then living, and so long as she lived; and to invest the other moiety for the use of Benjamin D. Rhodes, son of the said Thomas W. Rhodes; and upon the decease of Mrs. Toomer, to invest the whole for the benefit of the said Benjamin D. Rhodes, until he attained the age of twenty-five years, and then to convey and assure "the whole of the said property, with the accumulations, to the said Benjamin D. Rhodes, to him and his heirs, forever, in fee simple, and to no other uses whatever."

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*In process of time, the plaintiff married—and a child has been since born to him; the mother and child being now alive. This proceeding was thereupon instituted to have the said deed, of 15th January, 1846, delivered up to be cancelled, upon the ground that the same was functus officio. The answer of the trustee states that the deed was executed contrary to his wishes and against his protestations, and that he accepted the trust only upon the urgency of the plaintiff. But that, having done so, he did not regard himself at liberty to do any act which might prejudice the rights of the cestuy que trusts. Benjamin D. Rhodes is yet an infant, and the answer filed on his behalf, is merely formal. Against Mrs. Mary E. Toomer, an order pro confesso has been taken.

The proposition of the plaintiff is, that the terms "die unmarried and without children," must be construed, die without having been married, and without having had children; 1 Jarman on Wills, 456, was cited as authority. But upon examination of the text, it will be perceived, that the learned commentator disapproves of this construction, and adopts, as a sounder interpretation, that the words mean, not having a wife or child at the time of his death. And for this construction, he relies on the high authority of Lord Ellenborough and Lord Hardwicke, as well as more recent adjudications. It is not proposed, at this time, to express any definite opinion upon the construction. For the disposition of the cause, and in the situation of the parties, it is sufficient that a reasonable doubt may well be entertained. If the plaintiff should die without leaving wife or

child, the conjuncture would arise upon which the claims of Benjamin D. Rhodes, under the deed of January, 1846, would be more satisfactorily considered. In the meantime, no rights are affected by declining to interfere by cancellation of the deed. It is ordered and decreed, that the bill be dismissed without prejudice, but at the cost of the plaintiff.

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*The plaintiff appealed on the grounds:

1. Because, the gift to the first taker being defeasible, on the event either of marrying or dying without children, and both of the contingencies of marrying and having children having occurred, the deed of 1846 was functus officio, and should be cancelled.

2. Because, the gift to the parent, although in form a life interest merely, is, in effect, the whole equitable estate defeasible on certain conditions, and there being nothing limited to the children, it was error to apply to such a case, a rule of construction belonging to those cases only in which the interest given to the parent is partial, and the remainder of the estate limited directly to the children; it being plain in such cases that the provision intended for the children, must necessarily be referred to the death of the parent.

Rhett, Youmans, for appellant.
De Treville, Bell, contra.

Curia per O'NEALL, C. J. This Court concurs in the decree of the Chancellor.
It is therefore affirmed.

JOHNSTON and WARDLAW, JJ., concurred.

Decree affirmed.

11 Rich. Eq. *259

*Ex parte WILLIAM NAYLER and THOMAS P. SMITH.

(Charleston. Jan. Term, 1860.)

[Creditors' Suit \hookrightarrow 54.]

A creditor, who has failed to present his demand within the time limited by an order, under a creditor's bill, calling in creditors to present their demands, may, upon contributing his fair proportion of the expenses of the bill, be permitted to present and prove his claim at any time before actual distribution of the assets.

[Ed. Note.—Cited in Wardlaw v. Troy Oil Mill, 74 S. C. 375, 54 S. E. 658, 114 Am. St. Rep. 1004.

For other cases, see Creditors' Suit, Cent. Dig. §§ 211, 212; Dec. Dig. \hookrightarrow 54.]

[Creditors' Suit \hookrightarrow 54.]

But such creditor will not, it seems, be saved from the effect of his neglect, if any defence, arising from the lapse of time prior to the filing of his petition for leave to present and prove his demand, can be made.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 211, 212; Dec. Dig. \hookrightarrow 54.]

Before Dunkin, Ch., at Beaufort, March, 1859.

Dunkin, Ch. Mr. Davant reports that on 23d of November, 1855, proceedings were in-

stituted in this Court, under the title of *McBride v. Kirk*, for the purpose of marshalling the assets and administering the estate of Rollin H. Kirk, deceased. On 8th December, 1855, the commissioner was ordered to call in the creditors, by public notice, in the usual way. This was accordingly done, and at February sittings, 1856, claims were established to a large amount. Further time was given; and at February sittings, 1857, a small additional amount was established, making an aggregate of about \$47,500.

The real estate had been sold by the commissioner, and in January, 1858, he notified the administratrix that a deficiency existed to pay the debts thus established, and which had been ordered to be paid, of about \$3,000; and on 3d May, 1858, a friend of the family paid into his hands the sum of \$3,140, which made up the deficiency.

On 26th April, 1858, a petition had been filed on behalf of the minor children of Rollin

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H. Kirk, in the name of Lewis *W. Garth, their guardian, stating that he was the brother of their mother, (who was also administratrix of her deceased husband, Rollin H. Kirk,) that she, with her children, were about to remove to Kentucky, where the petitioner resided—that the estate of the intestate consisted of about twenty negroes, to two-thirds of which his wards were entitled—that the debts of the intestate were paid or provided for, and praying leave to remove their property. On 11th May, 1858, the commissioner reported that the facts were as stated, and thereupon, Chancellor Wardlaw made an order that the petitioner have leave to remove the property of his wards to the State of Kentucky. Both Mrs. Kirk and her children removed to Kentucky with the negroes, where they have since continued to reside.

About 14th February, 1859, this petition was filed. The petitioners had a claim of \$532 41 against the estate of Rollin H. Kirk, deceased, which was presented and established prior to the report of February, 1856, and is therein provided for and ordered to be paid. They pray now to be allowed to establish other claims. No evidence was offered—the petitioners' counsel declined to offer evidence—that these claims had ever been presented either to the commissioner, or to the administratrix, or to the solicitor of the estate, nor was any evidence offered of the reasons for the omission.

The commissioner reports that he has no funds, except those already ordered to be paid to creditors, whose claims have been long since established. It is clear that these creditors never would have allowed the order of 11th May, 1858, for the removal of the property to be made, if the funds to satisfy their demands had not been paid to the commissioner. The order of 11th May, 1858, implied a final distribution of the funds among the distributees. If the petitioners have any

claim against the estate of Rollin H. Kirk, deceased, their laches has precluded them from any aid on the part of this Court.

It is ordered and decreed, that the petition be dismissed.

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*The petitioners appeared upon the grounds:

1. Because the right of the petitioners to prove their claim under the order made in the case of *McBride v. Kirk*, calling upon creditors to present their demands, is in no manner dependent upon "whether the claim was ever presented to the commissioner, or the administratrix, or the solicitor of the estate," but upon the question whether there is a residuary fund in the Court, or in the hands of the administratrix, at the time of the application.

2. Because, if the demands of the petitioners ought to have been first rendered to the solicitor of the estate, or the administratrix, before they could claim the right to prove them before the commissioner, the petition, which is sworn to, distinctly stated, and the fact has never been denied or contradicted, that the said demands were not only rendered to the solicitor, but also to the commissioner; and the reference made at the hearing of the petition, in this case, ought to have been, not merely that the commissioner should report what funds were in his hands, and whether any final decree had been made, but whether the petitioners did render their demands as stated in the petition.

3. Because the petition is always for leave to come in and prove "nunc pro tunc," which pre-supposes the neglect or omission of the creditor to present or give notice of his demand before the expiration of the time limited by the order.

4. Because his Honor erred in supposing there was any final decree or order for the distribution of the residuary fund in the hands of the administratrix; the order made in "ex parte Garth" was outside of the case made at chambers, and without the knowledge of the creditors, besides which, it appears by the said order itself, that one-third part of twenty negroes still remained in the hands of the administratrix.

5. Because it appears by the commissioner's report, which was before his Honor, that in 1858, there were twenty-five negroes, part of the assets of the estate of Rollin H. Kirk,

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*in the possession of the administratrix, subject to the disposition and order of the Court, and it is submitted, that it was not in the power of the said administratrix, by consenting to an order taken at chambers without the knowledge of the parties to the bill, to withdraw any part of the said negroes from the control of the said Court.

6. Because the said Mrs. Kirk is now in possession of the said negroes, as administratrix, and not as distributee, and all of the

negroes, as well those in her possession, as those in the possession of her children, are liable, at least, for the debts which have been proved, should the funds in the hands of the commissioner, from any cause, prove insufficient.

De Treville, Pope, for appellants.

Fickling, contra.

The opinion of the Court was delivered by

WARDLAW, J. In bills to marshal and administer the assets of embarrassed estates in the Court of Equity, commonly called creditors' bills, the practice is well settled to allow a creditor who has failed to present and prove his claim before the day appointed in the order calling in creditors, still to come in with his claim, at any time before the actual distribution of the assets, upon his contributing his fair proportion of the expenses of suit. This practice needs no vindication beyond that contained in the cases of Shubrick v. Shubrick, 1 McC. Eq., 406, and Ex parte Hanks, Dud. Eq., 233. The petitioners who seek to intervene as creditors in the case of McBride v. Kirk, make a case within this procedure. No final order for the distribution of the funds, much less no full distribution, has been made. Some of the assets are yet in the registry of the Court; and the administratrix has in her hands twenty or more slaves of the intestate estate, undertaken to be administered by the Court. The

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*ex parte order of May 11, 1858, that their guardian might remove the property of the infant distributees beyond the limits of the State, implies no actual distribution, cannot commit creditors, and cannot protect the administratrix. The petitioners offer to pay a fair share of the expenses.

This petition seems to have been filed about February 14, 1859. It prays that the petitioners may be allowed to prove their "claims nunc pro tunc, subject only to such legal and equitable grounds of objection as were valid against said claims on February 25, 1856," when the first report on debts was made by the commissioner. We think the petitioners are entitled to come in and prove their demands nunc pro tunc, in the sense that they shall not be barred by their mere failure to present their demands before the expiration of the time limited by the order. But we can afford no patronage or protection to laches. The Chancellor says in his decree, "the petitioners' counsel declined to offer evidence that these claims had ever been presented to the commissioner, or to the administratrix, or to the solicitor of the estate, nor was any evidence offered of the reasons for the omission."

The petitioners are not entitled to be saved from the consequences of the lapse of time before the filing of their petition.

It is ordered and decreed, that the petition-

ers have leave to prove their demands, as if presented February 14, 1859; and that the circuit decree be reformed accordingly.

O'NEALL, C. J., and JOHNSTON, J., concurred.

Decree reformed.

II Rich. Eq. *264

*THOMAS W. GLOVER and Others v. FRANCES ADAMS and Others.

(Charleston. Jan. Term, 1860.)

[*Husband and Wife* ⚭31.]

By marriage settlement, the property of the wife was settled to the joint use of husband and wife during coverture, and if the husband survived, to his use for life, with remainder to "the legal heirs and representatives" of the wife. The husband survived, and upon his death, *held*, that the persons entitled to take were the heirs and distributees of the wife, including the husband, at her death.

[Ed. Note.—Cited in *Shaffer v. McDuffie*, 14 Rich. Eq. 149; *Ex parte Roberts*, 19 S. C. 159, 160; *Blount v. Walker*, 31 S. C. 29, 9 S. E. 804; *Roberson v. McCauley*, 61 S. C. 423, 39 S. E. 570.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig. ⚭31.]

Before Dunkin, Ch., at Charleston, June, 1859.

The bill was filed for the sale and distribution of certain property of Mrs. Lydia Adams, deceased, which, upon her marriage with Benjamin Adams, had been settled upon James W. Gray as trustee of the contracting parties. The clause of the marriage settlement under which the distribution is to be made, is as follows, to wit:

"In trust for the sole and separate use, benefit and behoof of the said Lydia Surr, until the solemnization of the said intended marriage, and from and after the solemnization thereof, in trust for the joint use, benefit and behoof of the said Benjamin Adams and Lydia Surr, during the time of their coverture, without the said premises, or any part of them, being in any way liable or subject to the debts or incumbrances of the said Benjamin Adams. And from and immediately after the death of the said Lydia Surr, should the said Benjamin Adams survive her, then in trust to and for the use, benefit and behoof of the said Benjamin during his natural life, and after his death, to result to such person, or persons, as the said Lydia Surr may, by

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her last will and *testament, duly executed in writing, appoint (and the power to make such will is hereby given to the said Lydia Surr, notwithstanding her coverture); and in case of the failure of the said Lydia Surr to make such will, then, in trust for her legal heirs and representatives; and should the said Lydia Surr survive the said Benjamin Adams, then all of the said estates to remain in the said Lydia, free and unincumbered of all trusts."

Benjamin Adams was the survivor of the parties, and died, having enjoyed the life estate in the property as provided for in the deed. Lydia Adams left no will, and the parties to the suit claim the property as her heirs and legal representatives, under the last clause of the limitations.

Drakin, Ch. Until the marriage of Mrs. Lydia Surr with Benjamin Adams, she was the absolute owner of the property. After that time, the legal estate was in the trustee; and Mrs. Adams had no interest, except as declared by the marriage settlement. It has been often remarked, that a more liberal construction is put upon such deeds than upon conveyances at common law. The intention of the parties is here more particularly looked to, and the words more made to bend to the intention. As was said by an eminent advocate in a similar case, "it is not what is the effect of a limitation to a man's heirs, but who is meant by the description contained in the ultimate limitation in this deed? They are words of description, and nothing else; and in order to see who it is that the party means to describe by that limitation, you must take into consideration his professed intention, and what is the whole effect and tendency of the deed in all the preceding limitations." In giving construction to this instrument, it may be premised that the property was that of the wife; and, moreover, that the parties did not probably contemplate the existence of issue, as no provision is made with reference to such event. The primary provision is, for the joint use during coverture, but so as not to

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be subject to the husband's debts. The provision next made is for the contingency which actually occurred. "Should the said Benjamin survive her, (the said Lydia,) then in trust for the use, benefit and behoof of the said Benjamin, during his natural life; and, after his death," (on failure of appointment on her part,) "then in trust for her legal heirs and representatives." In order to enable the trustee to discharge his duty finally, and surrender the property to those entitled, his only enquiry is: Who, after the death of Benjamin Adams, fulfilled the description of "the legal heirs and representatives" of Lydia Adams, deceased? The enquiry is not who may have been her heirs at the time of her death, but what persons answered that description at the time when the trustee was to perform his final act. It is not unlike the case of a legacy to a class of persons at a future period, in which the constant rule has been, that all persons answering the description at the period of distribution, and none other, are entitled to take. See *Matthews v. Paul*, 3 Swan., 328. In this case, the manifest intention of the parties was to prevent the marital right from attaching, and, therefore, the legal estate was vested in a third person. Regard was had to the in-

terest of the husband by securing to him a joint use during the coverture, and the exclusive use during his life, in the event of his survivorship. When his power of enjoyment should cease, provision is made for the final disposition of the property to such persons as could then substantiate their title under the description of the deed. When it is declared that the trustee shall hold for the use of the husband during his natural life, and after his death, then in trust "for her legal heirs and representatives," these latter are in contradistinction to, and exclusive of him, for whom the previous use was declared.

It is ordered and decreed, that the trustee account for his transactions as such, and that the property be divided among the parties entitled thereto, according to the principles of this decree. Costs to be paid out of

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the fund, except those of the *administratrix of Benjamin Adams, deceased, which are to be paid out of the assets of said intestate.

The defendant, Frances Adams, appealed on the ground:

That the "heirs and legal representatives" of Mrs. Lydia Adams are those who were such at the time of her death; and it is respectfully submitted, that his Honor erred in ruling, that her heirs and representatives were not fixed until the death of Benjamin Adams, who survived her.

Pressley, for appellant.
Simonton, contra.

The opinion of the Court was delivered by

JOINSTON, J. Had the limitation, after Mrs. Adams' life, been to a stranger instead of her husband, and, upon his death, then over to her heirs, it would, since *Reichell v. Tompkins*, 1 Strob. Eq., 114, *Seabrook v. Seabrook* [1 McMull. Eq. 201], and many other cases, scarcely have been doubted in this State, that the husband must come in among those entitled to succeed under this designation.

Nor is it doubtful, under *Hicks v. Pegues* [4 Rich. Eq. 413], *Buist v. Dawes*, 4 Rich. Eq., 415, note, and other cases, to the same effect, that a class of persons, designated to take as heirs of a given individual, became fixed and ascertained, and their interests vested at the death of that individual: so that if they should afterwards die before the time assigned for their enjoyment of their interests, these interests would be transmitted from themselves, as a new stock.

The conclusion to be naturally drawn from these principles, would seem to be, that, under this deed, the husband, in addition to the provision made for him, as survivor of his wife, took an interest along with her distributees, upon her death; an interest, which, when it became vested in him, became of value, and might have been aliened, either along with his life estate or separately.

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*These interests were cumulative.

But though these positions seem clear, it has been conceived that to allow the husband to take as heir would defeat the intention of the parties to the deed. The intention of parties is not so much to be conjectured, as derived, by construction, from their words. In this case, it has been argued that it was not intended to provide for the husband under the description of heir, because he was provided for under another designation. But it will hardly do to blot out one express provision, because there is another express provision. It seems to be going too far to make the husband's exclusion or inclusion depend upon the fact that provision has been made for him, unless we can be certified that that provision was intended to exclude all further provision; and how can we know that, in the face of express words, that do include him? How can we know, in the absence of language to inform us, that the words, heirs of the wife, were not intended to have their natural meaning, and designate heirs living at her death, but those living at her husband's death? Do they mean the one or the other, according as the husband is or is not provided for?

I should draw a different inference as to the intention; an inference that heirs at her death were contemplated, from the fact that the deed, on its face, provides an alternative which must then take effect, either in those who were then to take from the wife by testament or by intestacy.

It is ordered, that the decree be reformed according to these views; and that the distribution be made accordingly. The provision, in the decree, as to costs, to remain unaffected by this judgment.

WARDLAW, J., concurred.

O'NEALL, C. J. I concur in Chancellor Dunkin's decree.

Decree reformed.

11 Rich. Eq. *269

*W. C. SMITH and Others v. B. F. HUNT,

Executor of B. F. HUNT, and Others.

(Charleston. Jan. Term, 1860.)

[Trusts ⇐74.]

II, being attorney on record in a judgment, of which he owned one-half, purchased, at sheriff's sale, a tract of land, sold under the execution on the judgment, and without paying the purchase money, received from the sheriff a deed of conveyance for the land:—*Held*, that H. must be presumed to have purchased as trustee, and that he held the land as equitable tenant in common with the other owners of the judgment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 106; Dec. Dig. ⇐74.]

[Trusts ⇐86.]

Lapse of time, more than twenty years, *held*, under the circumstances, not to rebut the presumption that H. had purchased as trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 128; Dec. Dig. ⇐86.]

[Judicial Sales ⇐62.]

The land having been sold by the master and the proceeds being in Court, *held*, that the other owners of the judgment, who had another demand against H., growing out of a similar transaction, had the right, as against other creditors of H., to look to the proceeds of the sale as a common fund for payment of both of their demands.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 123–125; Dec. Dig. ⇐62.]

Before Dargan, Ch., at Charleston, February, 1858.

This case came before the Court on exceptions to the master's report. The report is as follows:

Under a special order made by Chancellor Dargan in this cause, at the last term of the Court, I am directed to examine and "report as to whether the complainants are entitled to any portion of the Crow Island, or the proceeds of sale, either as equitable part owners, creditors or otherwise, and if so, to what amount, and that I make a special report of the same, with leave to report any special matter relating thereto."

In pursuance of this order, I have investigated the matters thereby submitted to me, and proceed to submit the conclusions at which I have arrived.

The land in question must formerly have been the property of Nathan Huggins, a resi-

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dent of Georgetown district. *It appears to have been levied upon as his property by the sheriff of that district, under an execution issued upon a judgment in a suit instituted in the name of William S. Smith and Peter Cuttino, as administrators of George Smith, surviving copartners of George and Savage Smith, against C. Huggins, executor of Nathan Huggins.

It was by a deed bearing date the second day of December, 1833, conveyed by John Harrelson, sheriff of Georgetown district, to Benjamin Faneul Hunt, for the sum of \$3,200, as stated in the deed. The sheriff's conveyance recites as the authority for the sale, a "Fieri Facias, issued out of the Court of Common Pleas held for the District of Georgetown, tested the second day of February, in the year of our Lord one thousand eight hundred and thirty-two, at the suit of W. S. Smith and Peter Cuttino, administrators of George Smith, who survived Savage Smith and Cuttino, partners in trade, under the firm of Smith & Cuttino, commanding that of the goods and chattels, lands and tenements of Nathan Huggins in the hands of Charles Huggins, his executor, to levy the sum of three thousand and two hundred and sixty-five dollars debt and damages, and

costs, &c." This deed is filled up in the handwriting of Mr. Hunt, the purchaser, and contains in the printed form the usual acknowledgment of the receipt of the purchase money, and is endorsed as recorded in the office of the Register of Mesne Conveyance, 3d December, 1833. It is also endorsed with the signature and seal of the purchaser in blank, witnessed by Thomas F. Purse. By a transcript from the record, it appears that the purchaser, Mr. Hunt, was the plaintiff's attorney in the suit, under which the execution was issued.

The complainants first insist, that this purchase was made by Mr. Hunt for him and themselves, as the persons entitled to the joint copartnership estate; that no money was paid, but that it was to be held on joint account, and that therefore they are entitled

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to one-half of the proceeds of the sale, *recently made by me under the order of this Court, reserving the equities of the parties.

No testimony of any agreement or arrangement to that effect has been produced before me, but the relations of the parties, and the proceedings in the cause then pending in this Court, for the settlement of the mutual claims between Mr. Hunt and the heirs of Savage Smith, are relied on to establish this. The purchase for joint benefit is denied in the answer of B. F. Hunt, executor of his father, (who had made the purchase,) and he insists that the purchase was made for himself exclusively, and whatever may be conjectured as to the probable intentions of the parties at the time, there is not, it seems to me, sufficient ground now to presume a distinct contract or agreement on the part of Mr. Hunt in the sense now contended for, and I am, therefore, not able to assent to such conclusion.

The complainants, however, insist in the alternative, if the former view should not be sustained, that as the purchase money was not paid, half of which they would have been entitled to receive, they are clearly entitled to the same amount with interest from the time of the purchase, to be paid out of the proceeds of sale now in my hands, and after examining the matter, I have come to that conclusion.

In examining the claim made on this ground, as well as a further claim to be considered hereafter, it is necessary to advert somewhat to the proceedings prior to the conveyance by the sheriff.

Several years before this, C. T. Brown and wife had filed their bill in this Court against the administrators of the surviving copartner, George Smith, and the complainants, as the distributees of the deceased copartner, Savage Smith, praying a partition of the copartnership estate, and setting up besides large claims (on grounds not now necessary to be considered) against the copartnership estate. In this cause a partition of certain

lands and negroes was made specifically between the distributees of the two copartners,

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and the debts and *choses in action due to the copartnership, as appears by the receipt of the commissioner, Mr. Heriot, dated February 7th, 1852, were taken out of the hands of the administrator, and transferred to the commissioner. In the list of debts thus transferred, my attention has been called to one from Nathan Huggins, which, it is affirmed, was the subject of the suit under which the sale was subsequently made. These debts were, by a report in the cause afterwards made by Mr. Heriot, recommended to be placed in the hands of an attorney for collection. After the partition in 1825, C. T. Brown and wife sold and assigned all their interest in the copartnership estate to Mr. Benjamin F. Hunt, deceased, and he took up the proceedings which had been previously commenced in the name of Brown and wife, and afterwards, February 1st, 1833, filed a bill entitled a bill of supplement and revivor, in substitution for bill filed in 1822, setting up the claims which had been originally set up by C. T. Brown and wife, claiming a large amount over and above a moiety against the copartnership estate; praying an account of all these claims; and praying, besides, that a suit which had been commenced against him, on a bond given by him for a purchase from the commissioner, of a portion of the copartnership estate, should be enjoined, alleging that the bond was only given to enable the commissioner to close his sales; and that when the account should be taken, it would appear that he was entitled to a much larger amount from the copartnership estate.

It was shortly after this that the sale of the sheriff was made, as the conveyance bears date December, 1833. The account claimed by Mr. Hunt in his supplemental bill, would clearly, I think, have embraced any such purchase or debt from him. He could not ask an account against the other persons entitled to the joint estate without bringing into it all that he had himself received from the same source, and these proceedings have been regularly continued to the present cause, in which an order was

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made, at the last term, reviving *all the former proceedings and decretal orders not already carried out.

It is admitted by the answer of the executor, that the purchase money expressed in the deed, was never paid by the testator, on the ground, as it is alleged, of existing claims, which, if established in his favor, would have superseded the necessity of such payment; and it is further admitted that the testator always acknowledged his obligation for the said purchase money, and that it is now payable out of the proceeds of sale.

But it has been contended before me, upon the defences on behalf of the creditors of

Mr. Hunt, that this claim is barred by lapse of time and the statute of limitations; that it was so before the death of the purchaser, and that a claim thus extinguished, cannot be subsequently revived as against creditors by the admission of an executor. Whether an executor is, in all cases, bound to set up the bar of the statute against a claim which he knows not to have been paid, but to have been constantly acknowledged by his testator, and whether a creditor can set up such bar against such acknowledgments, might admit, perhaps, of some doubt. But I do not rest my conclusion upon this. I think the plaintiff's claim cannot be defeated by the statute, for two reasons: first, because proceedings have been constantly pending in this Court for the settlement of claims within which it is embraced; and, secondly, because the purchaser was himself the attorney of the commissioner or receiver having charge of the copartnership estate. If another person had been the purchaser, Mr. Hunt, as the attorney for the plaintiffs on the record, or for the commissioner to whom the assets had been transferred, would have been entitled to receive the purchase money from the sheriff; but being himself the purchaser, he may be considered to have received it in that character; and therefore could not have set up the statute of limitations, at least while proceedings embracing such an accountability were pending. If the purchase

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money had been paid to the *commissioner by Mr. Hunt, or, if upon non-payment, the land had been re-sold, and the proceeds so paid into Court, I think there can be no doubt that the complainants would have been entitled to one moiety of the amount that Mr. Hunt had contracted to pay, and it does not appear that this right should be defeated because the sale has only been lately made.

I therefore report as my conclusion, that the complainants are entitled to one-half of the purchase money expressed in the conveyance, with interest from the date of the deed, to be paid out of the proceeds of sale now in my hands.

Besides this, however, the complainants contend that they are entitled to have the residue of the proceeds of Crow Island applied in liquidation of the amount which has been heretofore decreed to them, on account of the purchase by Mr. Hunt of a piece of land called Clegg's Point, which was included in the copartnership or joint estate. The character of this demand will be understood by reference to the decree of Chancellor Dunkin, made June, 1850, by which it is recognized. 3 Rich. Eq., 522.

It appears (Chancellor Dunkin's decree, 1850) that the plantation known as Clegg's Point, had been mortgaged to secure a debt due to the copartnership estate, that the first purchaser not having complied, it was re-sold by the commissioner under the order of this

Court, for the benefit of the parties entitled to the copartnership estate, and purchased by Mr. Hunt for the sum of \$8,010, and a claim for a portion of this amount being subsequently established in favor of third parties, Mr. Hunt was declared liable for the difference between such claim and the amount of his bid, to one-half of which the complainants were decreed to be entitled to be paid by Mr. Hunt.

The complainants insist that the funds recently received from the proceeds of Crow Island are to be considered as precisely of the same character; in fact, that the money to be made in the execution against Nathan Huggins

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and the *proceeds of sale of Clegg's Point, are portions of one common fund, to one moiety of which they are entitled; and that if they have not received it out of one portion, they are entitled to receive it out of the other; and I think this position correct. If both amounts had been paid into Court as part of the copartnership assets, they would have composed one fund divisible in moieties between the complainants and Mr. Hunt, or his estate; if only one, however, had been so paid in, then neither party would have been allowed to take out any portion until he had been charged with what he had already received out of the same or an equivalent fund, and a debt of this sort for a purchase, must be regarded as equivalent to a receipt, so that the fund now in the Court, from the sale of Crow Island, must be paid in such manner as to equalize the share of those entitled in moieties.

I therefore report, lastly, that the residue of the proceeds of sale of Crow Island now in my hands, after providing for the claim previously made, or so much as may be necessary, should be applied in liquidation of the amount decreed to be due to the complainants as their moiety of the amount due on the purchase of Clegg's Point by Mr. Hunt.

The complainants excepted to so much of the report of master Tupper, in this cause, in the matter of the rights of the parties to the proceeds of Crow Island, as concludes that the purchase made by Benjamin F. Hunt, deceased, of the tract of land called Crow Island, is not to be treated as made for the joint benefit of himself and the complainants, so as to render them equitable tenants in common, according to their interests in the copartnership estate, and entitled to the proceeds in that proportion.

The defendant, Benjamin F. Hunt, executor of B. F. Hunt, and a creditor, excepts to the report as follows:

1. Because Crow Island never was copartnership property, and a copartnership in-

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terest in the debt of Huggins, in payment of which it was sold, could not affect the property itself in the hands of a purchaser.

2. Because, when Col. Hunt purchased

Crow Island, he became responsible to the sheriff for one-half of the purchase money, and was accountable therefor, as a personal debt, while Crow Island itself, by conveyance from the sheriff, became his own absolute property, and subject as such to all judgments then existing against him; whereas the master, in his report, would displace such legal liens in favor of parties who could only charge Col. Hunt with one-half of what he owed to the sheriff, as one item of an unsettled account.

3. Because the equitable lien that is now claimed by the complainant, and sustained by the report, was never pretended to until a comparatively recent period, while they had permitted Col. Hunt to hold the property as his own unencumbered estate for more than ten years, during which entire period he held adversely as to any such presumed lien.

4. In the decree as to Clegg's Point, the liability of Col. Hunt was expressly decided to be merely personal; and there is no reason for subjecting the Crow Island purchase to a different rule of construction.

5. This defendant, as executor and creditor, concurs in all the exceptions filed by other parties to the said report, so far as they are consistent with his answer and the above exceptions.

The defendant, Milberry S. Martin, excepted to the report, on the grounds and for the reasons following:

It is submitted that the master is in error in supposing the complainant to have any lien or priority on the funds derived from the late sales of Crow Island. Because—

1. The complainant had no equity arising out of the proceedings referred to by the master, for those proceedings originated 1st February, 1833, and had relation to the state of accounts between the parties at that time; whereas, the sale to Mr. Hunt, of Crow Is-

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land, took place in December *thereafter, and was wholly independent of the state of the account existing at a former period.

2. The sale and deed of conveyance to Mr. Hunt, by the sheriff, invested Mr. Hunt with an absolute title, in his own right, without any trust; whereas, the master's ruling has, in effect, declared a trust, of which there is not the least evidence in fact.

3. Mr. Hunt not complying with the sale, the sheriff should have re-sold, and otherwise proceeded under the Vendue Act of 1785. Not having done so, the complainants should have pursued the sheriff; none of these proceedings having taken place, they lost all claim to the land, and consequently to the funds arising from the sale.

4. Mr. Hunt held an adverse possession for over twenty years between his purchase and the master's sale; this period was enough to render any equitable demand a stale claim,

and would have barred a legal claim to the land twice over.

5. That the claim, if any, having been barred by the statute, and by lapse of time, whilst testator lived, the executor could not revive it by any admission on his part.

6. That the decree, in the matter of Clegg's Point, made by Chancellor Dunkin, June, 1850, was a mere general lien, and did not entitle complainants to any priority of payment out of the proceeds of Crow Island.

7. That, according to said decree, the Clegg's Point transaction constituted no part of the original matters of controversy in issue between the parties, and consequently is not affected by any of the equities incident to them.

8. In all other respects, the former grounds will apply to the Clegg's Point transaction.

Dargan, Ch. The report of master Tupper, as to the proceeds of Crow Island, in this cause, with the exceptions to the same, having been submitted for some conclusion, by the Court; without opportunity for argument or consideration, it is, with a view to the ul-

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timate decision of the questions *involved, ordered, that the exceptions severally be overruled, and the report be confirmed.

The complainants, and the defendants, Mrs. Martin and B. F. Hunt, executor, appealed on the grounds taken in their several exceptions.

Mitchell, for complainants.

Northrop, Simons, Campbell, Whaley, contra.

The opinion of the Court was delivered by

O'NEALL, C. J. The greatest difficulty experienced in this ancient and vexed case, has arisen more from the accumulation of documents and the obscurity of facts, than from any intrinsic difficulty in the questions at issue.

1. Crow's Island. It appears that this land was the property of Nathan Huggins (deceased). It was sold, as such, under a *fi. fa.*, issued upon a judgment recovered by William S. Smith and Peter Cuttino, administrators of George Smith, surviving copartner of George and Savage Smith, against Charles Huggins, executor of Nathan Huggins, deceased. This debt was part of the assets of George and Savage Smith, which was undivided, and placed in the hands of Mr. Heriot, as receiver. Col. Hunt was his attorney for the collection of the debt; and also his agent for the management of the undivided partnership assets. He, by purchase from Brown and wife, the only child of George Smith, deceased, had an interest of one-half in the debt; the other parties, the children of Savage Smith, had an interest in the other half. The land (Crow's Island) was sold, and purchased by Col. Hunt, for a sum very nearly the whole amount of the debt;

the deed was made to him the second day of December, 1833. There is no plea of the statute of limitations. The first question which arises, does lapse of time, twenty years, raise the presumption "omnia esse rite acta,"

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*and therefore, that it cannot now be questioned, that the purchase of Col. Hunt was in his own interest, and not as trustee of himself and the other parties in common interest with himself? This presumption, it must be remembered, is a presumption of fact, and not an irrebuttable presumption. Nor is it like the statute of limitations, which is a statutory bar to the remedy, and, in general, cannot be thrown aside by an executor where the remedy is barred at the time of the death of the testator.

Keeping these distinctions in mind, let us turn to this case. How is Col. Hunt to be regarded independent of the lapse of time? He bought under an execution obtained by him as an attorney, and also as an agent for the receiver, in the collection of a debt which, in equity, belonged to him and the children of Savage Smith. Beyond all doubt, he was at the option of his copartners to be rated, either as a trustee, in the purchase, or accountable for the purchase money. The master's report finds the fact that he paid the purchase money, by the use of the debt, but declines to charge him as trustee principally because no express trust was proved. That was not necessary. Equity implies such a trust, from two circumstances: the relation of confidence, which he occupied, as attorney, and also from the fact, that whatever was paid for the land was the debt, in which he and the children of Savage Smith had an interest in moieties. These facts make him an implied trustee.

But, it is said, these are mere presumptions, and cannot now be set up after this great lapse of time. There are two answers to this. First, that the settlement between Col. Hunt and the children of Savage Smith, of the partnership, has been the subject of "hot litigation," as is said, in *Smith and Hunt*, 3 Rich. Eq., 465, since February, 1832, and that in a case so situated, the presumption cannot arise, and in connection with this it may be remarked, that this objection does not come from Col. Hunt himself, who, it is probable, from statements made by his

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executor, and hereafter to be noticed, *would never have resorted to lapse of time, as a defence, but it is interposed by persons who claim to be creditors of Col. Hunt. They cannot set up an equity superior to the present claimants, who are not only creditors but who have furnished the very means of acquiring the property. But the second answer is, that the executor states "that Crow Island, formerly belonging to Nathan Huggins, against whom a judgment had been re-

covered, in favor of the said copartnership, for about \$3,265, was put up for sale, and was purchased, as this defendant believes, by the said Benjamin F. Hunt, to whom a deed of conveyance was made and delivered: and this defendant believes it to be true, that the purchase money was not made, and that payment was refused until a final settlement of the accounts between the said Benjamin F. Hunt and the other parties concerned could be made, respecting which, there was much controversy up to the time of his decease." This admission certainly ends all pretence of lapse of time, as a bar, if the executor's admission can be allowed to have any weight in a case like this. He is both executor and creditor, and as to him and his rights it must have effect. So, too, I think it must govern the case as to all other parties. For it is not like the statute of limitations, which as a statutory bar, he might not be at liberty to waive. But lapse of time is a mere presumption in fact, which may be rebutted, and the executor's admission is a statement of fact, which completely destroys the presumption. I am, therefore, satisfied that the deceased Col. Hunt must be regarded as a trustee for himself and his copartners in the purchase of Crow Island, and that, of course, he and they are entitled to moieties of the proceeds.

2. So, too, as to Clegg's Point. I concur in the view of the master, that the proceeds of sale in that respect are a common fund with the proceeds of Crow Island, and that the complainants are entitled to moieties of both, and that Col. Hunt, or his estate, is en-

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titled to the other moieties. Of course, *if Hunt has received any part, or parts, that must be deducted from his moieties, so that he shall receive that much less, and thus equality be produced. The circuit decree and the master's report are modified according to these views, and the master is directed to pay out the fund accordingly.

JOHNSTON and WARDLAW, JJ., concur.

Decree modified.

11 Rich. Eq. *282

*THE ADMINISTRATORS OF J. T. SESSIONS v. SAMUEL M. STEVENSON and Others.

(Charleston. Jan. Term, 1860.)

[Judgment \hookrightarrow 876.]

Levy, under execution, on a house and lot, with other circumstances; held sufficient, after a lapse of near twenty years, to raise the presumption that the judgment was satisfied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1648; Dec. Dig. \hookrightarrow 876.]

[United States \hookrightarrow 76.]

A sovereign State, coming in as a creditor, under a bill to marshal assets, stands as other

creditors, and is liable to the ordinary presumptions of payment.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. §§ 58, 59; Dec. Dig. ☞76.]

Before Johnston, Ch., at Horry, February, 1859.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Connor, for appellant. The defendants rely on the presumption of payment. Less than twenty years has elapsed, and the deficiency in time must be aided by other circumstances in order to raise the presumption. *Butler v. Wightman*, 2 Speer, 359; *Williams v. Clinton and Sims*, 1 Rich. Eq., 53. The levy and laches are relied on. The levy being on real estate is not *prima facie* satisfaction, *Clerk v. Withers*, 1 Salk., 322. Neither can laches be relied on to aid the deficiency of time. The maxim *nullum tempus occurrit regi* rests not so much on prerogative as on grounds of public policy, and the crown or government cannot be prejudiced by lapse of time or the laches of its officers. Co. Litt., 70, b, 119, a, note 1; *Legatt's case*, 10 Coke Rep., 111, 114; Com. Dig. Prerogative, D., 86; *Regina v. Fenton*, per Pollock, C. B., 2 Excheq., 220; *United States v. Knight*, 14 Pet., 315.

Harlee, contra.

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*The opinion of the Court was delivered by

WARDLAW, J. In a suit pending in the Court of Equity, for Horry district, to marshal the assets of Josias T. Sessions, the creditors were regularly called in, the amount of debts ascertained were paid, and at February Term, 1853, a balance remained in the hands of the commissioner for distribution among the heirs of said J. T. Sessions. At February Term, 1855, the United States, through the post-master-general, interposed a claim founded on a judgment against said Sessions, obtained in July, 1836, and at February Term, 1859, the commissioner reported in favor of this claim. The administrators excepted to this report on the ground that the circumstances in evidence warranted the presumption of the satisfaction of the judgment; and the Chancellor sustained the exception. The circumstances relied upon in aid of lapse of time are, that the fi. fa. for execution of the judgment was levied on the house and lot of Sessions by the deputy marshal, March 10, 1837; that J. T. Sessions, in April, 1838, (after paying \$40 to the marshal in February, 1838,) sent off two negroes to be sold, to raise money for the payment of a debt in Charleston—probably that in question: and that Sessions afterwards was apparently solvent, and was undisturbed by the pursuit of this claim. It is true, as asserted in the first ground of appeal, that not quite twenty years had elapsed from the rendition of the judgment be-

fore the presentment of this claim. And it does not appear that the estate of Sessions has been actually distributed. Yet it is clearly settled by our cases, that the presumption of satisfaction of a debt of record may be legitimately deduced within less than twenty years, where there is considerable lapse of time, with corroborating circumstances.

The presumption of satisfaction *prima facie* arising from the levy, the disposition of which is not accounted for, is supposed, in the second ground of appeal, to be rebutted by the partial payment afterwards to the marshal, followed by the delivery of his negroes by defendant in execution to an

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*agent, to sell, and from the proceeds of sale to pay this debt. It seems to us, that if the plaintiff in execution did not receive the proceeds of the negroes, this furnishes no reason for not proceeding on the levy. If the plaintiff did receive the proceeds, the whole sequence of things is natural.

In the third ground of appeal, it is asserted that no laches can be imputed to the petitioners. The argument is, that the United States is the petitioner, and that that government as sovereign, is entitled to the benefit of the maxim, *nullum tempus occurrit regi*: applicable to all sovereigns deriving their institutions from the common law.

Individually, I dispute the sovereignty of the United States, and consider it as a mere agency of sovereign States; and, especially, I deny that the rights of a sovereign pertain to one of the officers or departments of the government. But it is enough for the occasion to say, that when a sovereign State interposes as a mere creditor in a bill for marshalling assets, in the absence of statutory or positive regulations, it stands on the same footing as any other creditor.

Under all the circumstances of the case, we approve the conclusion of the Chancellor: to which in this tribunal we feel bound to give all the efficacy of a verdict.

Ordered, that the appeal be dismissed.

O'NEALL, C. J., and JOHNSTON, J., concurred.

Appeal dismissed.

11 Rich. Eq. *285

*JOHN N. MAFFITT v. JOHN H. READ.

(Charleston, Jan. Term, 1860.)

[Trusts ☞332.]

Bill by a cestui que trust against trustee, for account, dismissed, certain dealings between the parties being held sufficient evidence of a final settlement between them.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 495; Dec. Dig. ☞332.]

Before Dunkin, Ch., at Charleston, June, 1859.

Dunkin, Ch. About 12th May, 1842, the late James Withers Read intermarried with Caroline Laurens, who was at that time about eighteen or nineteen years of age. In contemplation of the marriage, the fortune of the lady, consisting chiefly, though not entirely, of personalty, was conveyed and transferred to Edward R. Laurens and the defendant, in trust for the uses therein and thereby declared. The estate thus settled, was composed of a moiety of some eight slaves, and certain articles of plate, held by her brother and herself, and which constitute no part of the enquiry to be made; and also of her moiety of certain bonds and stocks, of a lot in Hasel street, and her interest (being a sixteenth) in certain marsh lands. Her moiety of the stock and bonds (as afterwards ascertained on partition) amounted to (\$41,079 66) forty-one thousand and seventy-nine 66-100 dollars, and her interest in the realty was afterwards sold for (\$2,962 50) two thousand nine hundred and sixty-two 50-100 dollars, or in the aggregate forty-four thousand and forty-two dollars sixteen cents (\$44,042 16.) The uses declared were, among others, for the joint use of husband and wife, during coverture, and in the event of the survivorship of the wife, with or without issue, then to her absolutely, discharged of all other and further trusts.

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It was also provided, that in the event that the said Caroline Laurens and James W. Read should, at any time during their joint lives, &c., think it beneficial to their interest to have the estate, or any part thereof, sold, disposed of, invested in, or exchanged for other property, real or personal, and the purchase money invested in any other property whatsoever, or placed at interest, that then the said trustees, on being thereunto requested in writing by the said Caroline and James, shall dispose of, convey, invest or exchange the same, or any part thereof, as the case may be, without any right of refusal on the part of such trustees, and invest the purchase money in such other property, real or personal, or invest or place it at interest, as may be required by them, the said Caroline and James, &c., and such purchased property or invested funds, &c., shall stand subject to the same uses, &c.

For about four years after the marriage, and until 5th March, 1846, the corpus of the estate remained substantially in the same condition, the interest, dividends, or use being enjoyed by the parties according to the terms of the settlement. On the day last-mentioned, the trustees, at the instance and by the request of the cestuy que trust, purchased one moiety of the Rice Hope plantation on Cooper river, and of the slaves thereon, for the sum of forty-one thousand seven hundred and sixty 37-100 dollars (\$41,760 37) to wit: \$20,000 for the plantation, and \$21,760 37 for the slaves, and to secure the

payment of the same, the trustees executed their bond to the vendor, J. Harleston Read, the elder. Subsequently, the trustees added to the gang two negroes, purchased for thirteen hundred and sixteen dollars, making the agricultural investment forty-three thousand and seventy-six 37-100 dollars (\$43,076 37).

James Withers Read and his wife entered into possession of the premises, and continued in the use and enjoyment of the same until the death of the former, which took place 28th June, 1851. In fulfilment of the terms of the marriage settlement, in such contingency declared, the trustees, on the

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*12th August, 1851, conveyed and transferred to Mrs. Read the moiety of Rice Hope plantation and the slaves, which had been purchased for the trust estate. On 1st January, 1852, Mrs. Read conveyed her moiety of the plantation to J. Harleston Read, Sr., for the sum of twenty-thousand dollars, and executed to him a bill of sale for her moiety of the slaves for the consideration of twenty-four thousand dollars—making an aggregate of forty-four thousand dollars (\$44,000). But in adjusting the payment with J. Harleston Read, Sr., the balance due on the bond of the trustees for the original purchase money (being upwards of seven thousand dollars) was deducted and allowed. Early in August, 1852, the plaintiff intermarried with the widow of James Withers Read, deceased. These proceedings were instituted, on behalf of the plaintiff and his wife, on 8th May, 1854.

The scope and object of the bill is not to charge the trustees, or either of them, for any sums by them, or either of them, actually received and misapplied, but to render them responsible for permitting the late James Withers Read to receive certain funds belonging to the trust estate, which were either wasted by him, or not properly re-invested, or in any other manner applied to the purposes of the trust. After the answers had been filed, an order of reference was taken, without prejudice to the defence set up by the defendant, and the bill was dismissed as to the defendant E. R. Laurens, by consent of plaintiff and the codefendant, J. H. Read, and without prejudice to the plaintiff's right of account otherwise. The report of the master had been filed, when, in March, 1859, the wife of the plaintiff departed this life, and on 14th May, 1859, the proceedings were revived by the plaintiff in his own right, and as administrator of his deceased wife.

Preliminary to the consideration of the exceptions to the master's report, it may be well to notice the answer of the defendant, John Harleston Read, as the order of reference was made subject to the defence

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therein disclosed. This defendant does not shrink from the responsibility which, according to the principles of this Court, he in-

curred in becoming a party to the marriage settlement. For the consequences of any misplaced confidence in his deceased brother, he admits his liability, but the defendant contends, that by far the greater part of the trust fund received by the said James W. Read, and to which he may not have been entitled as the usufruct of the estate, was re-invested by him with the full knowledge and consent of his wife, for the use and as part of the trust estate; that such investments were not only with her approbation at the time, but received her further and confirmed sanction when she afterwards became his widow, and entitled absolutely to the estate. The defendant admits that a portion of the fund received by the said James W. Read was not thus re-invested; but that about two months before the death of the said James W. Read, an adjustment was made of this deficiency, ascertained in the presence of his wife and of his solicitor; that for this amount the said James W. Read, then and there, confessed a judgment to his said trustees (who were not aware of the transaction until some time afterwards). That more than twelve months after the death of the said James W. Read, to wit: on 15th July, 1852, the defendant, who had become administrator of his deceased brother, settled the said judgment, then amounting to about (\$2,200) two thousand two hundred dollars, by executing to her his own individual bond for the payment of the same; and that the said bond was subsequently paid in full to the plaintiff, John N. Maffitt, after his intermarriage with the widow of the said James W. Read, deceased; that all this took place some time prior to the institution of these proceedings, and the defendant insists on the same as a final settlement of any defalcation of the said James W. Read, in relation to the trust estate.

In order to appreciate a part of this defence, it is necessary to advert to some of the provisions of the settlement. It is therein declared to be the duty of the trustees,

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upon the re*quest, in writing, of the cestuis que trust, to dispose, &c., of any part of the trust estate, and re-invest in such other property as may be required of them, "without any right of refusal on the part of the said trustees." It will be perceived that the right of control and direction, as to the mode and manner of investment, was in the cestuis que trust absolute and unlimited. It was only necessary that the request or requisition of these latter should be distinctly signified. It was probably for the protection of the trustees, or of a purchaser, that it was required to be in writing. Their assent or desire might be otherwise established, as by their acceptance and use of the property taken in exchange or as a re-investment. This is illustrated by the purchase

of Rice Hope and the slaves, in March, 1846, and the sales of stocks, &c., to meet the payments. No evidence appears of any request in writing, on the part of the cestuis que trust, but they took possession of the estate and enjoyed the same in common during the coverture. After the death of James W. Read, the plantation and slaves were, in pursuance of the provisions of the settlement, on 12th August, 1851, conveyed by the trustees to the survivor, Mrs. Read, by whom they were subsequently (1st January, 1852) conveyed to another purchaser for valuable consideration. After this, it would not have been competent for Mrs. Read, or her representative, to have impugned the investment in Rice Hope, for the want of evidence of a written request on the part of her deceased husband and herself, nor is the same in any manner, now called in question or impugned. So, in regard to the sale of the marsh lots, and also of the investment in the Morris island lot, there is no evidence of any written request on the part of James W. Read and wife, but the master has concluded from the circumstances detailed in his report, that these transactions were at the instance and by request of the parties, or received their subsequent sanction; and he has accordingly sustained the same, without objection to his judgment. It would scarcely be competent for the cestuis que

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*trust, accepting the property purchased as a re-investment, afterwards to repudiate it as such, as between themselves and the trustees, because there was no evidence of a written request.

Nor can it any more be properly objected to a re-investment, that it was not of a character which this Court would have selected, or which a prudent trustee ought to have sanctioned. The terms of the marriage settlement expressly defined the authority of the trustees in this respect. They were required to pursue implicitly the requisitions of the cestuis que trust, who were thereby constituted the sole judges of the expediency, as well as the mode of re-investment, "without any right of refusal, on the part of the trustees."

During the five years which elapsed between the purchase of Rice Hope, and the death of James W. Read, in June, 1851, agricultural investments on Cooper river proved entirely unprofitable. For four, out of the five years, there was a failure of crops, in consequence of the condition of the river. Within this period, James W. Read had put valuable improvements on the trust estate, and he had also improved and furnished the house on Morris island, which was their summer residence. For none of these have any allowance been made, and for the reasons stated in the master's report, upon which it is not proposed, at this time, to make further observation. In his answer,

the defendant states that his intestate, James W. Read, died insolvent, and, at the hearing, records of unsatisfied judgments to a large amount, existing against him at the time of his death, were adduced in evidence.

Upon the death of her husband, Mrs. Read, as survivor, became entitled absolutely (as already stated) to the whole of the trust estate, consisting as well of the original investment as of any re-investments. In this way she took and conveyed to a subsequent purchaser, the moiety of Rice Hope and the slaves for forty-four thousand dollars; and to the same purchaser, she conveyed for valuable consideration her moiety of the stock, plantation, horses, &c. In addition to

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*these, Mrs. Read, (as proved by the testimony of N. H. Guyton, for many years manager on the place,) claimed and took possession of many other valuable articles of property. A large portion of these she subsequently sold or otherwise disposed of. A paper was produced (marked D) which the witness proved to be in the handwriting of Mrs. Read. This purports to be a list of stock, tools, &c., on Rice Hope, and at the latter part, the names of various horses are given, with this caption: "Horses bought by J. Withers Read for the use of his wife and self." All the horses thus designated were taken and disposed of by Mrs. Read. There was also the slave Clarinda; she had been purchased by James W. Read for three hundred and ten dollars; she was a cook, and not a field negro. When Mrs. Read came to town, after the death of her husband, she brought Clarinda with her, and hired her out, as a cook, in Charleston, where she died the early part of the following year. It was satisfactorily established, that for the various articles of property thus taken by Mrs. Read, her husband, James W. Read, had paid upwards of three thousand dollars. In addition to this, she had also a promissory note of James Smith Colburn to James W. Read, for five hundred dollars, which was subsequently collected by the plaintiff in this cause. It further appeared that on 19th April, 1851, about two months prior to the death of James W. Read, he, of his own accord, confessed a judgment to his trustees for the sum of two thousand and twenty-nine 63-100 dollars (\$2,029 63). In the defendant's answer it is stated, (and as the Court understood, was so conceded,) that "this confession of judgment was executed in the country before his (J. W. Read's) own solicitor, and in the presence of his wife, and with her full knowledge." Further, it is stated that "this confession was arranged by the said James W. Read and his wife, the said Caroline," &c. Taking into computation the original price paid by James W. Read for the articles of property above referred to, and thus claimed and received

by Mrs. Read after his death, the amount

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for which *the judgment was thus confessed rather exceeds the balance of the trust funds, for which the master regarded the said James W. Read as at that time chargeable. The intestate, in his actual situation, had no conceivable motive to diminish the amount for which he was about to give a security to his trust estate. The various articles of property in which re-investment had been made were before him. It must have been as well known both to his wife and himself, to which of them the trust character attached, and the deficiency of the trust fund, for which he was, therefore, accountable. In confirmation of this view, Mrs. Read, after the death of her husband, (as the master reports,) rented out the Morris island property, and subsequently conveyed the same to a purchaser, from whom she received the proceeds. She also held possession of Clarinda, whom she carried with her to Charleston, and there hired her out; and this slave afterwards died while in her employment, or under her control. Several other of these articles she afterwards sold or disposed of, and among them, of the carriage, horses, &c., which she had designated, in the list given to the manager, as having been purchased "by J. Withers Read for the use of his wife and self." Furthermore, the present plaintiff in her right, demanded payment of the promissory note given by James Smith Colburn, and subsequently received satisfaction of the same from him. Unless Mrs. Read, as the survivor, had been entitled, under the terms of the settlement, to these several articles of property, she had no authority to receive, dispose of, or appropriate the same, nor had the legal representative of the intestate's estate any excuse for permitting it to be done.

But, on the death of her husband, Mrs. Read had the right to demand of the trustees an account of any portion of the corpus of the trust estate, which her husband had been permitted to receive, and which he had failed properly to re-invest or appropriate; and the trustees had a correspondent right to account from the estate of the intestate. With a full knowledge of this, and knowing

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too, the circumstances under *which the confession of judgment was given, and the purposes for which it was given, Mrs. Read, more than twelve months after the decease of her husband, to wit: on 15th July, 1852, received from the defendant, J. Charleston Read, his own bond for the full amount of the said judgment and interest. The caption of the receipt run as follows: "Mrs. James Withers Read, in account with J. Charleston Read, Jr., trustee;" and after charging the amount of the judgment and interest, and crediting an account paid or allowed to the solicitor, "Received, Charles-

ton, July 15th, 1852, from J. Harleston Read, one hundred and eleven 25-100 dollars, in full for balance of interest of the above-mentioned judgment, also his ——— for \$2,029 63, in full of the principal of the same, as per statement above." Signed, "Caroline L. Read." The defendant, in his answer, says that "at the time of giving his bond, this defendant was under the most certain conviction that he was making a full and entire settlement of his trust with the complainant, and nothing was intimated on her part, that she either expected or demanded any further account, or that she had any other claim against the said James W. Read and this defendant; and defendant then believed that she considered as he did—that the settlement was final and conclusive, well understood and apprehended by her, and entirely acquiesced in on her part. Nor did defendant ever hear of any dissatisfaction on her part until after her intermarriage, &c., and then not until the lapse of some time after the marriage," &c.

The bond thus given by the defendant to Mrs. Read in July, 1852, was payable in one and two years, with interest from the date. On 20th July, 1853, the plaintiff, who had in the meantime intermarried with Mrs. Read, received from the defendant the annual interest on the bond, and on 30th September of the same year, he received full payment of the bond, which was thereupon delivered up to be cancelled. On 21st June, of the same year, the plaintiff had also received payment from James Smith Colburn of the

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*note, which had been given by him to the intestate, James W. Read. Until nearly two years after the arrangement of July, 1852, and nearly eight months after the final payment of the bond, no proceedings were instituted against the defendant.

It is not suggested that in the meantime any discoveries had been made, or any new light shed upon the condition of the parties.

Upon a full review of the transactions of the several parties, the Court is of opinion, that the plaintiff's bill should be dismissed, and it is so ordered and decreed.

The complainant appealed on the grounds:

1. Because there was no sufficient evidence of any final settlement between the complainant's intestate and the defendant.

2. Because, even if the dealings of the parties were intended as a final settlement between the trustee and her cestuy que trust, it is respectfully submitted that this would not have barred an account, or entitled the defendant to have the bill dismissed, unless, 1st, It had been consummated by a release, under seal; or, 2d, There had been such a lapse of time as would authorize the application of the statute of limitations; or, 3d, The settlement had so changed the condition of things, as to render it inequitable to subject the defendant afterwards to an account.

3. Because, upon the examination of the report and testimony, it does not appear that the purchases and expenditures referred to in the circuit decree, to support the settlement, were made on behalf of the trust estate, but were in fact purchases made by James Read personally, and constituted no portion of the trust estate.

Mitchell, for appellant.

Simons, contra.

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*PER CURIAM. We concur fully in the excellent decree of Chancellor Dunkin, and, for the reasons therein given, it is affirmed.

O'NEALL, C. J., and JOHNSTON and WARDLAW, JJ., concurring.

Decree affirmed.

11 Rich. Eq. *296

*DANIEL JEWELL and Others v. BENJAMIN JEWELL and Others.

(Charleston. Jan. Term, 1860.)

[*Executors and Administrators* ⇨ 473, 474.]

To a bill, against an administrator, for account of the estate of the intestate, received by a deceased agent and attorney of the administrator and heirs, for whose professional services a large amount was claimed, *held*, that a representative of the attorney was a necessary party to the bill.

[*Ed. Note*.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2042; Dec. Dig. ⇨ 473, 474.]

[*Account* ⇨ 7.]

It was the agent of B, an administrator, to receive the rents of a certain lot. After some years, a son of B claimed the lot as his own, and received the rents for many years, but permitted his father to use them; *held*, that the son was liable to account to B for the rents received by him.

[*Ed. Note*.—For other cases, see *Account*, Cent. Dig. § 21; Dec. Dig. ⇨ 7.]

[*Executors and Administrators* ⇨ 131.]

Where an administrator receives, himself or by agent, the rents of real estate of the intestate, though his sureties may not be, he is liable to account to the heirs for the rents thus received.

[*Ed. Note*.—Cited in *Kinsler v. Holmes*, 2 S. C. 494.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 542; Dec. Dig. ⇨ 131.]

Before Dunkin, Ch., at Charleston, June, 1858.

This case will be understood from the reports, exceptions and circuit decree.

The first report of the master, Mr. Gray, filed on the 20th June, 1856, is as follows:

The order of Chancellor Dargan, on the 11th March last, after directing a sale of the house and lot at the corner of East Bay street and Unity alley, and providing for the distribution of the sale, proceeds to direct the master to take the account of the defendant, John Meyer, the tenant of the house, for the rent due, and to receive the same and distribute the same as the sales-money.

Also, that the master take and state an account with Benjamin F. Hunt, the defendant, of the rents received, or to be accounted for by him. And also, to take and state the account of the administrator, Benjamin Jewell, with the estate of his intestate in South Carolina, and to receive testimony as to the

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administration *and distribution of the estate in Louisiana, and report the same.

I respectfully report my investigation of the matters so referred to me in the order of time. First, as to the administration account of Benjamin Jewell, with the estate of Benjamin Jewell, the elder, in South Carolina. I find that the said administrator executed his bond and surety to the ordinary for Charleston district, on the 27th March, 1829, in the penal sum of \$8,000. There does not appear to have been any inventory of the estate made by the administrator; and the estate of Benjamin Jewell, the elder, in South Carolina, as far as I can discover, consisted of the house and lot at the corner of East Bay street and Unity alley, and of eleven shares in the Union Insurance Company of South Carolina.

I find that the administrator applied to the ordinary, by petition, on the 15th June, 1834, for leave to sell the said shares, for the purpose of distribution; and on the 25th of the same month, in that year, leave to sell them was granted by the ordinary. I further find that the administrator passed his accounts before the ordinary, commencing the 23d June, 1829, to the 6th April, 1832, showing a balance to the credit of the estate, on the last-named day, of nine hundred and fifty dollars eighteen and a quarter cents, (\$950 18¼,) a copy of which is herewith filed. In stating an account with the administrator, I have charged him with this balance, from 6th April, 1832, with the rents of the house from that time, and the dividends on the Union Insurance shares, up to the time when he obtained leave to sell them, viz: in 1834; I have, then, charged him with the sales of these shares, at the then market value, viz: \$84 each, amounting to \$924; I have given him credit for the taxes and insurance of the property, from year to year, and have charged him with interest on the annual balances, to the 6th April, 1845, when the rents passed into other hands, so that the amount due by the said administrator, on the 5th

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June, 1856, is seventeen *thousand seven hundred and eighty-three dollars, thirty-five cents, (\$17,783 35,) as will appear by the account herewith filed.

I further report, that I have stated an account with Benjamin F. Hunt, Jr., for the rents of the said house, from the 6th April, 1845. From an inspection of the tax returns, I find that the house and lot have been returned as the property of the said Benjamin F. Hunt, Jr., from 1846 to 1852 inclusive,

before which time they had always been returned as belonging to the estate of Jewell. I have charged him with the rents of the house from the 6th April, 1845, to 16th June, 1854, at the rate of \$300 per annum, for which his receipts have been produced, and have credited him each year with the taxes and insurance, and have charged interest on the several balances, so that the amount due by the said Benjamin F. Hunt, Jr., with interest to the 6th June, 1856, is \$8,549 48. The rents from the 16th June, 1854, to July, 1855, at an increased rent of \$27 50 per month, were received by Mr. M. Goldsmith, as agent of B. F. Hunt, or for estate of Jewell.

I further report, that I have received from the tenant of the house, the rent from the 16th July, 1855, to the 8th April, at the rate of \$27 50 per month, amounting to \$240.

And lastly, I report, that no testimony has been submitted to me as to the administration of the estate in Louisiana.

Exception to the report of master Gray, in behalf of Benjamin Jewell and B. F. Hunt, and of other defendants:

Because the said report was made up and filed after the above-named defendants had filed their answers, and neither they nor their solicitors had notice to attend any reference before the master previous to the filing of the said report.

Agreement in This Case.

It is agreed between Mr. Campbell and Mr. Northrop, that Mr. Gray shall reconsider his

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report of 20th June, 1856, and *that Mr. Northrop shall have the right to file exceptions to said report as if it had not been filed; and that it shall be considered as open in all respects, except that whatever report shall finally be made by Mr. Gray, shall be considered as bearing date on the 20th June, 1856.

References to close and report to be made up as early as practicable, Mr. Northrop engaging to avoid all delay.

(Signed) Jas. B. Campbell,
C. B. Northrop.

Charleston, 16th February, 1857.

Exceptions in behalf of Benjamin Jewell to the report of James W. Gray, master in Chancery:

I. That in the account stated against Mr. Benjamin Jewell, he should not have been charged as administrator of his deceased father, with any of the rent of the real estate.

1. Because there was no evidence that he ever authorized any one to collect the rents on his account as administrator; for, as administrator, he had no concern with the real estate, and he never received any rents.

2. Because it was in evidence that all of the said rents were actually received by the late Benjamin F. Hunt, who was the attorney of the heirs-at-law of the intestate, for whom he conducted the litigation, affecting their rights to said real estate and their

status as legitimate children and heirs of the intestate.

3. Because the evidence before the master showed that the late Colonel Hunt managed the said real estate for the heirs of Jewell, who had entrusted him with the prosecution of their rights; and that the said Benjamin Jewell never assumed any authority, or exercised any trust, in respect to the real estate, except as one of the co-heirs of his deceased father.

II. That it appeared, from the evidence before the master, that the said Colonel Hunt claimed to appropriate all he had received in payment for his professional services, and

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for *his advances, as the attorney of the distributees and heirs-at-law of the intestate, who were as much concerned in the same as this defendant, and as well able to protect their interests; but that the importance of the litigation to the whole family was such that they were all in the power of their said attorney.

III. That, even if the defendant, Benjamin Jewell, could be held responsible, as administrator, for the rents of the real estate of his intestate, it appeared in evidence that all of the rents were received by Hunt & Shand, and their successor, Benjamin F. Hunt, who were lawyers, in good standing, and that the defendant, who was residing in another State, was justified in employing them as professional men, and could not be made responsible for the losses occasioned by any pretended defalcation of his attorneys, in the absence of fraudulent collusion, which is charged in the bill, but disproved by the evidence.

IV. That there was no evidence before the master, in support of the charges of fraud against this defendant; that it was proved that he never received any of the rents of the real estate; and that there was nothing in the evidence to warrant the master's charging him with interest, or with interest upon a calculation with annual rests.

Exceptions in behalf of Benjamin F. Hunt, one of the defendants, to the report of James W. Gray, master in Equity:

1. That after the coming in of this defendant's answer, and the evidence before the master, there was no ground for any account whatever against him.

2. That at the time of the filing of complainant's bill of complaint, the said defendant was not in the possession of the property, of which the complainants prayed a partition, nor in the reception of the rents.

3. That, even if it should be conceded that this defendant had, for a period of years, intruded upon the real estate of the complainants, and his codefendant, who were the legal

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*owners, there is no evidence that he did so, as their confidential agent, or that there was any relation of trust between him and them, which could subject him to an account in chancery, as a defaulting trustee.

4. That it appears, from the answer of this defendant, and the evidence of Mr. Phillips and Mr. Goldsmith, that his only connection with the property in question, was under the direction of his deceased father, who was, up to the time of his death, the attorney of the heirs of Jewell; and, with their consent, had the entire control of the property, and that he claimed, without objection from them, to be entitled to treat it as his own, on account of his professional services and advances.

5. That the master has charged this defendant, in the account for rents received by him, with rent from the 6th of April, 1845, until 6th April, 1853, or for eight years' rent, at the rate of \$300 yearly; whereas, the receipts given by this defendant, in evidence, only show that he received the sum of \$375, and it was proved that up to ——— Mr. Phillips, the clerk of Col. Hunt, actually received all of the rents, and credited them to Col. Hunt; and that Mr. Goldsmith received the rents, in the same way, from January, 1853, after which time it is not pretended that this defendant ever received any portion of the rents.

6. That the master has charged this defendant interest, with annual rests, as if he were a defaulting executor, or trustee, whereas, there is no pretence that he ever had any such relation to the parties in interest.

Second Report of the Master, Mr. Gray.

Since the filing of my report of the 20th June, 1856, I have been attended by the solicitors of the parties, and taken the testimony of several witnesses, and have investigated the claim of Benjamin F. Hunt, for professional services rendered to the parties in the cause.

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*After much consideration of the testimony and the character of the cause, I have concluded that my former report ought to be modified in several important particulars.

From the testimony given in relation to the claim of Benj. F. Hunt, I am satisfied that his services were of the greatest importance to the parties interested in the estate, and I have concluded to allow for the claim, five thousand and ninety-four dollars forty-three cents, (\$5,094.43,) to be paid out of the assets chargeable to Benjamin Jewell, the administrator of the estate, which were in Mr. Hunt's hands, as his attorney. This has rendered necessary a re-statement and modification of the account filed with the former report.

In taking the account with the administrator, under this new aspect, I have charged him with the monies received, from time to time; but not with the interest on the annual balances, as the items constituting the claim of Mr. Hunt run through the long space of time in which the important cause of Jewell v. Jewell had been pending in the various

courts. After stating the account in this matter, I find there is due by the administrator, Benjamin Jewell, Jr., to the estate, two thousand seven hundred and eighty-six dollars forty-eight cents, (\$2,786.48,) as per account A, herewith filed.

In taking the account with Benjamin F. Hunt, Jr., the defendant, I find, as stated in my former account and report, that the rents of the house on East Bay were received by him from 1845, and that the tax returns from 1846 to 1852, inclusive, were made in his name, as his property; and his receipts for the rents, from 6th April, 1845, to 16th June, 1854, have been exhibited to me at the rate of \$300 per annum. I have taken this account in the manner stated in my former report, charging interest on the annual balances, and crediting each year the taxes and insurance. In the former report, I found that the balance stated in this account was due by Benjamin F. Hunt, Jr., as his acts, in relation to the property served to indicate

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that he treated it as his own. *But I have re-considered this matter, and from the testimony since produced, am disposed to think that this amount ought also to be charged to the administrator. Mr. Phillips, who was clerk in Col. Hunt's office from 1841 to 1849, testifies, that with the consent of Col. Hunt, these rents were received by him, and applied to the payment of his salary as clerk. Another witness, Henry Goldsmith, testifies, that to 1853, the rents were collected by Mr. Whitney, and applied to the payment of rent due by Col. Hunt to Dr. Geddings; and that the witness afterwards collected the rents, and accounted for them to Col. Hunt; also, that he made the return in the name of B. F. Hunt, Jr., beginning in 1853, as he then found it made, and so he made it at the direction of Col. Hunt. It would seem then that B. F. Hunt, Jr., did not derive any benefit from the rents, and his answer corroborates the fact.

I find that the amount due on this account is three thousand nine hundred and thirty-seven dollars fifty-five cents (\$3,937.55); and if I am right in the above conclusion, the administrator will be liable for

Account A.....	\$2,786 48
And for the account B.....	3,937 55
Amounting, together, to.....	6,724 03

I further report, that the rents from the 16th June, 1854, to the 16th July, 1855, at an increased rate of \$27.50 per month, were received by Mr. Goldsmith, as agent of B. F. Hunt, or for the estate of Jewell; and that one quarter's rent was paid to Mr. J. B. Campbell. The rents from the 16th July, 1855, to the 16th April, 1858, have been paid to me by the tenant, John Meyer, now deceased, and by Mr. Meyer, the present occupant, at the rate of \$27.50 per month.

I further report, that at the time of filing the bill, the 4th September, 1855, John Meyer was in possession of the house, as tenant, who declined paying the rents to any person

until ordered by this Court, and these rents were paid to me as above mentioned.

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*I further report, that of the eight distributees of the estate of A. Bondy and wife, and her children, and Jane E. Jewell and her family, by their several answers, and Mrs. Juliana Rickenbacker, as appears from her letter to her brother, dated 1st April, 1855, which is in evidence, object to any account being taken against the administrator; so that the liability of the administrator will be reduced by their shares, amounting to three-eighths, and Benjamin Jewell's share, one other eighth, to one-half of the sum reported.

I further report, that since the former report, I have ascertained that in addition to the other assets of the estate, there are two shares in the Union Bank of this city, standing in the name of B. F. Hunt, attorney of Benjamin Jewell, on which Col. Hunt has received thirty-seven dividends, amounting to \$105, which I have included in account A, and there are still in the bank, undrawn, fourteen dividends.

Memoranda of Causes in Which Col. Hunt was Engaged for the Jewells.

1830. July 2.—Obtaining letters of administration on the estate of Benj. Jewell.

Defending administration on citation before the ordinary, when administration to B. Jewell was revoked and awarded to Simon Magwood.

1833. Trial of the cause of Jewell and Magwood, in the Court of Common Pleas, on appeal from the ordinary, resulting in verdict for the plaintiff, Benj. Jewell.

1834. April.—Same cause on appeal, confirming the verdict below, and re-establishing the administration of B. Jewell, and thereby settling, in the State Courts, the legitimacy of Benj. Jewell and his family.

1834. December.—Ejectment suit, Roe, dem., S. J. Jewell et al. v. Benj. Jewell, for the recovery of the property at the corner of Unity alley and East Bay, in the United States District Court, at Charleston, S. C.

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*1834. The case of Sophia Storne and husband, for dower, v. James Preston, brought in the name of Jno. B. Thompson, in which Messrs. Petigru and Lesesne pleaded, first, *ne unques accouplie*, and second, *elopement and adultery*—resulting in non-suit.

Judgment on file in the Court of Common Pleas.

1843. The case of Jewell v. Jewell, as reported in 1 How., 219 to 234, in which the judgment of the Circuit Court was reversed as to the ruling of the testimony, which had been for the defendants, Col. Hunt's clients.

1843. Col. Hunt represented his clients in a suit brought in the Court of Common Pleas, (State,) and subsequently in the new trial in the United States Court, in which plaintiffs were non-suited in April, 1843.

1843. April.—Sarah J. Jewell and others

v. Benjamin Jewell and others. Bill in chancery, filed by Ashby, solicitor, and discontinued.

Testimony.

J. L. Petigru, sworn, says of the inception of the case of Jewell, he is ignorant. The decisions in the Court of Ordinary, and the Court of Law had been made, and Jewell had got the administration of the estate before the witness was retained. Witness came in, on the retainer of the widow, who desired him to recover the house in Charleston. Witness brought ejectment. Witness told her that, as the estate was in Louisiana, they had better decide the question there. But the Louisiana lawyers told her, that the question must be decided according to the law of the place where the supposed marriage took place, and that the decision here would be of the last importance in ascertaining the heirs of the Louisiana estate, which was understood to be large. The first trial took place in the Circuit Court of the United States, when Judge Lee presided; it was argued by Mr. Legare and witness on one side, Mr. King and Mr. Hunt on the other,

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and resulted in a mis-trial. Judge Lee said he had never heard a case better argued. Witness thinks Col. Hunt argued the case with great skill and ability. He prepared for a second trial with might and main, and when it took place, Judge Wayne presided. It was argued by Mr. Legare and witness on one side, and by Mr. Hunt and Mr. King on the other. The questions involved were of the greatest magnitude, going to the examination of the very institution of marriage, and the conditions necessary to its validity. The Judge charged against us throughout. Witness took exceptions to his charge, and to his ruling of testimony. The case is reported in 1 Howard. When the case came on in the Supreme Court, Judge Story was not there, and the other Judges were equally divided on the great question about what is essential to the contract of marriage. The case was sent back for error of the Judge in ruling out evidence, which he ought to have received. The case was argued in the Supreme Court by Mr. Legare, and, witness thinks, Col. Hunt. Witness prepared very extensively for the last trial. We had got but a short way in the evidence, when Judge Wayne ruled out a very important piece of testimony. Witness was so annoyed by this ruling, that he told the crier to call the plaintiff, and upon the Judge asking the reason, replied, that he could not afford to go to Washington every year to settle points of evidence. Witness intended, at the time, to renew the action in the State Court, but nothing further was done, as he understood that his clients had lost all their property. The case was in Court many years. Witness received from Mrs. Jewell \$200, and he spent more than that for the expenses.

Witness cannot say what Col. Hunt's services were worth. If Col. Hunt's client, on the termination of the case, had given him \$5,000, witness would have thought it liberal, and would have seen no objection to his taking it. If witness's clients had offered him \$5,000, and he had thought they could afford it, he would have accepted it, with-

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out any feeling of impropriety; but should have felt bound to give Mr. Legare his share.

John E. Phillips, sworn, says, upwards of fifteen years ago he commenced staying in Col. Hunt's office, in the year 1842—probably before. He several times collected the rents, say, generally collected the rents of the East Bay house. Witness accounted to Col. Hunt, when he was agent, for the rents, and, by leave of Col. Hunt, received them on account of his salary. Thinks the rent was \$500 per annum, and witness's salary was originally \$300, and afterwards more. Thinks B. F. Hunt, Jr., became copartner with his father soon after his admission to the bar. Thinks about five years after witness entered Col. Hunt's office. Thinks he left Col. Hunt's office about eight years ago. Was not there as late as 1851, as he thinks. Has no recollection of having ever returned this property for the taxes. Witness knows that all the rent of the house, up to the time of witness' leaving Col. Hunt's office, was applied to his salary, as clerk. During that period, witness can say, that no one received rents but himself. Cannot say the arrangement, that he was to be paid from this rent, commenced with entrance into the office, but a year or two afterwards.

H. Goldsmith, sworn, says he was engaged by Col. Hunt, as out-door clerk, in 1850, and entered his office in 1851, and continued until after the office was taken from him. Thinks in 1852 was the first he returned the property for taxes, the only guide he had for the way of making the return, which was in the name of B. F. Hunt. He made the return by direction of B. F. Hunt. Witness saw very little of B. F. Hunt, Jr., at his father's office, while he was there; was there occasionally, but was seldom engaged in professional business there. They were partners. The books of the office were in the name of Hunt & Son. Witness commenced collecting the rents immediately after Whitney's receipt, which was in 1853. Witness followed the form of Whitney's receipt for the two next receipts,

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and afterwards receipted in the name of Col. Hunt. Witness believes that the rent which Whitney received went to Dr. Geddings, to pay Col. Hunt's rent. Witness collected the rents after that time, and accounted to Col. Hunt, or his order. Witness has tax receipts and vouchers for repairs done to the house. In 1853 he returned it as property of B. F. Hunt; in 1854, 1855 and 1856, as estate of B. Jewell. Witness accounted to Col. Hunt for all the rent, except one quar-

ter's rent, which he paid Mr. Campbell, by virtue of a letter which Mr. Campbell showed him. That was a letter from B. F. Hunt, Jr., authorizing Mr. Campbell to receive the rents.

(The letter is produced by Mr. Campbell, on the call of Mr. Northrop.)

Col. Hunt always acted for his son, as if it were his own business.

Exceptions to the Report of Master J. W. Gray, of June, 1858, on Behalf of the Defendant, Benjamin Jewell.

1. Because Benjamin Jewell, as administrator of the personal estate of his deceased father, was not responsible for the rents of the real estate of his intestate, except for such sums as were actually received by him.

2. Because, if Messrs. Hunt & Shand were authorized to collect rents, in the name of the administrator, and charge the same in his account with the ordinary, then he should be only chargeable with the balance of the last account rendered by them, before the ordinary, viz.:

6th April, 1832	\$ 950 18
And the following sums, received by Col. Hunt, for him, as administrator, viz.:	
Dividends, April, 1833	93 50
" " 1834	93 50
" " 1835	93 50
Sales of eleven shares Insurance stock	924 00
Dividends on two shares Union Bank	105 30
	<hr/>
	\$2,259 98

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*which sums he was warranted in leaving in the hands of Col. Hunt for the expenses of litigation.

3. Because there were no circumstances in evidence to justify the charges of interest upon the balances of the account, as reported by the master.

4. Because the account taken in exhibit B, filed with the report of the master was for rent collected by Col. Hunt, who was, during the whole period, and long before, the attorney of the heirs of Benjamin Jewell, Sr., to whom the property belonged. And this defendant, as administrator, had no connection whatever with the real estate, or Col. Hunt's management of the same.

5. Because, even if this defendant could be held responsible for the rents collected by Col. Hunt, there were no circumstances in evidence which would justify the charges of interest, or the punitive charges of interest, on the annual balances.

6. Because the whole claim of the complainants against their co-heir, Benjamin Jewell, as administrator, is stale and unjust; the last account before the ordinary having been filed more than twenty-three (23) years before the filing of the bill, and the ejectment suit for the recovery of the property having been brought against all of the heirs of the intestate, and defended for them jointly, by Col. Hunt, more than twenty-one (21) years

before the filing of the bill, and these pretended claims for rent.

Exceptions before the Master, by Complainants.

1. Because he has allowed to the administrator credit for the large sum of \$5,094.43, for the professional services of Col. Hunt, upon insufficient evidence of such services, and of their value, and of the right to charge the same, in his accounts, to the estate of his intestate.

2. Because, in his account with the administrator, he has stated the interest account

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without annual rests, and the *account appended to the original report, is a correct account and the same ought to be confirmed.

These exceptions were heard and overruled by the master for the reasons given in his report.

The complainants renew their exceptions, heretofore taken, before the master, and further except as follows:

1. Because the account with the administrator, Benjamin Jewell, is incorrectly stated. It should have been made up with interest on both sides, and annual balances in the usual and established way of accounting in this Court; and the account appended to the first report, in this case, is correct in form, and whatever set-off, or credit, the administrator may be entitled to, ought to be credited to him in like manner and form, and then, a final balance being struck, will show a fair and just account.

2. Because the master, by his report, has discharged B. F. Hunt, Jr., from all liability for the rents of the premises, at the corner of East Bay and Unity alley, while in his possession, and claimed by him as his own property.

Dunkin, Ch. The exceptions to the master's report cannot well be understood without some preliminary statement of the facts. These are principally derived from what is termed "the paper book," in Jewell v. Jewell, reported in 1 How., 219; as well as the report of Judge Martin, and the opinion of the Appeal Court, by Judge Harper, in 1833-1834, in Jewell v. Magwood, Rich. Eq. Cas., 113, together with the evidence taken by the master in this cause.

About the year 1794-5, Benjamin Jewell resided in Savannah, where he kept a grocery store. In 1795, Mad. Prevost, a French refugee, from St. Domingo, with her family, arrived in Savannah. Sophie Prevost was her daughter. According to the evidence, a marriage ceremony afterwards took place between Benjamin Jewell and Sophie Prevost.

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As he *was an Israelite, and she a Roman Catholic, their union was, according to the Jewish rules, irregular. But they lived together, as man and wife, for several years, in Savannah. About 1804, they removed to

Barnwell district, and resided some two years, about ten miles from the Court House. They then went to Charleston, where they lived together until about 1812. During this interval, they passed as husband and wife, and eight children were born to the marriage. On the other hand, in March, 1796, while they were living in Savannah, Sophie, under her maiden name of Sophie Prevost, executed a paper, in the presence of two very respectable witnesses, in which she acknowledged the receipt of \$500 from Benjamin Jewell, as well in satisfaction of a suit instituted against him for breach of promise of marriage, as also in payment of past cohabitation and of future cohabitation. And, on 10th December, 1810, during their residence in Charleston, a deed of separation between them was executed, reciting their past cohabitation, and providing for the payment to her, by the name of Sophie Prevost, of the sum of \$3,000, and a bill of sale of four negroes, (by name,) and some scheduled furniture. She executed receipts for the same, as Sophie Prevost, on 11th January, 1811, and the papers were duly proved and recorded in the Secretary of State's office, on the day last mentioned. It was also provided by this instrument, that, of their eight children, she should retain three, to wit: Juliana, Daniel and Washington, and the father should take Benjamin, Joseph, Hannah, Hetty and Delia.

In June, 1813, Benjamin Jewell intermarried with Sarah Isaacs, a Jewess, of respectable family, in Richmond, Virginia. They resided in Richmond until the year 1820, and perhaps, rather later, when they removed to the State of Louisiana. He continued a resident of that State until his death, which took place in the latter part of 1828. In the meantime, and during the lifetime of Benjamin Jewell, to wit: about the year 1820, Sophie

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had intermarried with *Joseph Storne, of Charleston, whose name she ever afterwards bore, and whom she survived.

It is stated in the pleadings, that Benjamin Jewell died, possessed of a large estate in Louisiana, which, upon his decease, fell into the hands of his reputed widow in that State, and his children by her. He owned, in South Carolina, a lot of land, with a wooden house thereon, situate at the corner of East Bay and Unity alley, and also eleven shares in the Union Insurance Company. The late Col. Simon Magwood was his agent to receive and remit the rents and dividends of stock, and the receipts of Benjamin Jewell, as late as 1828, were established by Charles A. Magwood.

At the time of Benjamin Jewell's death, some of the children, by his marriage with Sophie Prevost, were resident in Louisiana, and some in South Carolina. The evidence does not enable the Court to fix the residence of each. But the two plaintiffs, Daniel Jew-

ell and Juliana Rickenbacker, were residents of South Carolina—the former living in Charleston, the latter in Charleston or in Orangeburg. The defendant, Benjamin Jewell, was, at that time, a resident of the parish of Point Coupee, in the State of Louisiana. Soon after the decease of his father, he repaired to South Carolina, as he stated in his answer, and on 27th March, 1829, letters of administration of the estate were granted to him by the ordinary of Charleston district: "that he appointed Messrs. Hunt and Shand to act for him, as his agents, in the administration of his father's estate, and returned home to Louisiana."

Very soon after the grant of administration to the defendant, application was made by Col. Simon Magwood, as agent, or attorney, of Sarah J. Jewell, to the ordinary, for the purpose of having the defendant's letters revoked, on the ground that he was of illegitimate birth, and to have the same granted to the applicant, as attorney of the lawful widow of Benjamin Jewell, deceased. A decree was made by the ordinary, in accordance with the prayer of the petition, from which decree an appeal was taken to the Court of

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*Common Pleas. The litigation, thus commenced, was actively prosecuted in the various Courts until 1841 certainly—perhaps until 1843. It involved questions, both of law and fact, of great interest and importance, as will be seen by the records to which the Court has referred. But the result in this State was not so important for the amount involved, as for establishing the status of the parties, and also from its bearing or influence on the Louisiana estate. Mr. Petigru (who represented the widow in the United States Court) said, "that the Louisiana lawyers had told his client, that the question must be decided according to the laws of the place where the supposed marriage took place, and that the decision here would be of the last importance in ascertaining the heirs of the Louisiana estate, which was understood to be large."

The suit in reference to the right of administration, was finally determined in favor of the defendant, Benjamin Jewell, by the judgment of the Court of Appeals, on 14th April, 1834.

Proceedings in ejectment were then instituted in the Circuit Court of the United States in behalf of Sarah J. Jewell, and her six children, for the premises at the corner of Unity alley. On 24th December, 1834, the declaration and notice were served on Claus Dascher (the tenant) and Daniel (one of the present plaintiffs). A consent rule was taken out by which Benjamin Jewell, Samuel Rickenbacker, and Juliana, his wife, (another of the present plaintiffs,) Jacob Meyers, and Delia, his wife, Daniel Jewell and Washington Jewell, were made defendants in place of the nominal defendants; and a plea of not

guilty was filed by Benjamin F. Hunt, attorney, in behalf of all the defendants; including, also, Verg Aigne, and Hannah, his wife, and Joseph Jewell.

A detailed narrative of these proceedings appears in the writ of error finally sued out on the 11th May, 1841, after judgment on verdict for defendant. It appears that there had been two mis-trials prior to the verdict. Mr. Petigru's description of the diffi-

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culties in the cause, and the forensic *ability exhibited in the defence, cannot be abridged. It appears to have finally terminated in a non-suit in April, 1843.

On 4th September, 1855, these proceedings were instituted in behalf of Juliana Rickenbacker, Daniel Jewell and Stephen N. Berry, and Sarah J., his wife, alleged to be the daughter of a deceased child of Benjamin Jewell, which child had married one — Mitchell, and had since died. The object is to have partition of the premises at the corner of East Bay and Unity alley, and an account of the rents, as also an account of the administration of Benjamin Jewell, (the defendant.) The premises have been sold by the master, under the previous order of the Court, and no objection was stated to partition among those of the parties who were the heirs of Benjamin Jewell, deceased, and Sophie, his wife.

In reference to the rents of the premises, the bill charges that, down to 1845, they were received by the late Benjamin F. Hunt, and since that period by his son, Benjamin F. Hunt, who is made a party defendant, and that the premises are now in possession of John Meyer, who is also made a defendant. Benjamin F. Hunt, the elder, departed this life in 1854, or early in 1855, but no legal representative is a party in this case.

On 16th June, 1856, an order was made by Chancellor Dargan, in this cause, as follows: "On motion of Northrop and Allemon, solicitors for Benjamin Jewell and B. F. Hunt, defendants in this cause, and, after hearing Mr. Campbell, complainant's solicitor, ordered, that the decrees pro confesso, heretofore taken against them, be set aside, and that they have leave to file their answers to the bill of complaint."

The bill charged the defendant, Benjamin Jewell, as administrator of the estates, both in Louisiana and South Carolina. The answer filed—June, 1856, denies that he ever administered in Louisiana, or ever received any part of the estate in that country—admits that he administered in South Carolina, and that he was informed by his agents,

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*Messrs. Hunt and Shand, that the estate consisted of \$950 18, in their hands, besides eleven shares in the Union Insurance Company, (afterwards sold by them for \$924,) and a lot of land and wooden house thereon; that he never received any part of the estate

except \$140 or \$150 from Mr. Shand; that, "on applying to Col. Hunt for a rendition of the accounts, he was informed that the amount of property was not even sufficient in amount or value, to remunerate him for his professional services to the estate and to the heirs; that respondent, knowing that said services had been very valuable, believed him; that Col. B. F. Hunt kept all he recovered of said estate in South Carolina, in payment of his professional services."

No evidence was offered to invalidate the material statements of the defendant's answer, that no funds had ever been received by him. He was as much interested as any other distributee of the estate. The master's report proceeds on the assumption, well sustained by all the circumstances, that whatever sums were received were retained by Col. Hunt, and that no part of the same came to the hand of the defendant, Benjamin Jewell.

The master's report is filed 12th June, 1858. The first exception of the defendant, Benjamin Jewell, is because, as administrator, he was not responsible for the rents of real estate thus received. The Court is of opinion, that this exception is well taken. Upon the death of Benjamin Jewell, the elder, the lot on East Bay vested in his heirs-at-law. The plaintiffs were residents of South Carolina—the defendant a resident of Louisiana. In taking charge of the real estate, (if he did so,) Col. Hunt was no agent of the administrator. His principal had no such authority, and could depute none. He had been appointed administrator by the ordinary of Charleston district, and, upon leaving the State and returning to his home, "he appointed Messrs. Hunt & Shand, as his agents in the administration." He is responsible for the acts of Messrs. Hunt & Shand in the

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administration of the per*sonal estate of his intestate, and no further. The plaintiffs being residents of the State, were more particularly capable of taking care of their own interests in regard to the real estate. It is very probable they were not unmindful of those interests. The plaintiff, Daniel Jewell, was the only one of the heirs of Benj. Jewell, deceased, who, in December, 1834, was served with a copy of the declaration in ejectment, "as being in possession of the premises, or claiming title thereto;" and Col. Hunt, immediately afterwards, in behalf of him and of the other heirs of Benjamin Jewell, deceased, entered an appearance and filed a plea in the proceedings in the United States Court. Thenceforth, in all the stages of the litigation, he was on record as attorney of the heirs. Col. Hunt was responsible to the defendant, Benjamin Jewell, as he was to the other heirs, for rents received by him; but Benjamin Jewell is no more responsible to the other heirs than they (and particularly the plaintiffs) were responsible to him for

any short coming on the part of Col. Hunt, their common attorney. The first, fourth and fifth exceptions of this defendant are sustained.

Then, in regard to the personal estate of Benjamin Jewell, deceased, the Court has not been furnished with a copy of the inventory, (if any were ever made,) nor with any copy of the account said to have been rendered by Messrs. Hunt & Shand, or by Col. Hunt, in behalf of the administrator to the ordinary, 6th April, 1832. The Court is unable, therefore, to judge whether it consisted entirely of personalty. But on 25th June, 1835, the Union Insurance shares (the only remaining personalty) were sold out, and that closed the receipts on account of the personal estate. Assuming the balance of the account of 1832 to be exclusively of personalty, the whole amount of personalty received by Col. Hunt was about twenty-one hundred and fifty dollars (\$2,150). And the last receipts of the defendant, as administrator, (through his agent,) was 25th June, 1835.

The only persons demanding any account

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from the de*fendant of the sum thus received by his agent, are the plaintiffs, Juliana Rickenbacker and Daniel Jewell. If Hetty Mitchell, had any claim, her personal representative would alone have a right to prefer it, and none such is before the Court.

The Court concurs, too, with the master, in his construction of the letter of the plaintiff, Juliana Rickenbacker, to her brother, the defendant, and which was produced in evidence on his behalf. It bears date, Orangeburg, April 1, 1855, and was manifestly written in reply to a letter of her brother, in reference to proceedings instituted, or about to be instituted, against him. The letter of the plaintiff must speak for itself. She speaks, however, of the agreement under which the suit was undertaken—that the paper was sent for her signature when she was in Alabama—that she was willing to agree to the terms, "if it did not interfere with you, (the defendant,) Joseph, or any of my brothers," that "she did not sign the paper sent for her signature, but had the papers drawn, as she thought, by a lawyer at Cedar Bluff," &c. It is manifest, that she understood the suit to be for the real estate. She says, "I have signed an instrument of writing, agreeing, when the property is placed in my hands, to give to Mr. C. one-third of the amount I receive," and she concluded by saying, "from what I can learn, Mr. C. has the property, at this time, in possession, and has paid tax for it: if so, why not contend for our right?" In the opinion of the Court, it would do great injustice to the author of this letter, to put any other construction upon it than that adopted by the master, to wit: that it was a disclaimer of any intention to demand any account from the defendant as administrator, or "to interfere with

him," but to secure her rights in the real estate, of which the solicitor employed by her, was, as she understood, then in possession. But it was due rather to this plaintiff, than important for the defendant, that the Court should have said thus much in regard to this correspondence. The second and sixth

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exceptions maintain the propositions, *that, under the circumstances, the defendant was guilty of no default in allowing the proceeds of the personalty to remain in the hands of Col. Hunt, and that the claim of the plaintiffs, instituted more than twenty years after the last receipt, is stale and unjust. In considering these exceptions, it should be borne in mind, that Col. Hunt was not only the agent of the administrator, (himself being a resident of Louisiana,) but he was also his solicitor to maintain his administration. When his right to the administration was sustained in 1834, by the final judgment in the State Court, the controversy in the United States Courts immediately commenced, in which Col. Hunt represented the interests of all the parties. It is not necessary to determine, with any precision, the value of Col. Hunt's services. The preliminary inquiry is, whether the defendant was guilty of any laches? Whether he was bound to do for others what he did not do for himself? Nor is this the precise inquiry. The plaintiffs made no complaint for more than twenty years after the last act of administration. Col. Hunt (alone able to have answered satisfactorily,) was already in his grave when the claim was preferred. The plaintiffs, Daniel Jewell and Mrs. Rickenbacker, with her husband, resided in the same community with him. The defendant was abroad. The Court is of opinion that the disclaimer of Mrs. Rickenbacker to charge her brother, the defendant, with any default, not only does credit to her social affections, but is founded on a just view of the principles of this Court. The second and sixth exceptions of the defendant are sustained. This judgment disposes of the remaining exceptions on the part of the defendant, and of all the exceptions on the part of the plaintiffs but the second, which is in relation to Benj. F. Hunt, Jr.

On this subject, the master concluded, from the evidence, that the rents were received by the agents of Col. Hunt, and were applied to his use, and according to his directions, and that the defendant, Benjamin F. Hunt, Jr., was not chargeable with them. This

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is the ground of the plaintiffs' second *exception to the master's report. The bill charges, among other things, that, about the year 1845, Col. Hunt delivered possession of the premises on East Bay to the defendant (his son), and allowed him to claim the same as his own; and that the defendant, "well knowing that he had, and could have no right or title, fraudulently and deceitfully combined,"

&c., that the plaintiffs "had applied to the said Benjamin F. Hunt, Jr., to deliver up possession and account," &c., "but that, under divers pretences and pretexts, he had evaded and refused their reasonable requests." The bill was filed 4th September, 1855. The answer of Benjamin F. Hunt, Jr., is explicit in the denial that he ever claimed the premises as his own, or did anything but as the agent of his father. Furthermore, a letter was in evidence, from this defendant to the plaintiffs' solicitor, and produced by him on notice from the defendant's solicitor. It is dated New York, 18th February, 1854, nearly nineteen months prior to the filing of the bill. From the tone and character of the letter, it would be inferred that he was writing to his own confidential adviser, or person charged with his interests. He says: "Having arrived here a few days since, I address myself again to settling my Charleston affairs. In the first place, I would like to settle the affair of Jewell's estate definitely. I claim no right to the property, and I do not think there is any matter on record, which can show any title in me. I do not think my father makes any claim to the property; and, as far as I am concerned, I don't see how I can be connected with it in any way." He then calls his attention to other matters, in which he was interested, and concludes by saying, "Schem and Jewell's business, I beg you would advise me how I can close in the speediest way." On the subject of the rents, the master incorporates, in his report, the substance of the evidence, which, as he says, is corroborated by the answer of the defendant, all showing that they were appropriated to the purposes of Col. Hunt, and that the defendant derived no benefit from them.

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*Taking into consideration the previous letter of the defendant, as well as his answer, and the parol evidence, the Court is of opinion that the conclusion of the master, exonerating this defendant, is well sustained. The exception is, therefore, overruled; and, as to Benjamin F. Hunt, styled in the pleadings Benjamin F. Hunt, Jr., it is ordered and decreed that the bill be dismissed.

It is further ordered, that the master's report, of June, 1858, be filed; and that the plaintiffs have leave, if they shall be so advised, to make the personal representative of Benjamin F. Hunt, deceased, a party in this cause. It is finally ordered, that the master report his proceedings under the orders or sale heretofore made, and also a statement of the rents of the premises, which have been paid into his hands; and that he also report upon the respective rights of the parties claiming to be interested in the fund, with leave to report any special matter.

The complainants, renewing their exceptions taken at the circuit hearing, appealed from the decree, as follows:

1. Because B. F. Hunt, Jr., is liable to account, in the usual form, for the rents received by himself or his agents, while he intruded upon the premises, and held the same as his own, without color of title.

2. The defendant, Benjamin Jewell, the younger, is liable to account to the complainants for the estate, real and personal, of Benjamin Jewell, the elder, received by himself, or by his authorized agents and attorneys.

3. The allowance to Benjamin Jewell, of the alleged claim of Col. Hunt, is irregular, and upon insufficient proof as to its amount. It is especially irregular to allow the large sum of \$1,000, "for services and advice as to suit in New Orleans," no proof of such services or advice, or even that there ever was such a suit, being offered.

4. If Benjamin Jewell is not held liable for the rents, then he cannot be allowed to

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apply the personal estate to pay for *litigation on account of the real estate; and there should be a separate account of the real estate, wherein it should be credited with rents, and charged with its own expenses of litigation, &c.

The defendant, A. B. Mitchell, appealed upon the same grounds as above.

Campbell, Dingle, for appellants.
Northrop, contra.

The opinion of the Court was delivered by

WARDLAW, J. We are of opinion that the representative of the late Benjamin F. Hunt should be made a party defendant in this cause. As agent of Benjamin Jewell, he is involved in all the matters of controversy, and especially as to the amount of compensation to which he is entitled.

As the case must be remanded to the circuit, and new inquiry and report be made by the master, we consider it prudent to refrain from amplification of the facts now before us, which probably may be materially varied by further investigation. Standing as the matter now does, all the grounds of appeal seem to have some merit. We do not perceive on what principle B. F. Hunt, the younger, can be exempted from liability for rents actually received by himself and agents, while he was in possession of the premises, claiming ownership. He now disavows title, but from April, 1845, to June, 1854, it appears by the reports of the master that he received the rents and returned the property to the tax collector as his own. It can make no difference as to his liability, that he appropriated the sums received by him to purposes of benevolence and filial duty. It may be that he was then an obedient and facile son of a dominant father, but he was of mature age, and practising law in partnership with his father, the agent of the administrator. It would render the administration of equity utterly indefinite and os-

collating, if liability were considered depend-

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ent on the easiness or kindness of disposition of the person pursued. The statute of limitations and the lapse of time would not avail this defendant, if pleaded, but it is enough to say that he makes no such defence.

We suppose, too, that the administrator of Benjamin Jewell is liable to account for any rent of the real estate of his intestate, received by himself and his agents. That he undertook the management of this real estate, and constituted Messrs. Hunt & Shand, as his attorneys in fact, for this purpose, are charged sufficiently in the bill, but with no great precision, and are substantially admitted in the answer. The primary duties of an administrator relate to the goods, chattels and credits of his intestate, and his sureties in the administration bond do not undertake beyond the faithful administration of the personality, but where he receives rents his personal liability is indisputable. The statute of 12 Geo. II, c. 5, 2 Stat., 570, making real estates liable equally with personality, for debts, has produced a very common interference of administrators with the renting of land; and it would be mischievous to hold that where they do interfere, they can take the rents to themselves, without responsibility.

Again, it seems to us that the large sum allowed to the administrator for the professional services of B. F. Hunt, the elder, proceeds on insufficient proof, and to a great extent is conjectural. It is manifest that he deserved large and liberal compensation, but the facts and principles on which his compensation was ascertained should be presented to the Court.

It is ordered and decreed, that the circuit decree in this case be vacated and set aside, and that the cause be remanded to the circuit, with direction to the plaintiffs to make the representative of B. F. Hunt, the elder, a party defendant, within three months, on pain of having their bill dismissed.

O'NEALL, C. J., and JOHNSTON, J., concurred.

Decree set aside.

11 Rich. Eq. *323

*NICHOLAS CULLETON v. THOMAS GARRITY and Others.

(Charleston. Jan. Term, 1860.)

[Trusts \S 151.]

Bill filed to subject trust property to demands for work done and improvements put on it by the tenant for life. *Held*, that no decree should have been made, subjecting the property to the claim, without directing an enquiry into the nature of the contract; by whom made; and the degree of his authority; the value of the work to the estate; its cost, and the different

interests held in the estate; also, as to a proper scheme of providing for paying the demands.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 195, 195½, 197; Dec. Dig. \S 151.]

Before Dargan, Ch., at Charleston, February, 1858.

Dargan, Ch. The facts stated in the bill are not disputed. Thomas Garrity being possessed of certain real estate, consisting of houses and lots in the City of Charleston, by deed, bearing date 27th April, 1854, conveyed the same to Richard S. Baker, his co-defendant, with certain personal property, described therein in trust, "to permit and suffer him, the said Thomas Garrity, during the term of his natural life, to take and receive the rents, issues and profits of the said real estate, and the income derived from the personality, and apply the same in payment of the interest accruing on certain mortgages, alleged to exist against said real estate, that is to say, a mortgage to the Charleston Building and Loan Association, to secure the sum of \$2,000, and also a mortgage to the Commercial Insurance Company, to secure the sum of \$12,000, which last has been assigned to the Provident Institution for Savings, in the City of Charleston, and gradually to pay off the principal, and for the support of himself and family, and for the education and advancement of his children, so that neither the said property, nor the income therefrom, shall in any way be subject to the future debts of the said Thomas

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Garrity, and from and immediately after the death of the said Thomas Garrity, then upon trust, that the said Richard S. Baker shall hold the said property, real and personal, and dispose of the same in such manner as he, the said Thomas Garrity, by his last will and testament, may direct, and in case he shall publish no last will and testament, and shall leave a wife, then in trust; that the said Richard S. Baker shall take and receive the said rents and profits, and other income, and apply (the same) for the maintenance of the widow and children of the said Thomas Garrity, and for the education and advancement of his children, so long as his said widow shall remain unmarried; and after her death, or marriage, if she shall survive the said Thomas Garrity, or in case he shall leave no widow surviving him, then in trust for the benefit of the children of the said Thomas Garrity." On the 7th June, 1854, the deed was recorded in the office of the Register of Mesne Conveyance, and also in the office of the Secretary of State, in Charleston. The family of Garrity, at the date of the deed and now, consists of his wife, Catherine Garrity, and of his three children, namely Christopher Garrity, Thomas Garrity and John Garrity, who are infants, and are parties defendants to the bill, and have answered, by their guardian, ad litem. The defendant is, and

has from the date of the deed been, in the sole and exclusive possession of the property, and manages and uses it as his own.

The plaintiff is, by trade, a bricklayer, and has been employed by Thomas Garrity, by various contracts, for building on and improving the lots of land conveyed in the said deed of trust, subsequently to the date thereof. The account for the work and the materials is considerable. The defendant, Garrity, admits the charges of the bill about the work, differing from the complainant, as to the amount due. The plaintiff prays that the trust estate may be subjected to his demand, and for general relief. The defendant, Garrity, resists the prayer, simply on the ground of the trust, as do also the other defendants.

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*It is a rule of law, as well as of morality, that property should be subject to the payment of the debts of the proprietor,—to the enforced payment, if necessary. This liability is one of the incidents of property. The only questions that can be made in such cases is, whether the property sought to be, is the property of the debtor. The only exceptions to this rule are persons under disability, as feme covert, infants, lunatics; and these, properly speaking, are not exceptions, for, by reason of their disability, they cannot contract debts except under certain restrictions. So far as these persons have the competency, they can make their estates liable.

As to the liability of property for the debts of its owner, there is no difference between legal and equitable estates; one is as much liable as the other. The only difference is in respect of the tribunal through which the property is reached, and the mode in which payment is enforced. Where the debtor is possessed of the legal estate in the property, the judgment of a Court of law, with its writ of fieri facias, are sufficient. Under this process, the sheriff can levy upon and convey the legal estate in chattels and lands, but he cannot levy upon and sell an equity. The debtor's equitable estate can be reached alone in the Court of Equity. And it would indeed be a reproach to this Court, if, having the exclusive jurisdiction of trusts, it did not enforce on such estates the payments of the debts of cestuis que trust, where no higher intervened. I say here, as I have said elsewhere, there is no scheme or device, which the skill or ingenuity of man can concoct or invent, which can baffle or defeat the principle of law, that the property of the debtor is liable for his debts, unless the attempt is sustained by successful perjury.

There is no fraud in this case. The deed is a bold and undisguised attempt, by means of a trust, to enable the owner of property to have all its uses, benefits and enjoyments, without its being liable for his debts. What incident of property is there which in the

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scheme of this trust is not *reserved to Thomas Garrity? He was to have the sole and exclusive control and management of it, and from the income to pay certain debts, that are mentioned, for which the property was already generally and specifically liable, without any limit as to the time when this application of the rents and profits should be made to the payment of debts. Such of that income as he did not think proper to apply to the payment of the debts mentioned in the deed, he was to apply to the maintenance and support of himself and his own family, at his own discretion, without any one to call him to account for the manner of its disbursements. At his death, the trustee is to hold the property for the use of such persons as he by his last will and testament should designate and appoint. And if he should leave no will, the property was disposed of to his wife and children very much in the same way that it would go by the statute of distributions in cases of intestacy. Here is the case of a man affecting to dispose of his property, yet reserving to himself all the benefits, enjoyments and control of it, while living, and the right to dispose of it at his death. This is a very barefaced attempt. If this scheme succeeds, this case would be a marked one, and it would afford a precedent for a great deal of knavery. It would be an easy matter to defeat the principles so important, so well established, that the property of the debtor is liable for the payment of his debts, and the absurd distinction arise that the legal estates are so liable, equitable estates are not.

It is ordered and decreed, that the deed of trust mentioned in the pleadings be set aside, so far as regards the debt due to the plaintiff, and that it be referred to one of the masters to state the account between the plaintiff and the defendant, Garrity. It is further ordered and decreed, that after the amount has been found by the master, and the same has been reported, and the report confirmed, the said trust estate, without distinction between income and corpus, be subject to the demand of the plaintiff, and that the plaintiff may proceed against the same by a writ of fieri facias, to be lodged in the

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*hands of the sheriff, and to be executed as in cases where the defendant in execution is possessed of the legal estate in the property proceeded against. The costs of this suit to be paid by the defendant, Thomas Garrity, and to be collected in the same way.

The defendants appealed upon the grounds:

1. That the complainant cannot aver against his own bill, and on the face of the bill the deed is bona fide on good consideration, and the complainant must be taken to have had notice of it, as notice is not denied, and, therefore, the bill should be dismissed.
2. That the decree is not warranted by the

pleadings. That on the pleadings the case is that of a creditor claiming payment out of trust funds, by application of the income to the satisfaction of the debt: but the decree sets aside the deed as fraudulent, and orders payment out of the property as free from any trust.

3. That the decree is inconsistent with the complainant's case, as stated by himself. The complainant states a case proper for a certain relief. The decree grants relief, which would not be granted, if the plaintiff's case be true.

4. That the remedy should be confined to the relief claimed by the bill, or the bill be dismissed on the ground that the complainant had contracted with the defendant upon his personal security, without reference to the trust property.

Northrop, for appellants.

Magrath, contra.

The opinion of the Court was delivered by

JOHNSTON, J. The bill does not allege that the deed is fraudulent; nor is it easy to see how Culleton, who contracted in the face of notice of its provisions, from the public registry, could well have sustained such an imputation, if he had made it.

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*The only questions in the case were, whether the contract made with Garrity entitled him to charge the trust estate, or Garrity's interest in it, for the work done by him.

Supposing it to be true that a trust estate is liable to be charged for repairs, according to the estate held by the successive tenants, or that the corpus may be charged for permanent improvements, proportionably to the value of such work, as explained in *Magwood v. Johnston*, 1 Hill Ch., 228, (reference being had, perhaps, to how far the trustee, or person making the contract, is a debtor, or in advance to the settled estate,) and moreover, that any interest such contracting party may hold in the trust property, may be subjected, in order to supplement the workman's wages, on the principle of *Rivers v. Thayer* [7 Rich. Eq. 136]: it appears to us that the Chancellor should have made no decree until he had directed an inquiry into the nature of the contract; by whom made; and the degree of his authority; the value of the work to the estate; its cost, and the different interests held in the estate by the persons to whose use it was settled, as well as by Garrity, with whom the workman is supposed to have contracted. Inquiry might, also, have been made as to a proper scheme of providing for paying the demand of Culleton.

It is ordered, that the decree be set aside, and the cause remanded; that these inquiries be made; when the case will be properly before the Circuit Court for its judgment.

O'NEALL, C. J., and WARDELOW, J., concurred.

Decree set aside.

CASES IN EQUITY,

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT CHARLESTON, APRIL TERM, 1860


JUDGES PRESENT:

HON. JOHN B. O'NEALL, CHIEF JUSTICE.
" JOB JOHNSTONE, ASSOCIATE JUDGE.
" F. H. WARDLAW, ASSOCIATE JUDGE.


11 Rich. Eq. *329


*EXECUTORS OF DR. J. W. SCHMIDT v.
ROBERT LEBBY.

(Charleston. April Term, 1860.)


[Partnership  336.]

Where two physicians agree to practice in copartnership, and divide the receipts of their practice, each is bound to devote his labor, skill, and services, as a physician, to the promotion of the common benefit; to keep books, and make entries of charges and receipts, and have them always ready for inspection and explanation; and if one should, for a considerable time, when in good health and full practice, neglect to keep any account of his practice, he must, nevertheless, be required to account for what he made, upon such evidence, as may be adduced.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 797; Dec. Dig.  336.]

[Account Stated  7.]

Where, after the dissolution of a firm, one of the partners took the books to collect the accounts, and he rendered statements showing balances due by him on account of his payments and collections: *Held*, that such statements did not amount to an account stated, so as to preclude him from demanding an account from the other partner.

[Ed. Note.—For other cases, see Account Stated, Cent. Dig. § 41; Dec. Dig.  7.]

Before Dargan, Ch., at Charleston, February, 1858.

This case was referred to the master, and was heard on exceptions to his report. The report is as follows:

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"This case was referred to me to take an account of the partnership of Drs. J. W. Schmidt and Robert Lebbly, and to report thereon.

"The articles of partnership have been submitted to me. They are dated the 2d January, 1850, and provide that the receipts arising from the practice of medicine by the parties

to the said partnership, shall, during the term of its continuance, be divided in the proportion of three-fourths to Dr. Schmidt, and one-fourth to Dr. Lebbly. On the 1st January, 1853, the health of Dr. Schmidt having failed, a new arrangement was entered into, whereby it was agreed that the said partnership should terminate on that day, and that for the year 1852, Dr. Lebbly should receive two-thirds, and Dr. Schmidt one-third of the amount collected, and that Dr. Lebbly should attend to making out and collecting the bills due, and the final closing up of the partnership.

"Dr. Lebbly has filed accounts, showing a balance due to the estate of Dr. Schmidt, on the 1st January, 1854, of \$2,362.32, and an additional balance due said estate on the 1st June, 1856, of \$407.84. In all, \$2,710.16.

"These accounts are satisfactory to the complainants. But the defendant, Dr. Lebbly, contends that Dr. Schmidt did not render any account of his earnings for the first thirteen months of the partnership, and that whatever said earnings were, he (Dr. Lebbly) is entitled to his share, according to the partnership articles, and the same should be set off against his indebtedness to the estate of Dr. Schmidt, as shown by the accounts herewith filed. The complainants, who are the executors of Dr. Schmidt, allege that they have no account of the professional business of their testator, during his connection with Dr. Lebbly.

"From the evidence submitted by the defendant, it appears that the books of the partnership, in the possession of Dr. Lebbly, do not show what was Dr. Schmidt's practice between the 2d January, 1850, and the 9th February, 1851. The whole sum of the accounts, for the entire term of the part-

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*nership, (three years,) is about \$18,000. Of this amount only about \$3,000 was earned by Dr. Schmidt, and this between February, 1851, and June, 1852. No books were furnished by Dr. Schmidt to show what were the services rendered by him to the partnership, except the one from which the accounts filed by Dr. Lebbly are made up, and all that is contained in that book is embraced in the said account.

"There being no written data, from which an account can be stated of the practice of Dr. Schmidt during the first thirteen months of the partnership, the defendant relies upon the evidence of Dr. Fitch and others, herewith submitted, to sustain his claim to a set-off against his indebtedness to the estate of Dr. Schmidt, as shown by the books of the partnership.

"Dr. Fitch, who was in partnership with Dr. Schmidt until the latter part of 1849, says that Dr. Lebbly immediately succeeded him; that Dr. Schmidt had, at that time, a large business and a fine reputation; that he appeared to be in active practice during the first year of his connection with Dr. Lebbly, and expresses the opinion that Dr. Schmidt ought to have made, during the first thirteen months of the partnership, twice as much as Dr. Lebbly, who had then but little practice and influence. Dr. Panknin, apothecary, testifies to Dr. Schmidt having ordered, in 1850 and 1851, medicines for the office of Schmidt & Co., but not for prescriptions. And an extract from the books of Drs. Simons and Dawson, shows that those gentlemen attended a patient in consultation with Dr. Schmidt, from 25th September to 22d October, 1850.

"While this evidence clearly establishes the fact that Dr. Schmidt did practice in 1850, it does not enable me to determine the extent of that practice, or what were his earnings during that year. The opinion of Dr. Fitch, that Dr. Schmidt ought to have made twice as much as Dr. Lebbly, seems to be based upon the relative amount of their individual

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business previous to the partnership, and not to the proportion of service which would properly be performed by each after the connection. The testimony, also, of Dr. Fitch, that Dr. Schmidt was engaged in active practice in 1850, is rendered uncertain in respect to the extent of that practice, by the explanation of the intelligent witness himself, that he did not meet with Dr. Schmidt in his practice, but that his opinion, as to the extent of his business, was formed from seeing him riding through the streets, and stopping at different houses, where he knew he attended. The only positive evidence on this point is that furnished by Drs. Simons and Dawson, of their attendance, in consultation, with Dr. Schmidt, upon a single patient.

"But whatever may have been the practice of Dr. Schmidt in 1850, it appears to be

certain that he entered no charge against his patients, and received no compensation for his services during that year. Dr. Fitch states that during the time he was in partnership with Dr. Schmidt, he, (Dr. Schmidt) kept no regular account of his own practice, and was careless about making entries in the partnership books, but that he believes that the books at the office exhibited all the collections made by Dr. Schmidt. 'He had no idea that the Doctor acted unfairly in the matter of the accounts. He was negligent, but not dishonorable.'

"But, while it is not claimed on behalf of the defendant that the complainants are liable to account for monies actually received by their testator for his services in 1850, it is contended that under the articles of partnership, Dr. Schmidt was bound to give his professional services in aid of the partnership, and if he chose to do nothing, or, if practising, neglected to charge for his services, his partner should not be the loser by his indolence or neglect.

"The articles of partnership are silent as regards the services to be rendered by each partner, and I know of no principle of law which undertakes, when this is the case, 'to settle between the parties the relative value

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of their unequal services in conducting the joint business.' And the reason given for this not being attempted is obvious in this case, where 'it is impossible to see how far in the original estimate of the parties when the connection was formed, the relative experience, reputation and business of each, entered as ingredients into the adjustment of the terms of the partnership.'

"Dr. Fitch paid to Dr. Schmidt \$2,500 upon the formation of their partnership, as a bonus. When the connection was formed with Dr. Lebbly, he had but little practice, while that of Dr. Schmidt was large, and it does not appear that Dr. Lebbly paid any bonus. It is reasonable to suppose that the reputation and business of Dr. Schmidt, and perhaps his prospective retirement from business, were considerations for Dr. Lebbly to form the partnership. The fact that no objection is made to the comparatively small sum earned by Dr. Schmidt (\$3,000) from 1st February, 1851, to 12th June, 1852, a large portion of which (as alleged by the answer) has never been collected, gives countenance to the opinion that the personal services of Dr. Schmidt were not the main considerations which moved the defendant to engage in the partnership. And, lastly, the articles of dissolution executed on the 1st January, 1853, while it provides that Dr. Lebbly, in consideration of the failing health of Dr. Schmidt, should receive two-thirds and Dr. Schmidt one-third of the amount collected for the year 1852, expressly stipulates that the proceeds of all business of the partnership for the two preceding years, shall be distributed according to the articles of copartnership.

"I find that Dr. Robert Lebbv is indebted to the complainants as executors of Dr. J. Schmidt, in the sum of two thousand seven hundred and ten dollars and sixteen cents, as stated in the account herewith filed."

The defendant excepted to the report:

1. Because the said master has reported a balance of \$2,710.16, as due by this defendant to the complainants upon a mutual accounting between them, when, in fact, the

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*complainants have omitted to account for the earnings and receipts of their testator for a period of more than one-third of the whole copartnership, whereas he ought to have refused to report any balance against this defendant until such account had been given by the complainants, or a fair allowance offered to be made by them upon reasonable grounds shown by them.

2. Because the said master had no right to infer any such condition of the copartnership as that suggested in his report, namely, that complainants' testator was not to be bound to practice for the joint benefit, as such a condition would be contrary to the nature of the copartnership proved.

3. Because even if there had been a condition expressed in the articles of copartnership, whereby Dr. Schmidt was at liberty to decline practice, yet as the evidence shows that he did actually practice, and that for reward or pay during the period for which there is no account, the master should have required of the complainants a sufficient account, or a fair allowance for that period, before striking a balance against this defendant.

4. Because the evidence does not justify the master's conclusion, that Dr. Schmidt did not receive anything for his professional services and practice during that period, as the proof to the contrary is full and conclusive, and as much as the defendant was bound to offer.

5. Because there was sufficient evidence before the master to have enabled the complainants to have proposed, and the said master to have allowed, or on the failure or refusal of the complainants to propose, for the said master to have found and reported a sum to be brought into account on the part of the complainants, as the amount of the earnings of the said Dr. Schmidt for the period alluded to, and that the said master should so have found and reported.

Dargan, Ch. I refer to the commissioner's report for the facts of this case.

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*I am with the defendant in all his exceptions; that is to say, I agree to all the propositions asserted therein. By the necessary implication of the articles of copartnership, bearing date 2d January, 1850, it was stipulated that Dr. Schmidt should practice medicine in conjunction with Dr. Lebbv; that he should charge those on whom he attended for those services, and that the benefit or gain

of such practice should result to the copartnership for their mutual profit. Any other interpretation than this would make the instrument of copartnership illusory. Dr. Schmidt, by the terms of his compact, was bound to practice for the benefit of the firm, and to make charges.

When the partnership was formed, he had a large practice, and an established reputation. Dr. Lebbv was a young practitioner and a stranger in the city. He considered it, therefore, as conducive to his interest to enter into a copartnership with Dr. Schmidt; in which the latter was to receive three-fourths of the profits, and Dr. Lebbv one-fourth. Dr. Schmidt was a man far advanced in life, and though, at the time the partnership was formed, he had a large practice, and was able to attend to it, his decadence afterwards was very rapid. The partnership was entered into on the second day of January, 1850, and was of indefinite duration. For the first part of the first year, Dr. Schmidt attended to his professional business, was active as usual, but so rapidly did his bodily infirmities grow upon him, that in the year 1852, he did but little in the way of practice; nor was he able. There was, by this time, almost a total prostration of body and mind. Still, the partnership continued till the 1st of January, 1853, when Dr. Schmidt being entirely incompetent for any business transactions, some members of his family intervened, and acting in the name of Dr. Schmidt, entered into other articles with Dr. Lebbv, by which the partnership was dissolved, and the original articles modified. These last articles recite the fact of the incapacity of Dr. Schmidt, and the fact that the principal

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burthen of the duties of the partnership *had devolved upon Dr. Lebbv, and in consideration thereof it was agreed, that for the last year of the partnership, (1852,) Dr. Lebbv should receive two-thirds and Dr. Schmidt but one-third of the profits. Each of the parties had kept books, in which their earnings were registered at the time when their medical services were rendered; except that for the year 1850, no book of Dr. Schmidt was forthcoming.

On the death of Dr. Schmidt, his will was admitted to probate, and his executors, the plaintiffs, have filed this bill for an account. But before the filing of the bill, they had demanded of Dr. Lebbv an account. He accordingly stated an account of the date of 1st August, 1853, by which he acknowledges a balance due to the estate of Dr. Schmidt of \$2,157.08. He subsequently rendered another account of the date 1st January, 1854, by which he states the balance due the estate of Dr. Schmidt to be \$2,302.32. This statement of account was based as well upon the books kept by Dr. Schmidt, so far as they were to be had, or known to exist, as upon the books kept by Dr. Lebbv. The balance was struck without condition or reservation.

No other books kept by Dr. Schmidt, than those used in making up this account, are known to exist. Dr. Lebby now resists the payment of the balance thus struck by himself, on the ground that he is entitled to demand an account of the representatives of Dr. Schmidt, for what he should have made by his practice, or of which he did actually make; or at least, he should have an account of that kind for the year 1850, when it does not appear that Dr. Schmidt kept any books at all. It was in evidence that Dr. Schmidt sometimes rendered professional services, for which he made no charge.

But I am of opinion that whatever may have been Dr. Lebby's original rights in this regard, he has concluded himself by the account which he has stated; in which, without insisting upon the claim now set up, he has stated an account, and struck a balance against himself, as before stated. He did this deliberately, and with a knowledge of

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all the circumstances. He did it twice; for the second account is the same as the first, with the additions of some further collections. I do not perceive any proper ground upon which he can open this statement, and surcharge it in his own favor.

Nor do I think that there is any ground for fear that injustice will be done by this view of the case. By the terms of the dissolution, Dr. Lebby was allowed two-thirds for the year 1852. By this arrangement, he realized about \$1,446 more than he would have done under the original agreement. This, I think, was a compromise, and was intended to cover all Dr. Schmidt's short-comings and deficiencies; and would probably have not been conceded, if it had been then known or believed that Dr. Schmidt was to be called to a strict account. This inference is strongly corroborated by the fact that Dr. Lebby, shortly afterwards, stated an account precisely in the way in which it would have been stated, if such had been the understanding. Upon the whole, I think that the defendant is concluded by his own statement, rendered by him to the representatives of Dr. Schmidt, without condition or reservation. And I also think, all the circumstances considered, this view fulfils the strict justice of the case.

It is ordered and decreed, that the defendant pay to the complainant the sum of two thousand seven hundred and ten dollars and sixteen cents, with interest from the first day of January, A. D. 1854.

The defendant appealed, upon the ground that his Honor, the Chancellor, has erred in supposing that the agreement of dissolution of the partnership was an adjustment of the partnership accounts, and a discharge of the testator, or his executors, from liability to account, or that the defendant's rendition of his accounts as a partner was a copartnership account stated, which discharged the complainants from liability to account for

their testator's earnings in behalf of the partnership, and for monies thereby received in that behalf.

McCrary, Campbell, for appellant.
Memminger, contra.

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*The opinion of the Court was delivered by

WARDLAW, J. The Chancellor adjudges that, by fair implication from the articles of partnership between the testator of plaintiffs and the defendant, testator was bound by his contract to practice as a physician, to make proper charges for his skill and services, and to bring the compensation and gain of these services into the common fund for the advantage of both partners. Indeed, he adjudges in favor of the defendant all the propositions affirmed in his exceptions; and to this extent his opinion is uncontroverted and incontrovertible. It is of the very nature and essence of a partnership, that each partner shall exert due diligence and skill, and devote his services and labors for the promotion of the common benefit of the concern, at such rate of compensation as may be stipulated; and that he shall not divert from the business of the firm that portion of diligence and skill he is bound to employ, nor engage in other business adverse to the common benefit. *Sto. Part.*, 174-185. The partners are pledged to each other that the business shall be so conducted that each may see that it is proceeding prosperously, and not injuriously, to the common interest; and, as Judge Story says, sec. 181, each partner should keep precise accounts of all his own transactions for the firm, and have them always ready for inspection and explanation; if he receives any money for the firm he ought, at once, to enter the receipt in the books of the firm, so that it may be open to the inspection of all the partners. The testator of plaintiffs, while apparently in good health and full practice, from the beginning of the partnership, in January, 1850, until February, 1851, has rendered no account of his services and gains whatsoever, although, in the opinion of Dr. Fitch, he should have made twice as much as the defendant; and, although testator did enter charges in the books of the firm to the amount of \$3,000 for subsequent services. In the course of the year 1852, the body and mind of testator greatly failed, and the present plaintiffs in-

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tervening in his behalf, the partnership was dissolved January 2, 1853, and the proportion of defendant in the profits of 1852 was extended largely beyond his proportion as stipulated in the original articles. The consideration expressed for this change in favor of defendant was "justice" to the defendant from the condition of Dr. Schmidt's health in 1852, in consequence of which the "larger part"—it is not said the whole—of the practice of the office had devolved on the defend-

ant. It was stipulated in the articles of dissolution that defendant "will attend to the making out and collection of the bills and debts due, and final closing up of the business of said partnership, distributing proceeds as collected, in accordance to the articles of copartnership up to January 1, 1852, and for that year," as therein stipulated. Testator died in the former part of the year 1853; and afterwards defendant rendered an account of his receipts and disbursements, with the caption: "Dr. J. W. Schmidt, in account with Dr. R. Lebby, in liquidation of late firm of Schmidt & Lebby," closing with the entry: "1853, Aug. 1. Balance due estate of J. W. Schmidt, \$2,157.08." He also rendered a second account for 1853, with the caption: "Estate of Dr. J. W. Schmidt in account with Dr. Robert Lebby in liquidation;" by which, after bringing in the former balance, he states, as of the date of December 31, 1853, "Balance of account to credit of Dr. S. to date, \$2,302.32." In this condition of things, the bill was filed March 4, 1856, praying that defendant should pay to the said plaintiffs "the said balance of \$2,302.32, and account to them for amounts received by him on account of the said partnership since January 1, 1854," and for general relief. The defendant, in his answer, filed May 14, 1856, admits that he rendered accounts exhibiting a balance in his hands from his transactions for the firm of \$2,302.52; but he states that no account whatever has been rendered by Dr. Schmidt or his representatives of testator's transactions in the business of the firm for the first thirteen months of the partnership, and he claims to retain the sum in his

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hands until the plaintiffs shall so account; and swears to his belief that if such account were fully and fairly stated, little or nothing would be left due by him. After answer, defendant filed a third account, headed: "Estate of J. W. Schmidt in account with Robert Lebby," and closing: "1856, June 1, by balance to credit (of plaintiffs) brought down, \$407.84." All the items in all of the accounts seem to be derived from the books kept by defendant, and the single book kept by Dr. Schmidt, beginning in February, 1851; and no full adjustment from all sources is professed. The Chancellor rejected the defendant's claim for an account from the representatives of his partner, on the ground that defendant had "concluded himself by the account he has stated." The defendant appeals for supposed error in this respect.

The defendant does not seek to surcharge or falsify the accounts he has rendered; on the contrary, affirms their accuracy: but he denies that they exceed a statement of his own transactions and of such of Dr. Schmidt's as are found in one incomplete book, and that they amount, in any proper sense, to an account stated. We do not perceive, in the lights afforded to us, that these

accounts are not exactly such in form and in substance as the defendant should have rendered, in case Dr. Schmidt or his representatives had rendered likewise full accounts as to his transactions concerning the partnership; nor that they were final; for defendant may have made subsequent collections, and consequently we do not find the evidence that they were intended to bar or waive an accounting from the other side. In bills for account, it is usually necessary to give jurisdiction to the Court of Equity, that there should be debits and credits, or one of them, on both sides; and in such suits the defendant is as much an actor as the plaintiff, and entitled to equal remedy and relief. Cross bills in such cases are very rare, unless the defendant seek discovery from the plaintiff as to matters not suggested in the bill or insusceptible of proof aliunde. The plaintiff

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is entitled to an account current from the defendant, sustained by oath, and the defendant ought to be in no worse position in regard to the plaintiff. In this case, the master reports that plaintiffs "allege that they have no account of the professional business of their testator during his connection with Dr. Lebby;" but this is probably an unsworn defence made through counsel, and may be formally true, although they have, or might obtain, full information and belief as to the extent and value of his services. The defendant has made a prima facie showing that Dr. Schmidt bestowed valuable services in the joint business, in the year 1850 and early part of 1851, and the plaintiffs should not be excused from all liability by reason of vague allegations or defective information on their part.

An account stated, in its proper meaning, implies a mutual accounting, and striking a balance, acknowledged on one side and accepted by the other. Sto. Eq. Pl., 798; Sto. E. J., 523, 526. Between partners, where there have been dissolution of the partnership and an adjustment of their affairs, showing that the concern was unprofitable, and that nothing was due from one partner to the other, but that their debts to creditors were payable by the partners in unequal portions, and such actual payment to creditors has been made—these circumstances are equivalent to an account stated. Such was our case of *Main v. Howland*, Rich. Eq. Ca., 352. This matter of account stated is frequently pleaded by defendants in bar of further accounting, but it would be difficult to find a sound precedent for a plaintiff to employ it as ground for recovering a specific sum in equity. If he be really entitled, for such reason, to a certain sum, his appropriate remedy is at law by action of assumpsit. The plaintiffs in this case do not set up, in their bill, an account stated with any strictness of averment; and they certainly claim a further account from defendant; and it is

not of regular procedure to do both in the same suit, and still bar the defendant from any counter claim.

Courts of Equity wisely foster the private

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adjustment and *settlement of disputed claims, but it is very unsafe to conjecture compromises without adequate proof. We do not see in the agreements for formation or dissolution of the partnership or elsewhere, satisfactory evidence that defendant has abandoned or waived, to any extent, or in any respect, the rights afforded to him by the law. It may be, as the master and Chancellor suppose, that by some process of irregular justice the defendant has obtained all the profit from this partnership that he is entitled to receive; but as ministers of the law, we think the defendant has the strict right to have the result ascertained by a regular procedure. We are aware that the master may have difficulty in attaining precise results in this case, but we trust that an approximation is at least probable.

It is ordered and decreed, that the circuit decree be set aside, and that the matters of account be recommitted to the master.

JOHNSTONE, J., concurred.

O'NEALL, C. J., dissenting, said: I think the master and the Chancellor took the right view of the case. The account made up by the defendant is plainly an account stated, in which the balances struck are in favor of the deceased. If the suit was at law, the defendant would be concluded, unless error could be shewn. The same rule, I apprehend, prevails in equity. For equity is bound to follow, and obey the law.

This is not disputed, I am told, by the majority, but they think it is not an account stated. Why? It is a statement of mutual accounts: that makes it an account stated. But it is supposed that Dr. Schmidt's accounts of his operations, as a partner, are not brought in. How does that appear? Certainly not from the account.

In 1853, the defendant, and the children of Dr. Schmidt, dissolved the partnership,

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and in the deed drawn up on that *occasion, it is stated that Dr. Schmidt, during the year 1852, was incapacitated by disease from attending to practice, and, therefore, it was agreed that Dr. Lebby should take, of the profits of 1852, two-thirds, and Dr. Schmidt one-third. The accounts were made up, according to this, by Dr. Lebby, on the 9th June, 1856, admitting the balances due Dr. Schmidt December 31, 1853, \$2,302.32, and June 1, 1856, \$407.84, making an aggregate of \$2,710.16. These are plain admissions of indebtedness to that amount, as a partner. I have seen no evidence of any mistake in the accounts.

The defendant contends that Dr. Schmidt

has not accounted for what he did as a partner. There is no doubt, if he made anything, it should have been brought into the accounts between them, before a balance was struck. A part only, it is alleged, was brought in, and now it is contended that Dr. Schmidt should be charged further. Striking a balance, it seems to me, concedes that everything is accounted for.

The master and the Chancellor are the judges of the disputed facts; they held there was no evidence that Dr. Schmidt made anything beyond what is accounted for. How can we say otherwise?



The compromise, by which the defendant took a larger interest for 1852, and the accounts made up under it, satisfy me that the defendant is properly charged. I am, therefore, for affirming Chancellor Dargan's decree.

Decree set aside.

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

*THE STATE BANK OF SOUTH CAROLINA v. HERMANN COX & CO.
and Others.

(Charleston. April Term, 1860.)

[Corporations 149; Principal and Agent 97.]

S. being the owner of certain shares in the stock of the State Bank, which, by the usage of the bank, could be transferred only by entry in the books of the bank, delivered her certificate of stock to her attorney B., with a blank power of attorney, authorizing a sale of the stock. B. borrowed money for his own use from C., and to secure the payment transferred to him the certificate and power of attorney: *Held*, that the transfer to C., who acted bona fide, and without notice of S.'s title, was valid.

[Ed. Note.—Cited in *Fraser & Dill v. Charleston*, 8 S. C. 342; *Fraser & Dill v. City Council of Charleston*, 11 S. C. 519, 520, 521; *Reynolds v. Witte*, 13 S. C. 14, 36 Am. Rep. 678; *City Council of Charleston v. Ryan*, 22 S. C. 349, 354, 53 Am. Rep. 713; *Richardson v. Wallace*, 39 S. C. 217, 233, 17 S. E. 725; *Hampton & B. R. & Lumber Co. v. Bank of Charleston*, 48 S. C. 130, 134, 26 S. E. 238; *Maxwell v. Foster*, 67 S. C. 385, 45 S. E. 927.

For other cases, see *Corporations*, Cent. Dig. § 539; Dec. Dig. 149; *Principal and Agent*, Cent. Dig. § 356; Dec. Dig. 97.]

Before Dargan, Ch., at Charleston, February, 1858.

This case will be understood from the circuit decree.

Dargan, Ch. Madame Leopoldine Szemere, née Turkovics, a Hungarian lady, residing in Paris, wife of Barthelemy Szemere, became the owner, by purchase, of fifty shares in the State Bank of South Carolina, in Charleston; which shares were transferred upon the books of the bank, according to the custom of that institution. Afterwards, the bank issued a new certificate of stock to her for the fifty shares, in the following form:

"South Carolina, ——— No. 5,600.

"This certifies that Madame Leopoldine Szemere, née de Turkovics, Paris, is entitled

to fifty shares in the State Bank, transferable only at the bank, by the said Madame Leopoldine Szemere, née de Turkovics, personally, or by her attorney.

"Witness the seal of the Company, and the signature of the President, at Charleston, this tenth day of July, 1852.

(Signed) Edward Sebring."

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*Upon this stock, Madame Szemere, by attorney, received the dividends to the 18th January, 1856.

One John Boldin, a merchant in Paris, dealing in cotton, was Madame's agent, in that city. The said certificate of stock, with a power of attorney, were delivered by Madame Szemere to said Boldin, for the purpose, as she says, of being transferred by him to one H. W. Kuhtmann, of Charleston, to enable him to receive the dividends for her. Kuhtmann was her agent in Charleston, and did receive the dividends from 1852 to 1853, inclusive. It does not appear that Kuhtmann was ever in possession of the certificate of stock, or of the power of attorney, delivered to Boldin; though Kuhtmann acted under another power to him by name, bearing date 6th April, 1852. The power of attorney delivered to Boldin, is in words as follows:

"Know all men by these presents, that I, Leopoldine Szemere, née de Turkovics, do hereby make, ordain, constitute and appoint ——— for ——— true and lawful attorney ——— for ——— and in ——— name, to transfer one certificate, No. 5,600, dated 10th July, 1852, of the South Carolina State Bank, for fifty shares inscribed in my name on the books of said bank; and to make and execute all necessary acts of assignment and transfer thereof, with power to the said attorney ——— to substitute an attorney, or attorneys, under ——— for all or any of the purposes aforesaid, and to do all lawful acts requisite for effecting the premises, hereby ratifying and confirming all that the said attorney, or substitute, shall do therein by virtue of these presents.

"In witness whereof ——— have hereunto set ——— hand and seal the eleventh day of November, in the year of our Lord one thousand eight hundred and fifty-two.

"Signed, sealed and delivered in the presence of us,

(Signed)

Leopoldine Szemere, née de Turkovics,
"Approved, Barthelemy Szemere," [L. S.]

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*Indorsed upon the power of attorney, is the following certificate:

"Be it known, that on the eleventh day of November, one thousand eight hundred and fifty-two, before me, S. G. Goodrich, consul of the United States of America, at Paris, personally appeared Leopoldine Szemere, née Turkovics, known to me to be the constituent named in the foregoing letter of attorney,

and acknowledged the said letter of attorney to be her free act and deed. In testimony whereof, I have hereunto set my hand and seal.

(Signed) S. G. Goodrich, U. S. Consul."

The said Boldin being in possession of the said certificate of stock, and the power of attorney of the 11th November, 1852, opened a negotiation with Hermann Cox & Company, commission merchants in the City of London, in which, claiming to be the owner of the stock, he proposed to them to make him certain advances of money, upon the pledge or hypothecation of the stock. Having agreed to his proposals, Boldin forwarded to the said Hermann Cox & Company, the certificate of stock and the said power of attorney; whereupon they accepted his three several drafts at three months, for £400, £240, and £169 10s. By their agent in Charleston, they have sold the said bank shares, and the proceeds have come into their hands. From the allegations of Madame Szemere's answer, it appears that Boldin has committed a breach of trust, and has not accounted to her for the proceeds of the sale of the stock; and has become a bankrupt, with a total loss of character. Under these circumstances, there are two adverse claimants of the ownership of the stock: Hermann Cox & Company, by virtue of their purchase from Boldin, and Madame Szemere, on the ground that Boldin was without authority to sell, and that the sale by him to Hermann Cox & Company was, on various grounds, null and void, as against her. The bank, not knowing with which party to deal

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as the true owner, has *interpleaded them by this bill, and called them into this Court, with the view of having their rights adjudicated. To the bill, each party has filed an answer, setting forth the grounds of her and their claims. In a bill of interpleader, the answer of a defendant cannot be evidence in his favor, against the other defendant, with whom he has been interpleaded. As to evidence, therefore, the case must be tried on the undisputed, or authentic facts of the case, as they have been developed in the progress of the cause.

The defendants, the Szemeres, do not deny the delivery by them to Boldin, of the power of attorney, with the original certificate of stock, but they deny that this was done for the purpose of clothing him with the power to sell the stock, and aver that it was, "upon the special trust and confidence, and with the express authority and instruction that they (the certificate and power) should be transmitted by the said Boldin to a certain H. W. Kuhtmann, in Charleston, South Carolina, for the purpose of collecting the dividends on the said shares." Here is, indeed, a seeming inconsistency. Kuhtmann had already a formal power of attorney of 6th April, 1852, to him by name, (and not in

blank as to the name, as was the case in that of the 11th Nov., 1852,) under which he (Kuhlmann) had received the dividends due on the 2d July, 1852. For what end could another power be given? Or why send the certificate of stock, when the power which he already had, was sufficient to enable him to receive the dividends?

In the argument at the trial, there was much discussion on the question, whether certificates of bank stock were transferable by delivery. Much can be said in favor of such a rule, founded upon the convenience and customs of commerce. I incline to think that the preponderance of authority, as well as reason, is in favor of the affirmative of the proposition. In this particular certificate of stock, (as all others that are issued by this bank,) there is a condition expressed, that it was "transferable only at

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the bank." The *charter of the State Bank, 8 Stat., 10, contained no provision for the transfer of stock, but in sec. 17, declared that "the stock of the bank shall be assignable and transferable according to such regulations as may be instituted in that behalf by the directors." The president, (Mr. Edward Sebring,) who was examined as a witness, said, that so far as he knows, there is no rule, regulation, or by-law on the records or journal of the bank, by which the form or manner of transferring stock is governed; but from the time he has been connected with the institution, the form of language in which this certificate is couched has been used, and that they keep a transfer book, in which all transfers and assignments of stock are made by the parties themselves, or their attorneys. But I apprehend that regulations of this kind, even when they are introduced into the bank charters, are intended for the convenience, protection and security of the banks themselves. It is to give the bank notice and information as to who are the stockholders. If the purchaser of a certificate of stock with such a provision upon its face, should not have it transferred or assigned to him at the bank, and upon the books of the bank, according to the regulation, he could not complain, if the bank should regard the original stockholder as the true owner, pay the dividends to him, and otherwise deal with him as still the owner. But as between other contracting parties, the rule is, must be, different. And I think I may say, without the fear of contradiction, that the transfer of stock by the owner, though not in accordance with the form prescribed by the charter, or the by-laws, will pass all the right of the shareholder, in equity, if not in law. Bank stock is property, and there is, and can be (reasonably) no inhibition in the general law of the land against its transfer, as other incorporeal chattels are transferred. The condition, then, in the certificate, that it was transfer-

able only at the bank, &c., I do not think can effect, much less conclude this question. Upon the question, whether certificates of bank stock are transferable by delivery sim-

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ply, I incline to think, as I have *intimated, that the preponderance of authority and argument is with the affirmative. But I do not affect to have arrived at a clear and assured conclusion as to this point, and do not wish to predicate judgment on this principle. I wish to rest it upon other grounds, upon which I can rely with greater confidence.

Madame Szemere admits in her answer, that she delivered the power of attorney and the original certificate of stock to Boldin; not, as she says, for the purpose of authorizing him to sell the stock, or to do any act in relation to the same, except simply to transmit the power and the certificate to H. W. Kuhlmann, in Charleston, South Carolina, to enable him to collect the dividends for her. I have already commented upon the absurdity of this statement, by referring to the fact, that she had already, on the 6th April, 1852, executed and delivered to Kuhlmann, a power to receive the dividends; under which he had, at the time of the execution of the power to Boldin, received one installment of dividends. Whatever may have been the motive for the delivery of the certificate of stock and the power of attorney to Boldin, she invested him thereby, with all the indicia of property and ownership as to said shares of stock, and if he abused her confidence, she must bear the consequences. From the fact that she received the dividends up to January, 1856, it is, I think, fairly to be inferred that Madame Szemere continued to be the owner of the stock, notwithstanding the delivery of the certificate and power to Boldin. But for this fact, and the inference from it, her continued ownership would not be proved, except by her own statement, and it would not appear but that Boldin was the assignee, as the transaction with him would import. I shall assume in all that I have to say in this judgment, that Madame Szemere continued to be the true owner of the stock, and that Boldin committed a fraud in disposing of the same as his own property.

Kuhlmann, her agent in Charleston, already having a formal and sufficient power,

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under which he was successfully acting *in the collection of the dividends, I can conceive of no motive for the delivery of the certificate and the power to Boldin, except it was to enable him, at his own discretion, to effect a sale for her benefit. But the motive is immaterial. She held him out to the world as the proprietor. The evidence is plenary that, according to commercial usage, this possession of the certificate and a power of attorney in this form, imported ownership. Hermann Cox & Company could not know the

secret trusts and equities that subsisted between Madame Szemere and Boldin. She armed him with the legal title to go forth and sell the stock for her; he went forth and sold for his own benefit, and put the proceeds in his own pocket. There is no doctrine of equity jurisprudence better supported by reason, as well as authority, than this: that where one or two innocent persons must suffer loss, it must fall on the party who, by incautious and misplaced confidence, has occasioned it, or placed it in the power of a third party to perpetrate the fraud by which the loss has happened.

But let us look at the transaction in another light. Suppose that the possession by Boldin of the original certificate, and a power of attorney in this form, did not imply an ownership by him of the stock? What then? He was then her authorized agent to sell the stock. It is vain for Madame Szemere to say, that he was not to sell under the power, but to transmit it to Kuhnmann. If that be true, it was a secret arrangement between them, and not binding upon third parties. It is equally vain to say, that the language of the power conveys no authority to sell. In the plainest language it invested him with the power "to transfer" "the fifty shares of stock, and to make and execute all necessary acts of assignment and transfer thereof," &c. She clothed him with the power to sell: whether wisely or not, is immaterial. In pursuance of the power, he did sell. The breach of trust did not consist in the act of selling, but in not accounting. Whether Madame Szemere

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had a good title to the shares of *stock, and Boldin a valid power to convey her title, it concerned the purchaser to know. But whether Boldin accounted for the proceeds to his principal, was no concern of the purchaser. It has not been made to appear, except by Mr. and Mrs. Szemere's own statement, that Boldin has embezzled or misappropriated the proceeds of the sale. But, admitting that he has, and, admitting further, that, by a parol reservation, he was not to sell under the power, it was Madame Szemere who put it into his power to commit the fraud. (See 1 Doug., 529; Code Nap., *lex loci*. Story Conflict. Laws, 384.) There was nothing of a suspicious nature in the transaction, (according to the evidence,) except the lapse of time, from the execution of the power, and the offer to sell to Hermann Cox & Company. This, and nothing else, (the witnesses, persons dealing in stocks, said,) was calculated to awaken suspicion. But, considering Boldin as the owner, I cannot see how that circumstance was calculated to excite suspicion. If it was considered as Boldin's stock, the possession of the certificate, and the power, constituted the evidence of his title. Considering him as a mere agent to sell, there was no limitation in his power, either as to time, price, or any other terms. It was as good a power then

as it was when first executed. It only behooved the purchaser to inquire if the principal was still living, and the power not being limited as to time, and remaining unrevoked, its efficacy remained unimpaired.

It was argued that Madame Szemere was a resident of France, and that as personal property had no locality, and was attendant upon the person, the transfer should have been made according to the law of the domicile. Two French advocates, living in Paris, were examined by commission as to what form was required by the French law for the transfer of such property, or rather their opinion was sought as to the manner in which this particular case should be decided. The case was submitted to them for their opinion, which was very frankly and decidedly given

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in favor of *Madame Szemere. Such an opinion, or judgment, of course, cannot be decisive here. But when a general or abstract principle of foreign law has, or is supposed to have, a bearing upon a judicial question pending in our courts, it is competent, in this way, to seek information as to such principle of foreign jurisprudence. In this point of view, a portion of these depositions is competent evidence. It was shown by these advocates, in their depositions, that this transfer by Madame Szemere, in the form and manner in which it was made, would be invalid, and ineffectual to transfer the stock, under the provisions of the Code Napoleon.

The fallacy of this argument consists in the assumption that the assignment, though not good under the Code Napoleon, would not be good if made according to the *lex loci sitæ*. The general rule, that the laws of the owner's domicile should, in all cases, determine the validity of every transfer of personal property made by the owner, is subject to some exceptions. One exception is, where the *lex loci sitæ* prescribes some particular form of assignment or transfer; another exception is, where, from the nature of the particular property, it has a necessarily implied locality. "In *Robinson v. Bland*, 2 Bur., 1079, Lord Mansfield has mentioned, as among the latter class, contracts respecting the public funds or stocks, the local nature of which requires them to be carried into execution according to the local law." And Justice Story, in commenting upon the rule, (*De Conflictu Legum*, ch. 49, sec. 363, 383,) says: "the same rule may properly apply to all other stocks or funds, although of a personal nature or so made by local law; such as bank or insurance stock, turnpike, canal and bridge shares, and other incorporeal property, owing its existence to, or regulated by peculiar local laws."

Subject to exceptions like these, says this eminent commentator, *ib.*, sec. 384, "the general rule is, that a transfer of personal property, good by the law of the owner's domicile, is valid wherever it may be situate. But

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it does not follow *that a transfer made by the owner, according to the law of the place of its actual situs, would not as completely divest his title; nor even that a transfer by him in a foreign country, which would be good according to the law of that country, would not be equally effectual, though he might not have his domicil there. For purposes of this sort, his personal property may, in many cases, be deemed subject to his disposal wherever he may be at the time of the alienation."

Nothing can be plainer and more directly to the point. If Judge Story is good authority, this settles the question arising on this part of the argument.

The equity of Hermann Cox & Company, however, extends only to the amount of their actual advances of money. It is only upon the ground of their paying valuable consideration for the stock in ignorance of Madame Szemere's claim, and upon Boldin's apparent title, and authority to sell, that their equity becomes paramount to hers. Otherwise, hers would have prevailed. If they had had notice before they paid their money, they would not have been entitled to the protection of this Court. It follows, that they are entitled to be reimbursed from the said stock, the sums which they advanced thereon, and the accruing interest.

The opinion and judgment of this Court is, that the fifty shares of the stock of the State Bank of South Carolina, mentioned in the bill, standing in the name of Madame Leopoldine née Turkovics, is to be, and is considered, the property of Hermann Cox & Company, to the extent of the consideration paid by them for the same.

It is, therefore, ordered and decreed, that one of the masters take an account of the sums of money advanced by the said Hermann Cox & Company, to the said John Boldin, from the date or dates of such advancements, to the time of the sale hereinafter ordered.

It is further ordered and decreed, that one of the masters of this Court, on some convenient day, to be fixed by him, after duly advertising the same, do sell the said fifty

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shares *of bank stock at public auction for cash; and that from the proceeds of said sale, he pay to Hermann Cox & Company the aggregate sum of the money paid by them for said stock, with interest thereon, as herein directed to be calculated, and that out of the overplus, if any, he pay the costs of these proceedings.

It is further ordered and decreed, that the defendants, Barthelemy Szemere and Leopoldine Szemere, pay the costs of this suit, out of the proceeds of the sale of the stock as above directed, if the proceeds of that sale be sufficient for that purpose, after satisfying the claim of Hermann Cox & Company, and

if not, that they be liable for said costs generally.

The defendants Szemere and wife appealed on the grounds:

1. That no right of property is vested in a vendee, even by a bona fide sale made to him for valuable consideration by a person having possession of chattels personal, without property or authority to sell, and that such naked possession does not authorize the application of the principle, that when one of two innocent persons must suffer loss, it must fall on him who has placed it in the power of a third person to perpetrate a fraud.

2. That a certificate of bank stock is not a negotiable instrument; nor does the legal title in the stock pass by a delivery of the certificate; and that the delivery and custody of the certificate passes no equitable interest, unless done with that intent.

3. That by the rules of the State Bank, the shares in that institution are transferable only at the bank, personally or by attorney.

4. That Boldin had neither property in the shares, nor authority to sell. Or, if it be supposed that there was any authority to sell, his transactions with Messrs. Cox & Co. were by way of hypothecation or pledge; and that an agent or factor, with authority to sell, has no authority to pledge or transfer the goods of his principal to secure his own debt.

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*5. That the power of attorney from Mons. and Madame Szemere was a naked power to John Boldin, not coupled with any interest, and as such was revocable at any moment before action under it, and that it was so revoked.

6. That the blanks in the said power cannot be filled up, without authority from Monsieur and Madame Szemere, expressed or implied.

7. That the lapse of time since the execution of the power, and all the circumstances attending its transfer from Boldin to Messrs. Cox & Co., were sufficient to excite their suspicion, and caution them of his want of authority and property.

8. That the question involved is not one of fraudulent dealing by an agent, within the apparent limits of his power, but one of an agent exceeding his power.

9. That although the mode of transferring a title to stock should be referred to the regulation of the bank, or the *lex loci rei sitæ*, the acquisition of any equitable interest, under a special contract, may be governed by the law of the domicil of the contracting party.

Pringle, for appellants.

Messrs. Cox & Co. stand only in Boldin's shoes; their title is his.

There is no evidence that any consideration was paid by Boldin to Madame Szemere, for the certificate of stock, or that he had in

any way purchased it, or had any interest in it.

Nor is there any proof of any contract or agreement between Boldin and Madame Szemere respecting the shares. Boldin stands before the court in no other situation than holding in his hand the naked blank power of attorney and the certificate of stock.

Under these circumstances, it is only in consequence of either one of two conditions that Messrs. Cox & Co. can claim any property or interest in these shares.

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*Either, 1st, In consequence of the legal character of the certificate;

Or, 2d, In consequence of title derived by force of the circumstances under which the certificate was delivered to Boldin.

As to the first position that Boldin has acquired property in these shares in consequence of the legal character of the certificate—There is but one species of character which instruments in writing possess, by force or virtue of which alone Boldin can claim title in these shares, and that is negotiability. Is a certificate of stock a negotiable instrument?

No contract was assignable by the common law; bills of exchange are an exception by universal commercial law. But it required an Act of Parliament to make even promissory notes negotiable.

This strict rule is by no means one of a technical character. As late as 1856, in *Dixon v. Bovil*, 39 Eng. Law and Eq. Rep., 47, a case decided in the House of Lords, the Lord Chancellor said: "It is a rule founded in extremely good sense. In England, a plaintiff suing on a contract, unless it be under seal, must prove a consideration. In England it is a perfectly good defence to show illegality of consideration. When an action is brought by one of the contracting parties, illegality of consideration can always be pleaded as a defence. It is the policy of the law to preserve this principle intact, in order to prevent Courts being made ancillary to violations of law. Now this principle is entirely defeated if a contracting party can make a floating contract enforceable by bearer, for the bearer does not sue as assignee of the original contracting party. He may be, and probably is, a stranger to the original contract. His right, if any, is under an independent contract with himself, against which no illegality, as between the original parties, can be set up. Bills of exchange have been made an exception for the convenience of trade, but it is an exception not to be extended. The drawer of the bill gives to the

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endorser a better title *than his own, and this leads or may lead to many ill consequences, but mercantile convenience has sanctioned it. No such necessity, however, exists in the case of other contracts, and there is no authority to warrant it. Indeed, I may

observe that the Stat. 12, Geo. III, c. 92, sec. 36, affords statutable authority by analogy against the present claim, for if a promissory note could not have been made transferable by indorsement, at common law, there would have been no necessity for that statute."

This being the wisdom and policy of the law, an examination into the principles of negotiable paper and a deduction from all the decisions will show that, in order to entitle any instrument to the character of negotiability, there must be invariably two essential ingredients—

First. That it must be by the custom of trade transferable like cash upon delivery.

Second. That the legal title must be conveyed to the person holding it, so that he may maintain an action in his own name.

See note to *Miller v. Race*, 1 Smith's Leading Cases, 250, and Broom's Commentaries on Common Law, 441.

As to the first point, that to make an instrument negotiable it must be by the custom of trade be transferable like cash upon delivery.

The custom of trade cannot be permitted to control the policy of law, and evidence of its custom must be permitted only in subordination to that general policy. No proof of custom would permit usury. But even if evidence of custom were permitted, it has utterly failed in the present instance. There is not a particle of proof by any one of the witnesses that such is the custom.

As to the second point, that it is of the essential characteristic of a negotiable instrument, that it must be capable of being sued on by the party holding it.

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*The certificate of stock is in these words:

Certificate of Stock.

South Carolina.

No. 5,600.

This certifies that Madame Leopoldine Szemere, née de Turkovics, Paris, is entitled to fifty shares in the State Bank, transferable only at the bank, by the said Madame Leopoldine Szemere, née de Turkovics, Paris, personally, or by her attorney.

Witness the seal of the company,

[Seal.]

and the signature of the president,
at Charleston, this tenth day of July,
1852. Edward Sebring,

President State Bank.

It is to be observed that this is not a contract for the payment of a sum certain; it is a declaration that one is entitled only to a division in the uncertain profits of the corporation.

Next—even with regard to bills of exchange and promissory notes, they must be made payable to bearer, holder, order, assigns, or some such equivalent word, in order to give the person holding them, by assignment, or endorsement, a right to sue upon them. Byles on Bills, 62.

Next—the certificate is under seal, and even a sealed note loses its negotiability by the seal. *Foster v. Floyd*, 4 McC., 159.

But the case of the *Commercial Bank v. Kortright*, 22 Wen., 348, will be quoted to prove that an action of assumpsit will lie against a bank by one holding the certificate of shares, and a blank power of attorney, even when there was no transfer on the books of the bank.

The case of *Kortright*, however, is essentially different from the present case. It was this: Barker, being owner of stock, sent the certificate, with a blank power of attorney, to one Barton, to effect a loan of \$10,000. *Kortright* advanced the money, and took the certificate and the blank power. Barton paid the money to Barker, and then

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absconded. *Kortright* then demanded a transfer of the shares from the bank, but it was refused for some reasons connected with another bank. Upon the refusal *Kortright* brought an action of assumpsit against the bank for damages. There was much question whether the action should not have been in case, but the Senate of New York, constituting the highest Court of Appeals, decided, with a strong dissenting opinion, from the Chancellor *Walworth*, that assumpsit would lie. Now, the essential difference between *Kortright's* case and this is, that the consideration money, the value of the shares, was paid by *Kortright*, and was received by Barker, the original owner of the shares. Barker never resisted the transfer, but the bank undertook to do so, and *Kortright* being, in consequence of the receipt of the money by Barker, the equitable owner of the shares, the Court held that there was an undertaking, on the part of the bank, to permit the transfer, and having refused, an action lay for damages. In the present case, no money has been paid to Szemere; there is nothing to constitute Messrs. Cox the equitable owners in the sense and manner that *Kortright* was.

This view of *Kortright's* case was afterwards sustained and expressed in another case which arose in New York, in reference to the same bank, the case of *Dunn v. The Commercial Bank*, 11 Barb., 581. This case, besides sustaining the point under discussion, is, in all its other circumstances, so very similar to the present, that it may be regarded as conclusive of the whole matter.

The action in *Dunn's* case, as in *Kortright's* was in assumpsit. The certificate of stock was as follows:

Commercial Bank of Buffalo.

It is hereby certified that John Cleveland Greene is entitled to one hundred shares, of one hundred dollars each, in the capital stock of the Commercial Bank of Buffalo, trans-

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ferred only in the books of the bank by

the said stockholder or his attorney, on surrender of this certificate.

In testimony whereof, the cashier has set his hand, this 24th day of June, 1836.

100 Shares.

J. Strinham, Cashier.

To the certificate was attached a power of attorney in the following form:

Know all men by these presents, that I, John Cleveland Greene, for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign and transfer onto — one hundred shares of the Capital Stock of the Commercial Bank hereunto annexed, standing in my name on the books of the said bank, and do hereby constitute and appoint — my true and lawful attorney, irrevocably, &c., &c., do sell and transfer, &c., &c.

Signed by J. C. Greene, [L. S.]

At the trial in the Court below, it was insisted that no evidence had been presented that the plaintiff was the assignee of the stock or entitled to the same. The Judge charged for the plaintiff against the bank, and a verdict was found accordingly. But the Supreme Court sent the case back, and in doing so said, after stating the facts of *Kortright's* case: "There is a manifest distinction between that case and this. Here there is no evidence that the plaintiff, Dunn, purchased the certificates. He does not prove that he owned them or had any interest in them whatever. It is true, he had possession of the certificates standing in the name of Greene and Buckland, and attached to such certificates were blank assignments and powers of attorney, authorizing the transfer to blank by blank attorney. If the plaintiff was the purchaser of these certificates, he was undoubtedly authorized, by reason of such purchase, and his ownership thereof, to write in his own name as he chose, as the

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attorney to make such transfer. So far, the case of *Kortright v. The Commercial Bank of Buffalo* decides. But it does not decide that the naked possession of the certificates and blank assignments and powers of attorney is evidence of both. Are certificates of stock, in reference to negotiability, placed on substantially the same ground as bills of exchange and promissory notes? Are they transferable by mere endorsement and delivery? Are a bond and mortgage, or any other evidences of debt not negotiable, assignable by the mere act of writing the name of the party on the back, and delivering the instrument with the name on so endorsed, without any consideration or agreement? If not, is it not incumbent upon the party claiming under such transfer, to prove the contract or consideration? I have found no case where the holder of an instrument was authorized to write the contract under which he claimed, over the signature or endorsement, except when the proof of the consid-

eration and contract was first made. See *Leonard v. Vredenburg*, 8 John, 29; *Bailey v. Freeman*, 11 Id., 121; *Herrich v. Carman*, 12 Id., 159; *Nelson v. Dubois*, 13 Id., 175; *Campbell v. Butler*, 14 Id., 340.

"So, in the case of *Kortright v. Commercial Bank*, an agreement and consideration was proved. But in this case the Court are called upon to presume, from the plaintiff's possession of the certificates and blank assignments and powers of attorney annexed, that he purchased the stock of Greene and Buckland, and that his name was inserted or assumed to be inserted in the instrument as assignee. The plaintiff not only asks the Court to assume the existence of the contract or consideration to support the assignment, but that the name of Isaac T. Hatch, or the bank itself, is inserted in the instrument as the attorney of Greene and Buckland, and that they are thereby authorized to assign the stock on the books of the bank to the plaintiff. It seems to me that this is carrying the rule—already sufficiently broad—beyond all precedents on that subject, and for one, I cannot consent to extend it beyond cases already adjudicated."

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*But the argument has been pressed that from the following clause in the Act of Incorporation, of 1802, 2 Faust, 464, "That the stock of the bank shall be assignable and transferable according to such regulations as may be instituted in that behalf by the directors," it is the intention and effect of the Act to make the certificate negotiable. Directly the reverse is the case. The object of that clause was not to confer any assignable or transferable quality upon the shares, for that to the same intent as all other non-negotiable contracts they already possessed by the general law; but the very plain and evident intention was to confer the authority upon the directors to make such rules as they desired. It was in reference to the regulations of the directors that this section of the Act was drawn—not to the transferability of the stock. And for this very excellent reason, that it concerned the directors very much to know who were and how many were stockholders of the bank. It would have been most ruinous if the bank were exposed to the suit of every one who happened to have in his possession a certificate of the stock. But it is said that the bank has made no regulation on the subject. This certainly is not so. The bank has made regulations. There are regular transfer-books kept, which, of course, are the highest evidence of the title to the shares. And the directors have fixed the terms and the language of the certificate of shares. This certificate declares that the shares are "transferable only at the bank." This is the regulation which the directors have made upon the subject. It is not the less a regulation because it is contained in the certificate. It is, perhaps, the most solemn and authentic regulation of the direc-

tors, because it is certified by, and has the sanction in each case, of the signature of the president and the seal of the corporation. So far from affording any greater facilities to the transferability of the shares, this clause of the charter was expressly enacted to enable the directors to restrain this facility, and this for the safety of the bank and the community, as will appear from the re-

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marks of Chancellor Walworth, in 22 Wend., 353: "Indeed," he says, speaking of New York, "the Legislature of this State, when they wished to restrain the negotiability of the certificates of deposit of the New York Life Insurance and Trust Company, so as to prevent them from forming a part of the currency or circulating medium of the State, supposed it to be merely necessary to insert a provision in the Act of Incorporation that such certificates should only be transferable on the books of the company according to such regulations as the directors should establish, in the same manner as the stock was transferable. I recollect distinctly being applied to by a committee of the Senate on the subject—(as the principal object of the Legislature, in granting that Act of incorporation, was to provide a safe place for the investment of funds belonging to suitors of the Court of Chancery, and of infants whose funds were under the protection of that Court and the Surrogate's)—and that this amendment was inserted for the express purpose of preventing a custom of Wall street, or any other custom, making that negotiable by a blank transfer which the Legislature had determined should not be negotiable by mere endorsement or delivery."

The certificate of stock, upon these principles, not being negotiable, the direct authorities on the subject entirely sustain all that has been said. The first to be noticed is that of *Dunn v. The Commercial Bank*, 11 Barb., 581, which has been already noticed. The question of negotiability of certificates of stock was also made in the case of *The Mechanics' Bank v. The New York and New Haven Railroad Company*, 3 Kernan, N. Y. Rept., 599.

In this case, the Judge, in delivering the opinion of the Court of Appeals of New York, says: "It seems to me, therefore, that we are brought directly to the question, whether certificates of stock in the defendant's corporation are to be regarded as negotiable instruments, in the sense of the commercial law, so that by their endorsement and delivery to a purchaser, in good faith, a title to

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the stock they profess *to represent may be acquired, although in the hands of the vendor they are spurious and void, and although the company itself has never recognized the transfer. This question, I think, must be answered in the negative. They contain, in the first place, no word of negotiability. They declare simply that the person named

is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer, or to the order of the party to whom they are given.

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"I have examined attentively the authorities cited upon the question, but do not find that the doctrine contended for has in them the least support. In the case of Kortright v. The Commercial Bank, 20 Wend., 91, and 22 Wend., 347, it was held that an action of assumpsit will lie against the corporation in favor of the assignee of a stock certificate for refusing to permit a transfer on the books. This, and the class of cases to which it belongs, proves that a transfer, not made according to the charter or by-laws of a corporation, confers upon the transferee, in an equitable sense, the title of the previous owner. That, being thus clothed with the equitable title, it is the duty of the corporation to permit him to take a legal transfer on the books, and that the law will imply an assumpsit for the performance of that duty. For a breach of this duty, actions of assumpsit and case have been indifferently maintained. In principle, the remedy should have been a special action on the case. Such was the opinion of Chief Justice Nelson, in the case referred to; but he adds: 'It being once settled that assumpsit will lie, there is no occasion for disturbing it.' It is only material to observe that the assumpsit is not in the certificate itself, and so passing by endorsement and delivery to the transferee, but is implied after the transfer, from the duty of the corporation to clothe the equitable owner with the legal title. Such cases, so far from tending to show that a dealer in certificates acquires rights better than those of the person with whom he deals, seem to me to justify quite an opposite conclusion.

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They *necessarily assume that the change of title is incomplete until the proper transfer is made on the books. * * *

"Looking at the question upon principle, I am not aware of anything in the nature or uses of this kind of property, which requires an application of the rules which belong to negotiable securities. Stocks are not like bank bills, the immediate representative of money, and intended for circulation. The distinction between a bank bill and a share of bank stock, is not difficult to appreciate. Nor are they like notes or bills of exchange, less adapted to circulation, but invented to supply the exigencies of commerce, and governed by the peculiar code of the commercial law. They are not like exchequer bills and government securities, which are made negotiable either for circulation or to find a market. Nor are they like corporation bonds, which are issued in negotiable form for sale, and as a means for raising money for corporate uses. The distinction between all these and corporate stocks, is marked and

striking. They are all, in some form, the representative of money, and may be satisfied by payment in money at a time specified. Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member. The primary use and design, I must be allowed to say, of this species of property is to afford a steady investment for capital, rather than to feed the spirit of speculation. I am aware that people will speculate in stocks, as they sometimes do in lands, and there is no law which absolutely forbids it; but such, I am persuaded, is not the use for which we should hold them chiefly intended."

In Edwards on Bills of Exchange, page 61, it is said: "A certificate of stock, which is not a contract for the payment of money, and is not in its terms negotiable, is an entirely different instrument, and is not placed upon the footing of commercial paper, and, conse-

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quently, the lender taking it in good *faith as a security for a loan of money, does not thereby acquire such a right as against the corporation, as will entitle him to compensation, notwithstanding the certificate was fraudulently issued by the assent of the corporation. In other words, certificates of stock in a banking association, or in a railroad company, are not securities for the payment of money that may be transferred, subject to the rules applicable to negotiable paper; on the contrary, they are simply the muniments and evidence of the holder's title to a given share in franchises of the corporation of which he is a member."

The question of the negotiability of instruments, similar to bank stock, has very recently, in 1858, been examined by the Supreme Court of the United States in the case of Combs v. Hodge, 21 How. 397 [16 L. Ed. 115]. The following is a statement of that case: Combs was the proprietor of bonds issued by the State of Texas, which concluded in this way: "This certificate is transferable by the said Leslie Combs, or his legal attorney or representative, on the books of the stock commissioner only."

In 1840, Combs endorsed two of these certificates in blank, and placed them in the hands of James Love, of Galveston, for the purpose, as he alleged, of enabling Love to receive payment, which was then expected, but which was not made.

Love transferred the bonds fairly to one Andrew Hodge, for valuable consideration. By subsequent legislation of the United States and of Texas, the bonds became payable at the Treasury of the United States, where payment of them was demanded by J. Ledger Hodge, the administrator of Andrew Hodge. Whereupon, an injunction was obtained by Combs, to stay the payment of the

money until it could be decided to whom it was legally due, by proceedings between the parties, in the nature of a bill of interpleader, which were instituted in the Circuit Court of the District of Columbia. This Court dismissed the bill of the plaintiff, Combs; upon an appeal to the Supreme Court of the United

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ed States, the Court reversed the decree of the Circuit Court, dismissing the bill; but in delivering their opinion, the Supreme Court said, that the "case is presented in an unsatisfactory manner," and ordered the cause back to the Circuit Court, "with directions to allow the parties to amend the pleadings and to take testimony, if they should be so advised."

Although the case was thus not finally disposed of, the Supreme Court expressed itself very emphatically and distinctly, as to the character of the class of instruments which was the subject of the suit.

The Court said: "The title of the defendant, therefore, depends upon the effect to be given to the endorsement of the certificates in blank by the plaintiff and their deposit with Love. The question is, was he invested with such a title that a bona fide purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business, and for value, and without notice; and legislation, in Great Britain and some of the States of the Union, has extended to the same class of persons a similar protection in other contracts.

"But this concession is made for the security and convenience, if not to the necessities and wants of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property—which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has.

"The party who claims the benefit of the exception must come within all the conditions upon which it depends. In the case of bills of exchange that have originated in fraud or illegality, the holder is bound to establish that he is not accessory to the illegal or fraudulent design, but a holder for value. If the bill is taken out of the course of trade, or overdue, or with notice, the rights of the holder are subjected to the operation of the

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general rule. In *Ashurst v. The Manager of the Bank of Australia*, 37 L. and Eq. R., 195, Justice Erle says: "It seems to me extremely important to draw the line clearly between negotiable instruments, properly so-called, and ordinary chattels, which are transferable by delivery, though the transferrer can only pass such title as he had. As to negotiable instruments during their currency, delivery to a bona fide holder for value gives a title,

even though the transferrer should have acquired the instrument by theft, but after maturity the instrument becomes, in effect, a chattel only, in the sense I have mentioned."

"When the instrument is one which by law is not negotiable, or when the negotiability has been restricted by the parties, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper, that the holder is entitled to sell or discount it. (*Berdebach v. Wilkins*, 10 Harris, 26; *Ames v. Drew*, 11 Foster, 475; *Synonds v. Atkinson*, 37 L. and Eq., 585; 25 L. and Eq., 318.) Nor can the holder write an assignment or guarantee not authorized by the endorser (4 Duer, 45; 25 L. and Eq., 19; 6 Harris, 434). This doctrine has been applied to determine conflicting claims to public securities which were not negotiable on their face, though the subject of frequent transfers.

"The suit of *Toukin v. Faller*, 3 Doug., 300, was for four victualling bills, drawn by commissioners of the victualling office on their treasurer, in favor of their creditor. These were sent to an agent, with a power of attorney, 'to receive the money and give receipts and discharges;' who pledged them for an advance of money. Lord Mansfield said, the only question is, who has the right of property in this bill? It must be the plaintiff, unless he has done something to entitle another. It is deposited with the defendant, by one who had it under a limited power of at-

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torney. If the plaintiff had ever consented to the disposal of the bill, he would not be allowed to object, nor would he if the money had ever come to his use. But here there is no such pretence."

Glynn v. Baker, 13 East, 500, was a suit for bonds of the East India Company, payable to their treasurer, and sold with his endorsement. Le Blanc, J., said:

"Here are persons intrusted with the securities of A and B, who part with the securities of A, and when called on for them, give the securities of B. That difficulty can only be met by assimilating such securities to cash, which, whether it has an ear mark set upon it or not, if passed by the person entrusted with it to a bona fide holder for valuable consideration without notice, cannot be recovered by the rightful owner, but how does the similitude hold?"

And Lord Ellenborough said, "any individual might as well make his bond negotiable." * * *

"We have considered this cause upon the assumption that the defendant was a holder for value." * * *

In delivering their opinion in this case of *Combs v. Hodge*, the Supreme Court of

the United States quoted and relied upon the case of *Dunn v. Commercial Bank of Buffalo*, 11 Barb., 580.

It has been urged, in argument, that certificates of stock are negotiable from their analogy to certain instruments of negotiable qualities, such as dock warrants, exchange bills and India warrants, and to bills of lading, whose negotiability is by no means conceded, but yet contended for. To this it may be conclusively answered that, it is evident that the first of these documents are not negotiable since it required the Stat., 6 Geo. IV, c. 94, to render them so, even in certain cases. And, in *Evans v. Truman*, 2 Barn. and Adol., 886, it was decided, with regard to East India warrants, one of the most important of the class, that where the provisions of that statute do not apply, there is no negotiability for those warrants at the common law. The argument in favor of the negotiability of bank certificates, from a

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comparison to bills of lading, is equally untenable, for a bill of lading is not a negotiable instrument—it is not transferable, like cash, upon delivery, nor can the person holding it maintain an action on it in his own name. The case of *Lickbarrow v. Mason*, 2 T. R., 63, is relied on as establishing the doctrine of the negotiability of a bill of lading. But “that case refers only to those instances in which a previous sale of the goods has been made to the consignee, and merely determines that if the vendee of goods resell them after they have left the custody of the vendor, to a bona fide purchaser for value, the right of property acquired by the latter shall not be defeated by a subsequent stoppage in transitu, if he have taken an assignment of the bill of lading.”

The idea which has been sometimes inaccurately expressed with regard to the negotiability of a bill of lading, has been very ably confuted in a note, by the American editor of Smith's leading cases, to the case of *Lickbarrow v. Mason*, the conclusion to which is as follows: “The whole of the argument against the negotiability of the bill of lading, may be summed up in a single sentence, by saying that to impress a character so new and extraordinary upon an instrument not for the payment of money, requires the authority of at least one decision, while no such decision can be found.”

This certificate being thus in no respect negotiable, the next question is, whether Messrs. Cox & Co. can claim title to it from the transfer to them by Boldin, by virtue of the circumstances under which it was placed in Boldin's possession by Madame Szemere. These circumstances can, but from two considerations, be supposed to confer any authority upon Boldin to convey a title to Cox & Co.

1. It may be said that Madame Szemere, having invested Boldin with all the indicia of title, and having held him out to the

world as the owner of the shares, should be liable upon any transfer which he may have made.

2. That Madame Szemere, having invested Boldin as an agent, with the power to sell, she is bound by his agency.

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*In other words, that Madame Szemere, having represented Boldin either as owner or as agent, she is bound by all that he has done.

As to the first proposition. It is not true that Madame Szemere invested Boldin with all the indicia of title, or held him out to the world as owner, so as to be liable upon any transfer which he might make. For this could be so only because the possession of the certificate conferred the legal title upon him, which is contrary to all the testimony, (see *Sebring's*, the president's,) and is in effect establishing that the certificate is a negotiable instrument. Or, because the mere possession of the certificate and the power of attorney indicated such absolute ownership, that any transfer which he might make, was conclusive against the true owner.

It is difficult to ascertain upon what precise ground the circuit decree rests its decision. In the first part of the decree, on the sixth page, the Chancellor says that he is inclined to think that the preponderance of argument and authority is in favor of the position that certificates of bank stock are transferable by delivery, but that he does not rest his judgment upon that ground. On the next page, when he is discussing the principles upon which he does rest his decree, he says, and the same idea is repeated throughout the decree, that by delivering the certificate of stock and the power of attorney to Boldin, Madame Szemere invested him with all the indicia of property and ownership, as to the said shares. This is but declaring that the certificate and the power of attorney are negotiable, and that by the delivery of them the right to the shares passes. How can the mere delivery of the certificate and the power of attorney invest one with all the right of ownership, unless they be negotiable in their character? And yet the Chancellor says that he will not rest the decree upon the ground that the title to the shares passed by the delivery of the certificate. This is a manifest inconsistency, and shows that while the Chancellor thought he was deciding the case upon other principles, he was, in reality, decid-

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ing it upon the ground that the title passed by the delivery of the certificate.

On the top of the 8th page, there is a declaration which at first appears to afford the unconfused idea upon which the decree rests. The Chancellor says:

“There is no doctrine of equity jurisprudence better supported by reason, as well as authority, than this: that where one of two innocent persons must suffer loss, it must

fall on the party who, by incautious and misplaced confidence, has occasioned it, or placed it in the power of a third party to perpetrate the fraud by which the loss has happened."

Now, this doctrine of equity jurisprudence, to which the Chancellor refers, proceeds upon the ground of constructive fraud—that is the reason of the rule. See 1 Story Eq., sec. 385. And fraud cannot be implied unless upon the doctrine of estoppel, that is, that a party has done some improper or wilful act, to which another has given credence, and to which the assertion of his own rights would be contradictory. If Madame Szemere had invested Boldin with all the indicia of title—if she had regularly transferred the shares to his name on the books of the bank, she would now be estopped from gainsaying the language which such indicia of title would hold, even although Boldin was not the owner of the shares. But if she has not done an act which invests Boldin with the indicia of title, and by which she would now be estopped from saying that the title is still in her, she cannot be held amenable to a principle of equity jurisprudence, which proceeds only upon the doctrine of estoppel. That the mere possession of the certificate and the power of attorney, is not the possession of the indicia of title, is apparent from the testimony, and every authority which has been cited. The Chancellor's application of the doctrine of constructive fraud, can proceed only from the idea that the title to the shares passed upon the delivery of the certificate, the ground upon which he desired not to rest his decree.

The mere possession of property is not the

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possession of *all the indicia of title, and the application of this doctrine of constructive fraud, that in cases where one of two innocent persons must suffer loss, the loss should fall upon him who is the occasion of that loss, to instances of the disposal of property by one who is merely in possession of it, is entirely inconsistent with a number of well recognized and adjudicated cases. If the doctrine referred to by the Chancellor can be made to apply to the case of Madame Szemere, it should equally have applied to the deposit by Combs in hands of Love, of the Texan certificates, with the blank endorsements, and yet the Supreme Court decided that Love could convey no title. So, in the very recent case of Carmichael v. Buck, decided in this Court, it is said: "If the mere custody of property is such evidence of ownership as to mislead, then what can a bailor do? Must he lose his property unless he go along and make continual proclamation of his rights and the limited contract he has made?

"There is no other solution of the difficulty, it seems to me, but to declare that when one, for a specific purpose, commits his prop-

erty to a limited agent, in the usual way of doing such things, he is not to be accused of holding out the agent as more than he is, or giving him the indicia of property. * * *

"Now, what indicia of ownership did Carmichael impart to Huggins? None whatever, according to the proof, except giving him possession, and if the possession of a bailee of this description is a sufficient indicium of ownership, to be construed into a misleading of the public, it will no longer be safe for a planter to send his cotton to market by a wagon or boat."

There is this difference between Carmichael's case and that of Madame Szemere, that the raft, in his case, contained no evidence whatsoever that it did or might belong to any one else; while Madame Szemere did that which, in the striking language of Carmichael's case, was a "continual proclamation of her rights." The certificate was in

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her *name; it declared that the shares were her property, and the power of attorney which accompanied it, was special and limited by its terms to the execution of a single act.

There are many other cases which illustrate these views; and here it will be proper to notice the case of Pickering v. Busk, 15 East, 38, which will be quoted on the opposite side. In that case, the purchaser of hemp had, at the time of the purchase, given orders in person that it should be transferred on the books of the warehouse from the name of the owner to the name of a broker, and a subsequent sale by the latter, without further proof of authority, was held valid against the first purchaser, in consequence of the particular course of conduct adopted by the latter. It was not the mere possession of the hemp that rendered the sale valid by the broker, but the possession of the hemp in connection with the transfer to the name of the broker on the books of the warehouse. Here was a concurrence of possession and of the indicium of title, as the entry on the books was an evidence of title. If Madame Szemere had actually made a transfer on the books of the State Bank, of the shares to the name of Boldin, this case would have been perfectly analogous to Pickering v. Busk, but wanting that transfer, it wants everything which makes Pickering v. Busk, applicable to her case.

In the case of McCombie v. Davis, 6 East, 538, a broker, who had been in the habit of dealing in tobacco on his own account, purchased a quantity of it in his own name, and had it entered as his own in the king's warehouse. He subsequently pledged the tobacco as his own property, and for valuable consideration, to the defendant, against whom the real owner, on whose account the original purchase was made, brought trover. The question here presented was, whether the

owner of goods, who has entrusted them to the possession of an agent, under circumstances which will enable the agent to impress other parties with the belief that he is the owner, will be bound by the contracts

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of the agent, *and the Court determined that, in the absence both of property and authority in the broker who had made the pledge, the plaintiff was entitled to maintain his action. In this case, as in the case of *Pickering v. Busk*, an entry was made of the property, on the books of the warehouse, in the name of the agent; but with this great difference between the cases, that in *Pickering v. Busk*, the entry was made by the owner, in *McCombie v. Davis*, the entry was the act of the agent.

In *Guerreiro v. Peile*, 3 Barn. and Ald., 616, 5 Eng. Com. Law, 399, the plaintiffs entrusted *Burmeister & Vidal*, merchants, in London, with twenty-five pipes of wine, and a general authority to sell. *Burmeister & Vidal* bartered the wine with the defendants for a quantity of rum. The defendants did not know that *Burmeister & Vidal* were merely factors, but, upon an action brought for the recovery of the wine, upon the ground that the authority of the agent was to sell and not to barter, the Court held that the plaintiff could recover.

To the same effect see also *Monk v. Whittenburg*, 3 Barn. and Adol., 484; *Taylor v. Kymer*, 3 Barn. and Adol., 320; *Andrews v. Dietrich*, 14 Wend., 31.

On the sixth page of the printed decree, the Chancellor says, that the provision of the charter of the State Bank "that the stock of the bank shall be assignable and transferable according to such regulations as may be instituted in that behalf by the directors," was "intended for the convenience, protection and security of the bank, and it is to give the bank notice and information as to who are the stockholders;" and "that the transfer of stock by the owner, though not in accordance with the form prescribed by law, will pass all the right of the shareholder in equity, if not in law." To this it may be answered, that it is difficult to perceive in what way the provision of the charter referred to can conduce to the convenience, protection or security of the bank, or inform them who are the

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stockholders, if, as in the *present instance, the certificate of stock could, without the knowledge of the bank, be floating over the continent of Europe for three years, the property of, it may be, a dozen different proprietors, conveying at each transfer the title to the shares in equity, if not in law. If by the word "transfer," used by the Chancellor, he meant anything done by the person in whose name the stock stood on the books of the bank, in consequence or furtherance of a contract proved with him, or a con-

sideration paid to him, the law undoubtedly is as he has stated it. But, if by the word "transfer," he means merely the passing or delivery, or the possession of the certificate of stock, without proof of any contract or consideration, he has overlooked what was decided in the cases of *Dunn v. The Commercial Bank*, 11 Barb., 581, and *Combs v. Hodge*, 21 How., 359, and is amply supported by other authority, that the naked possession of the certificate and power of attorney, without proof of consideration paid to, or contract made with the owner of the stock, is no evidence of title. The question has been made in a number of instances, but it is very important to remark, that in every case in which it has been decided that the holder of the certificate was entitled to the shares without the formality of a transfer on the books of the corporation, a consideration has been proved to have been paid to the former owner of the certificate, or a contract made with him. This essential condition has escaped the Chancellor's attention throughout the whole of his decree.

The following are some of the cases which have been and will be relied on to prove that the title to stock will pass even although there had been no transfer on the books. But in all of them it will be seen there was either a contract proved or a consideration received by the owner. In the *United States v. Vaughn*, 3 Binney, 394, the question was between an attaching creditor and a bona fide purchaser for valuable consideration, to whom the certificate of the stock and a power of attorney has been delivered, although as

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yet there *had been no transfer on the books of the bank. It was held that the attachment would not lie. But it was the bona fides of the transaction, and the payment of the purchase money which gave the purchaser all his equity.

In *Bank of Utica v. Smalley & Barron*, 2 Cowen, 770, a person had been called as a witness for the bank. He was objected to because he was a stockholder. He immediately made a transfer of all his shares to one N. Williams, and was called again as a witness. He was again objected to, on the ground that the transfer was not complete, not having been made on the books of the bank. But the Court held that he was competent. This was evidently upon the ground that the assignment thus made was done in pursuance of the express consent and contract of the owner of the shares.

In *Turner v. Marblehead Ins. Co.*, 10 Mass., 476, there was a bona fide sale by a debtor to his creditor, and the Court said that such a sale in satisfaction of the debt, was sufficient to transfer the equitable interest. Here the debt was the consideration.

So little regard do the banks pay to the possession of the certificate, that it is said in *Angel and Ames on Corp.*, sec. 565, "A per-

son to whom shares have been bona fide transferred, will hold them without any certificate." And it is the common and constant practice to issue a new certificate of stock upon affidavit of the loss of a former one, after three months advertisement in the papers. Now, this certificate and power of attorney had been three years and three months in the possession of Boldin, without the knowledge of Szemere, during the whole of which time the bank was recognizing his wife as the owner of the shares, and paying her the dividends. Suppose that Szemere, finding that Kuhlmann had not, as he thought, the certificate, had, after six months or a year, or even two years, made an affidavit of the loss, as he supposed, of the certificate, and advertisement had been made in the Charleston papers, of which, Boldin, in Paris, might very probably have had no

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knowledge, and that *then a new certificate had been issued to Szemere: upon the supposition that the certificate is the true indicium of title, which of these two would have been regarded as the true one? Could the fraudulent concealment of the certificate by Boldin have given him any title?

Besides, if the power of attorney and the certificate of the shares are indicia of title and of ownership, they must have been so from the date of the power, November 11th, 1852. In the meantime, and until the 14th February, 1856, the date of the transfer to Messrs. Cox & Co., a period of three years and three months, what had become of the dividends of the shares? The certificate still at that date, in the name of Mdme. Szemere, was proof that the shares had been untransferred on the books of the bank, and, of course, that she alone could receive the dividends. If, according to the Chancellor's view, the mere delivery of the certificate was a disposal of the shares, what right could she have to the dividends? This severance of the right of the shares and the right of the dividends, is the necessary consequence of the idea that the delivery of the certificate passes the title to the shares. In the three years which had elapsed since the date of the power, six dividends had accrued, and it is in proof that they were received by Mdme. Szemere—they could have been received by no one else. If the delivery of the certificate has the consequences contended for, six persons may have been the owners of the shares without having received the dividends. Of this extraordinary embarrassment Messrs. Cox & Co. must legally be supposed to have been informed.

If Szemere had been curious to impress upon these shares the fact that his wife was the true legal owner of them—if he had tasked his ingenuity to excite investigation and challenge suspicion, and invite and warn people to be upon their guard, what more could he do than he has done. Not only did

the certificate announce that it was his wife who was entitled to the shares, not only does

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it contain no words analogous to *assigns, not only does it say that the shares can be transferred, not in Europe, or anywhere, but only in a particular place, and according to the directions of a particular body, but it was accompanied with an imperfect power of attorney—a stale, antiquated power of attorney—more than three years old, whose very dates and gaps were sufficient to excite the alarm and suspicion of any man who was not careless as to how he might ruin and embarrass himself. And this is called arming Boldin with all the indicia of title to entrap the unwary. Laying aside all legal considerations and authorities, there is not a single witness who has not expressed himself with great distrust as to the property which he thought Boldin had in this certificate.

In the opinion of the Chancellor, the statement made by Mdme. Szemere in her answer, that she delivered the certificate of the shares and the power of attorney to Boldin, for the purpose of his sending them to Kuhlmann to collect the dividends, is an absurdity, which is inconsistent with the possession of Kuhlmann of another power of attorney, under which all the dividends had been received. But whatever may have been the motive of Mdme. Szemere, such motive cannot control the legal effect and operation of the certificate. If her acts, of themselves, are not necessarily illegal and fraudulent, the mere conjecture and surmise of their absurdity cannot give them that character. The intention of Mdme. Szemere is not a matter of any proof in the case, it is her own declaration which must be taken as she states it, or not at all. But attention to the imperfect knowledge which Mons. and Mdme. Szemere possess of the English language and commercial custom, and to the dates of the two powers of attorney and the certificate of stock, would have convinced the candid and impartial mind of the lamented Chancellor, of the consistency of her statement. It will be seen from the testimony of Mr. Ravel, and from the transcript by Mr. Jervey, from the books of the State Bank, that prior to July, 1852, Mdme. Szemere was entitled to

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thirty *shares in the bank. The dividends in these shares were collected on the 2d July, 1852, by Kuhlmann, under the power of attorney which he possessed, dated 26th April, 1852. The additional shares, which are the subject of this suit, were purchased on the 10th of July, 1852, a few days after the receipt by Kuhlmann of the dividends of the thirty shares. On the 11th November, 1852, before the accrual of any dividends on the recently purchased fifty additional shares, the second power of attorney was given to Boldin to be sent to Kuhlmann in time for the collection of the January dividends on

the fifty shares. Mdme. Szemere believing that without this additional power of attorney, the dividends could not be collected. That the power of attorney is to transfer and not to collect the dividends, can be explained from their imperfect knowledge of the English language and ignorance of business. The whole transaction is stated in the answer under the sanction of their oath, with the unreservedness of persons who prefer to rest the defense of their right upon a statement of the actual occurrence of facts.

If the supposition of the Chancellor be correct, that the certificate and the power of attorney were entrusted by Mdme. Szemere to Boldin for the purpose of disposing of them, that purpose must date from the date of the power of attorney, 11th November, 1852. Yet the receipt of the dividends, by Mdme. Szemere, for three years, would show that she was aware that during the whole of that time he had disregarded her instructions. It is not usual nor natural that public securities should be allowed to remain for three years in the hands of an agent for sale. The acquiescence for so long a time in the conduct of an agent, is presumptive that that conduct is in pursuance of instructions, rather than that instructions have been given contrary to the continued conduct of the agent. As Mdme. Szemere continued to receive the dividends from her agent, we must presume that the instructions to that agent were rather to receive and pay her the dividends than to sell the stock.

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*The Chancellor has said that the rule of the French law, which it was contended in the argument upon the circuit, should govern the transfer or pledge by Boldin to Messrs. Cox & Co., can have no application to the case, because, according to Mr. Justice Story, in his Conflict of Laws, ch. 19, sec. 363, 383, an exception to the general rule, that the laws of the owner's domicile should, in all cases, determine the validity of every transfer of personal property, must be made with regard to certain stocks or funds, "such as bank or insurance stocks, turnpike, canal and bridge shares, and other incorporeal property, owing its existence to, or regulated by peculiar local laws." The legal title to personal property of this character is not acquired unless the local requirements are complied with. Now, in the present instance, the local requirements are, that the stock should be transferred on the books of the State Bank by Mdme. Szemere or her attorney. The application, therefore, of the rule as laid down by Mr. Justice Story, taken in connection with the idea so often expressed in the circuit decree, that the entrusting Boldin with the certificate of stock and the power of attorney, was "investing him with all the indicia of property and ownership," and "arming him with the legal title," presents this dilemma. If the possession of the mere cer-

tificate and power of attorney by Boldin was, by reason of the requirement of the local law, the *lex loci rei sitæ*, not such an investment of absolute title in him as to give application to the French law, the *lex domicilii*, then the possession of the mere certificate and power of attorney was not such an "arming him with the legal title" as was sufficient to enable him to deceive any one, or impose himself upon any one as the owner of the shares. On the other hand, if the mere possession of the certificate and the power of attorney was, in the words of the Chancellor, "investing him with all the indicia of property and ownership," and was "arming him with the legal title," then the requirements of the local law, the *lex loci rei sitæ* were unnecessary to the per-

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fection of the absolute title in *him, and the French law, the *lex domicilii*, should have application and govern the case.

Since the delivery of the decree by Chancellor Dargan, the case of the Union Mutual Insurance Company v. The State Bank has been decided in the Circuit Court of the United States for this State. His Honor, Judge Magrath, there expresses the opinion that certificates of bank stock are negotiable instruments. The facts were these: F. S. Lathrop, being in possession of a certificate of stock in the State Bank certifying that E. W. Bancroft was entitled to forty shares in that institution, and of a blank power of attorney executed by Bancroft, left the certificate and the power with the plaintiff as a security for a loan made to him, the said Lathrop. Some time afterwards, the plaintiff presented the certificate at the bank and requested a transfer of the said shares to its own name. The bank refused, on the ground that it had a lien on the shares, in consequence of the indebtedness of Bancroft to it. The action was brought to recover damages in consequence of this refusal. It is to be observed that the transfer here was refused, not as it was in Dunn's case, in 11 Barb., 581, because of there being no proof of any consideration received by, or contract made with Bancroft, the owner of the shares; nor was there any question of misappropriation on the part of Lathrop. Bancroft seems to have acquiesced in the fact that the shares had been bona fide disposed of by him to Lathrop. He laid no claim to them. The single question was, whether a bank has a general lien upon the shares of its stockholders for their indebtedness to it, so that no transfer can be made to other persons till that indebtedness is discharged. In determining this question, the negotiability of certificates of bank stock was discussed. Judge Magrath argues for the negotiability of certificates of bank stock, from their supposed analogy to railroad bonds, payable in blank, no payee being inserted. He refers to the case of White v. The Vermont and Massachusetts Railroad Company, in 21 How. 575 [16 L. Ed. 221], where

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it was decided that bonds *issued by a railroad company, payable, in blank, to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, and suit be maintained upon them. In applying the principles of this case to certificates of stock, he says that "the principle laid down by the Court would be applicable to any other paper possessed of the same or similar qualities, and in that case, as has been seen, in testing the question of negotiability, the Supreme Court directed its attention to the form in which the paper was made, as indicative of the intention with which it was made, and to the mode of giving circulation to it, and then made reference to the usage and practice of the company by which it was issued, and of capitalists and business men, and, finally, to the decision or recognition of the principles applicable to such case by Courts and Judges."

Now, it is remarkable that at the same term of the Supreme Court at which this case of *White v. The Vermont and Massachusetts Railroad Company* was decided, in which the Court gave its attention to the negotiability of railroad bonds, the case of *Combs v. Hodge*, in which the negotiability of certificates of the public debt of Texas was discussed, was also decided; and, while the Court held that the railroad bonds, issued in a certain form and for certain purposes, might be regarded as negotiable, it expressed itself with equal distinctness and emphasis as to the non-negotiability of the Texas certificates. The reason of this is apparent, for, upon the very principles indicated by Judge Magrath, there can be no comparison or analogy between that class of instruments known as railroad bonds and that known as certificates of stock. They are not possessed of the same or similar qualities. They are different in their form, in their intention, in the mode by which circulation is given to them, and in the usage and practice of the companies by which they are issued. It was the recognition of these differences which guided the Supreme Court in their decision in

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the *two cases, and which alone can make them consistent. A railroad bond, such as was the subject of suit in *White v. The Vermont and Massachusetts Railroad Company*, differs from a certificate of the public debt of Texas, and from a certificate of the State Bank stock, which is similar to the Texas certificate in its form. One is an obligation for the payment of money to a blank payee, his assigns or order. The other, the bank certificate, simply certifies, without any words of assignment, that a named individual is entitled to an unascertained division of the profits of a franchise. Judge Magrath is of the opinion that the blank power of attorney which, in the case before him, was printed at

the foot of the certificate of stock, is a part of the certificate, and he would, apparently, infer that some negotiable quality was imparted to the certificate from such an incorporation of the power into it. But it is surely not the case that the power of attorney, so often printed at the foot or on the back of certificates of stock, is any part of such instruments, or enters at all into the contract made by them. Such blank powers of attorney are only printed, where they are, for the convenience of the holder. They are not contained under the seal of the corporation, or the signature of the president, and add nothing to the character of the instrument, any more than if they were written on a separate piece of paper.

A railroad bond also differs from a certificate of bank stock in the intention with which it is issued; in the mode by which circulation is given to it; and in the usage and practice of the companies by which they are issued. One is a security for money, issued in a negotiable form, for sale, in order to seek a market, and to raise money, and is satisfied by the payment of money. The other is simply a muniment of title and evidence of the owner's right to a given share in the property and franchises of the corporation, and is designed only to afford a steady investment for capital, not for circulation. These differences are not slight, and being

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founded in *the nature of the two classes of instruments, are quite sufficient to destroy any analogy between them.

Judge Magrath is also of the opinion that a certificate of stock in the State Bank is a negotiable instrument, in consequence of the section of the Act of Incorporation, which declares "that the stock of the bank shall be assignable and transferable, according to such regulations as may be instituted in that behalf by the directors." His argument is, "that when the law gives the stock an assignable quality, and does not at the same time qualify the effect of such an assignment, it thereby makes it negotiable."

The proposition of Judge Magrath in this part of his argument is, that if without qualification a statute affirm, in reference to a particular subject, the same qualities which the subject already possessed by the general or common law without the statute, the inference must be that other and different qualities must, by the force of the statute, be conferred upon the subject, although the language used be an exact legal definition or description of the qualities or capacities possessed before the passing of the statute. If this be so, if a statute cannot repeat or declare the common law, without, at the same time, making new law and different law from that which it repeats or declares, there can be no such thing as a "declaratory or affirmative statute."

But it has escaped Judge Magrath's atten-

tion that there is in this section of the Act of Incorporation the very qualification which, in his own opinion, would make an exception to even his own proposition. The stock was, as he says, assignable at common law, and the statute says that it should be assignable and transferable according to such regulations as the directors should institute. What is this but a qualification—a limitation of its assignability? If, by law, it was assignable generally, and by the statute it was assignable as the directors may institute, surely this is a qualification of the assignability. Whatever regulations were instituted by the directors became incorporated into the statute, and had

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*the same force and effect as if they had been specially designated. When, therefore, the directors said that the stock should be transferred only on the books of the bank, it was the same thing as if the statute had so regulated the assignability. The effect of the enactment was to declare that the stock, which by law was assignable generally, should be assignable only on the books of the bank. There can be no doubt but that this was intended to be, not an extension, but a restraint upon the transferability of the stock. See the remarks of Chancellor Walworth, 22 Wend., 353, quoted in a former part of this argument.

It remains to discuss the position, that Madame Szemere, having invested Boldin as agent, with the power to sell, she is bound by the acts of his agency.

The Chancellor, on the 8th page of the circuit decree, assumes it as beyond dispute, that Boldin was the agent of Mons. and Mdme. Szemere, for the purpose of selling and disposing of the shares, and being thus authorized, he says that the breach of trust committed by him did "not consist in the act of selling, but in not accounting." He also says, that it is vain for Madame Szemere to say that Boldin was "not to sell under the power, but to transmit it to Kuhtmann; if that be true, it was a secret arrangement between them, and not binding upon third parties." These conclusions of the Chancellor could not be denied, if it were established as undoubtedly as he supposes that Boldin was Mdme. Szemere's "agent to sell." But this is far from being the case, for against the fact of Boldin's agency, the following propositions can be maintained:

1. That the power of attorney being in blank, and no consideration being paid to Mdme. Szemere by Boldin, the mere possession of the papers conferred no authority upon him to complete them by the insertion of his own name, or to convey a like authority to any one else by a simple transfer of the documents.

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*2. That even if he had authority to complete the papers, the power is to "transfer," and not to "sell."

3. That even if he had the power to "sell,"

his transactions with Messrs. Cox & Co. are, as the Chancellor has said, by way of hypothecation or pledge for his own indebtedness, and so not warranted by a power to sell.

4. That the paper in Boldin's possession was, after all, only a power of attorney, not coupled with any interest, and so revocable at any moment before execution.

If either one of these propositions can be successfully maintained, the conclusion of the Chancellor that the instructions of Mdme. Szemere to Boldin to transmit the certificate and power to Kuhtmann are not binding upon third persons, and that Boldin's breach of trust did not consist in the act of selling, but in not accounting, must fall to the ground.

As to the first proposition, that the power of attorney being in blank, and no consideration being paid to Mdme. Szemere by Boldin, the mere possession of the papers conferred no authority upon him to complete them by the insertion of his own name, or to convey a like authority to any one else by a simple transfer of the documents. No man can be bound by a contract which he has not been proved to have made. If a man execute a paper with blanks, before those blanks can be filled, it must be proved how he has authorized that they should be filled. This rule is so strict, that in England it has been decided that the authority to fill up the blanks in a deed must be proved by an instrument as solemn as the deed itself, and that it cannot be done by parol. *Hobblewhite v. McMorine*, 6 M. & W., 200. In our State, the rule has been so far relaxed, as to permit the blanks in a deed to be filled by parol authority; but still, some authority, beyond the mere possession of the papers, is necessary. *Gourdin v. Commander & Read*, 6 Rich., 497. An exception has also been made to the rule in the instances of promissory notes and bills of exchange. See *Russell v. Langstaff*, 2 Doug., 514, and other cases which have fol-

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lowed that decision. But the *principle of these cases depends upon the character of the instruments. It is from their negotiability that the law raises a presumption not only of a consideration paid, and of an intention of an uncontrolled circulation, but of an implied authority in furtherance of their design to fill up the blanks which may be found in them. But this implication is confined to instruments of this description, and no case can be found which has decided that the holder of any other than a negotiable instrument is permitted to fill up blanks, unless he prove either express authority to do so, or a consideration paid by him to the maker of the instrument, from which authority may be equitably implied. This is precisely the point which has been ruled in *Dunn v. The Commercial Bank of Buffalo*, 11 Barb., 581, and confirmed by *Combs v. Hodge*, 21 How., 398 [16 L. Ed. 115].

As to the second proposition, that even if Boldin had authority to complete the papers, the power is to "transfer," and not to "sell." The word to "transfer" is not a synonyme with the word to "sell." The difference in their signification is constantly recognized in business transactions. "To sell" involves the idea of bargain and negotiation, which is completed by the act of transfer. One refers to an act of contract, the other to the mere execution of the title.

If it needed anything to make it appear what "transfer" means in the present instance, it is to be found in the certificate which accompanied the power of attorney. In the certificate of stock it is a part of the stipulation that the shares are "transferable only at the bank." Here a definite and precise meaning is attached to the word transferable, and its interpretation limited to the act to be done at the bank. In the power of attorney, which was fastened by a wafer to this certificate, the same word, "transfer," occurs. It is the only word occurring which directs what is to be done with the shares. Now, it is impossible to say that the same meaning should not be assigned to the same

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words in the different *instruments; they must be similarly construed; they cannot be made to bear different meanings. "Transfer," in the power, cannot mean to sell in London, or Paris, or anywhere—and "transferable," in the certificate, be confined, as it is by its context, to an act to be done only at the bank.

As to the third proposition, that even if he had power "to sell," his transactions with Messrs. Cox & Co., are, as the Chancellor has said, by way of hypothecation and pledge for his own indebtedness, and so not warranted by the power to sell.

Nothing can be clearer than this, that an agent to sell has no authority to pledge for his own debts. No point can be more fully sustained by authority. The case of *De Bouchout v. Goldsmid*, 5 Ves. Jr., 210, is singularly similar in its circumstances, and will be sufficient. The plaintiff and his wife were entitled to one hundred and ninety-one shares in a London Assurance Company, and they executed a power of attorney to Muilman & Co. to "sell, assign and transfer all or any of the said shares." Muilman & Co., being indebted to the defendants, pledged to them a part of the shares belonging to the plaintiff, and a transfer was actually made. Muilman & Co. failed, and the bill was brought for a re-transfer of the shares and an account of the dividends, upon the ground that an authority to sell did not permit a pledge of the agent for his own debt. The Lord Chancellor said: "It has been settled with regard to goods, and there is no doubt that if goods are consigned to a factor to sell, he cannot pledge them. It must be a bona fide sale for valuable consideration. The defendants are certainly wrong in point

of law. I take it not merely to be a principle of the law of England, but of the civil law, that if a person is acting ex mandato, those dealing with him must look to his mandate." The decree was, that the defendant re-transfer the stock, and pay the dividend and costs.

The fourth proposition is, that the power of attorney in Boldin's possession not be-

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ing coupled with an interest is *revocable at any moment before execution. The shares are yet untransferred on the books of the bank, and still stand in Madame Szemere's name. Up to the point of transfer, Messrs. Cox & Co. took the shares at their peril. Before the transfer which the power authorized, Messrs. Cox & Co. have been informed of the revocation, and the power remains void in their hands.

Memminger, De Saussure, contra.

Mitchell, in reply.

The opinion of the Court was delivered by

JOHNSTONE, J. This case has been pressed upon the Court as if the transfer of the scrip by Boldin was made in the character of agent, and by way of pledge; whereas, upon a careful examination of the facts, the scrip was represented and accepted as Boldin's own property: and it was a sale, and not a pledge. If the scrip was put into Boldin's hands by Madame Szemere under any restrictions, it was her duty to have proved what they were; but the only fact that bears on her transfer to him is, that she made a general delivery, with an indefinite power, in blank, before Mr. Consul Goodrich.

This, according to the general course of fair business, exhibited Boldin as the owner: and so he acted. Indeed, it appears that from that time he received the dividends, which was further proof of ownership.

The only formality omitted was that of filling up the blanks, and the taking out new scrip.

It is well known that Courts of law as well as Courts of equity, recognize the title of a person who purchases a security in the course of a fair business, although it be not negotiable. If, for instance, a note payable to A, be transferred by him to B, the latter is recognized as legal holder of the paper, and although he may be obliged to use the

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name of *A, in suing for the debt, A will not be allowed to release the action. That the security is liable, in the hands of B, to the equities between the maker and the original payee, may be conceded. That does not touch the point now under consideration, which exclusively concerns the property, the security itself, as between the original payee and one to whom he has transferred it without formal assignment. This morning the Chief delivers an opinion, in the case of *Salas v. Cay*, that the assignment, comprehending not

only tangible property but choses, enables the assignee to sue in his own name.

Whoever comes fairly by a security, as Cox did in this case, in the course of business, is entitled to hold it against him who passed it, or enabled another to pass it to him.

It has been argued that the inscription of Madame S.'s name in the scrip notified Cox of her right, so as to oblige him to enquire of her. But the plain authority was to transfer, which (no gratuity being reasonably intended) was a power to sell: and a sale was made. In a large proportion of cases, especially when such scrip is carried abroad, and considerable time has elapsed from the original issue, it has passed through many hands; so that the greater has been the efflux of time, the less reason has a buyer to suppose that the ownership remains in the original party, and the more insufficient is the guide for enquiry.

Boldin had been put in possession of this scrip, with an indefinite power of disposition, by Madame Szemere, and if he was not the owner (of which ownership there is much evidence) she exhibited him in a light which enabled him to lay claim to the stock. Under such circumstances, equity would not permit her to avail herself of the dry skeleton of title, which yet stands formally in her name, to defeat him whom she has contributed to deceive. The transfer should have been formally made; and this Court will not take notice of that as undone which ought to have

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been done. It *will, in all formal matters, execute agreements in good faith, and as they, in fairness, should be carried out.

It is ordered, that the appeal be dismissed, and the decree affirmed.

WARDLAW, J., concurred.

O'NEALL, C. J., dissenting, said: That the majority concede that the legal estate in the bank stock (fifty shares) is in Madame Szemere, the defendant. They hold, as I do, that the shares are not negotiable by delivery, or by any writing except that which operates to cause them to be transferred on the books of the bank. In this case, there has been no transfer on the books of the banks, and, of course, the shares remain in the name of Madame Szemere.

But, it is contended that the other defendants, Hermann Cox & Co., who hold the scrip, and blank power of attorney, which they received from Boldin, are, in equity, entitled to be reimbursed their advances out of the stock. This claim is no more than that they are entitled to hold the shares on hypothecation; and so the Chancellor's decree allows.

If they had purchased, and could shew that Madame Szemere intended to sell, and placed the stock and power in Boldin's hands for that purpose, then an equity would arise to

perfect the sale. But there is no such proof. Boldin called the stock his own, and sold, or pledged it as such, to raise money for his own use. Not a dollar has been traced to Madame Szemere's use. How an equity against her, under such circumstances, can arise, is what I cannot understand. These views are so fully sustained by the recent New York case, *The Mechanics Bank v. The New York and New Haven Railroad Company*, 13 N. Y. Reports, (3 Kernan) 599 to 641, that I may refer to the decision there for an answer to all the grounds assumed for Cox & Co.

So, too, I concur fully in the excellent argument of Mr. Recorder Pringle, and beg leave to refer to and adopt it, as fully illustrating the grounds on which I place my dissent.

Appeal dismissed.

11 Rich. Eq. *393

*WADE J. MARKLEY and Wife v. DANIEL M. SINGLETARY.

(Charleston. April Term, 1860.)

[*Deeds* Ⓒ129.]

A father gave, by deed, a negro girl, to his daughter C., "for her support, during her natural life, and at her, the said C.'s death, the said negro girl, together with her future issue and increase, shall be the property of the issue of the said C."—*Held*, that C. took an estate for life, with a valid limitation to her issue as purchasers.

[*Ed. Note.*—Cited in *Williams v. Kibler*, 10 S. C. 426; *Williams v. Gause*, 83 S. C. 268, 65 S. E. 241; *Adams v. Verner*, 86 S. E. 214.

For other cases, see *Deeds*, Cent. Dig. § 427; *Dec. Dig.* Ⓒ129.]

A gift to a married daughter "for her support during her natural life" creates a separate estate in the daughter—*Semble*.

[*Executors and Administrators* Ⓒ439.]

A bill for distribution of the estate of an infant who died when eleven years old, and who has been dead near twenty years, may proceed without making an administrator of the infant a party.

[*Ed. Note.*—Cited in *Grant v. Poyas*, 62 S. C. 436, 40 S. E. 891.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1784; *Dec. Dig.* Ⓒ439.]

Before Inglis, Ch., at Charleston, February, 1860.

The decree of the Circuit Court is as follows:

Inglis, Ch. Elisha Mellard, late of the parish of St. James, Goose Creek, on 20th day of February, A. D. 1830, made and duly delivered his deed of gift of that date, the disposing part of which is in the following words, to wit: "For certain causes, I do give unto Celia Ann Singletary, a certain negro girl, Sue, together with her future issue and increase, for her support during her natural life, and at her, the said Celia Ann Singletary's death, the said negro girl Sue, together with her issue and increase, shall be the property of the issue of the said Celia Ann

Singletary." The immediate donee, Celia Ann Singletary, was the grand-daughter of the donor, Elisha Mellard, and at the date of the gift, was the wife of the defendant, Daniel M. Singletary, and had issue, one child, Elisha Mellard Singletary, then about nine months old. The girl Sue went into the possession of the defendant, and if not recently removed by him, out of the jurisdiction, is still in his possession, as is also her son, Toney, the only issue born to her since the

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gift. Celia Ann Singletary died in July, *A. D. 1835, leaving surviving her, her said husband and two children, Elisha Mellard Singletary, above named, then six years old, and the plaintiff, Celia Ann, then about a year old—the former of these two children, died (intestate of course) in June, A. D. 1840, at the early age of eleven years, leaving his father and sister as the only distributees of any estate he was possessed of or entitled to. There has been no grant of administration on the personal estate of the mother, Celia Ann, nor on that of the son, Elisha Mellard. The plaintiffs, Wade J. Markley and Celia Ann Singletary, the younger, the other child of the donee surviving at her death, intermarried in May, A. D. 1855. In their present bill they claim to be entitled, in the right of the wife, to an undivided share in the slaves Sue and Toney, and in their hire, and pray an account from the defendant of the hire and a partition of slaves and hire, conceding to the defendant the right to a share. The defendant, under the form of a demurrer, denies wholly the title thus set up by the plaintiffs to Sue and her increase, or any share therein, and insists that the effect of the deed of Elisha Mellard was to convey an absolute legal estate in the girl Sue, to the donee, which instantly became vested in the defendant, by virtue of his marital rights. The issue thus made requires for its determination the construction of the deed of gift.

A gift of personality, in terms which, if the subject were realty, would create an estate in fee conditional, carries to the donee the absolute ownership of the personality.

Where an estate of freehold in realty is limited to one, and in the same instrument there is contained a limitation in remainder, whether immediately or mediately, to the heirs of his body, as such, the first taker has thereby an estate in fee conditional. This is a rule of property founded in principles of feudal policy, absolute and invariable in its application to all cases falling within its terms, not only wholly independent of the intention of the maker of the instrument, but by its very terms in positive contravention

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of that intention. In *devises the same result will follow even where the forbidden purpose expresses itself by the use of other than the strictly technical words, "heirs of the body." The single inquiry in all cases is

this: did the party using the words have in his contemplation and purpose, and therefore indicate by the words used, all those indefinite successions proceeding from the body of the first taker, whensoever existing, to whom the terms apply, "the whole line of inheritable succession," "all the issue of every generation to come?" Or did he thereby only designate a particular individual or class of individuals, as, for example, all in a certain degree of relationship to the first taker, or all in existence at a particular period? "Heirs of the body," and (in a devise) issue without more, import, *ex vi termini*, the former objects of contemplation, that is, the indefinite succession of persons embraced within the terms. I say "without more," because this *prima facie* meaning of the terms may be controlled by an explanatory context. But the context must be explanatory, the purpose—to use the words in a misapplied sense, (Hayes' Lim., 17,) as designating particular individuals or classes, must be evidenced "so clearly that no one can misunderstand it," or, as is elsewhere said, "by distinct and unequivocal demonstration." (Hayes' Lim., 15.) When we come to inquire of the adjudged cases, what it is which constitutes this distinct and unequivocal demonstration, of an intention to use the words in a restricted sense, such as shall place the particular case out of the terms of the rule of policy, the parallel between realty and personality soon terminates, and we find the lines in which the cases of the one and the other sort of property are ranged, begin presently to diverge. That which will demonstrate the intention to designate by the words, "heirs of the body," issue not the indefinite succession, but particular individuals or classes, as the objects of donation especially present to the donor's contemplation, when the subject of donation is personality, is often wholly ineffectual for the same purpose when it is realty. Thus, a limitation over of the sub-

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ject of gift upon the *failure of "heirs of the body," &c., of the first taker, in terms which clearly evince that the ultimate estate so limited is to take effect, if at all, not upon an indefinite failure of heirs of the body, &c., whensoever occurring, but at the death of the tenant of the first freehold, is held to demonstrate certainly when the subject is personality; and as to some of such terms, when it is realty, a purpose to indicate by the words "heirs of the body," "issues," &c., the particular individuals or class of persons, who, at that point of time, are in existence, and to whom (as part of the whole) (McCorkle v. Black, 7 Rich. Eq., 407,) the words may be applicable. A limitation over to "survivors" of the first taker has this effect, whether the subject of gift be realty or personality. (Henry v. Archer, Bail. Eq., 535; McLure v. Young, 3 Rich. Eq., 559.) A limitation over upon the event of the first taker "leaving"

no heirs of his body, issue, &c., has the same effect as to personality. (Hull v. Hull, 2 Strob. Eq., 175; Chaplin v. Turner, 2 Rich. Eq., 136.) So, too, words of distribution, as "share and share alike," &c., or words of limitation, as "to the heirs of the body of A, and their heirs and assigns forever," superadded in the terms of direct gift to the words "heirs of the body," "issue," &c., as to personality, but not as to realty, are equally held to demonstrate such intention. And, as coming within the reason of the last rule of exception, a gift to "A for life, and after his death to be the absolute property of the heirs of his body forever," have been adjudged to constitute such a demonstration. Cases, such as these now alluded to, where there is considered to be the necessary "distinct and unequivocal demonstration" of a purpose, to use the otherwise technical words, "heirs of the body," "issue," &c., as only designating particular individuals or classes, are not exceptions to, or relaxations of the rule of policy above stated. (Hayes' Lim., 13; 2 Jarman, 240.) They do not come within its terms; there is not a limitation in remainder to the heirs of the body, as such, and, therefore, they are outside of the application. The persons des-

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ignated by the words "heirs of the body," "issue," &c., take not by succession to, or descent from the ancestor, or first taker, but directly from the donor, and are therefore said to take as "purchasers." There is one other general remark proper to be made. In the terms of the rule of policy, as stated in the early part of this judgment, it will be observed, the limitation to the heirs of the body of the first taker, is said to be a limitation, "in remainder." (Hayes' Lim., 4-51; 2 Jarman, Wills, 244.) This word "remainder," necessarily supposes that the two "limitations are of the same quality," both legal or both equitable estates. When, therefore, the freehold, limited to the ancestor, is "equitable, and the remainder to his heirs special, is legal, or vice versa," the rule is silent.

The rule of policy to which allusion has been made—the rule in Shelley's case—has, it is true, no direct application to estates in personality, but when it is said that terms which create an estate in fee conditional in realty carry the absolute ownership of personality, it becomes necessary to inquire what terms do create an estate in fee conditional in realty; and when to this inquiry it is, among other things, answered, that an estate for life to one, followed in the same instrument by an estate in remainder to the heirs of his body, &c., becomes an estate in fee conditional in the first taker, it seems to result that instruments creating estates in personality cannot escape wholly from the operation of the rule; it becomes, therefore, important in cases like the present, to inquire into the extent of its application, and how far, if at all, that application is modi-

fied, when the subject of gift is personality, by the flexibility of the principles of interpretation.

I proceed to apply the general principles which have been stated to the determination of the issue made between the parties now before the Court—What estate did Celia Ann Singletary, the immediate donee, take in the negro Sue, under the deed of Elisha Mellard? What estate did her issue take?

It must be observed that the instrument

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which created these estates is a deed, and the term used to describe those to whom the remainder is limited is "issue." The word "issue," in a deed, is designatio personæ, always a word of purchase. An estate in fee conditional, (Hayes' Lim., 15, 52,) could not be created by deed by the use of this word even when clearly designed as a word of limitation as "to A and his issue." Again, in Myers v. Anderson, (1 Strob. Eq., 344 [47 Am. Dec. 537],) already adverted to, it was held that when the gift was "to A for life, and after her death to be the absolute property of the issue of her body forever," the issue of A took as purchasers. The reason assigned was, that the words showed an intent to constitute the "issue" a new stock of inheritance or succession; but where personal property is the subject of gift, the words "to be the property of" are fully as effective as those other words, "to be the absolute property forever." (Williams on Personal Property, 205.) "A gift of personal property to A simply without more, is sufficient to vest in him the absolute interest." How can the addition of the superfluous words "absolute" and "forever," any more strongly import a purpose to make the "issue" a new stock of inheritance or succession? Perhaps, too, the peculiarly definite form of expression "at her death" ought not to pass unobserved, in an effort to ascertain whether there is in this instrument the required demonstration of an intention to use the word "issue," as a designatio personarum.

In order to ascertain the quantity of estate which Celia Ann Singletary took under this deed, it is pertinent to inquire into its quality. Is it legal or equitable? The gift is to her "for her support during her natural life." Do these words create an estate for the separate use of Celia Ann Singletary?

No particular technical form of words is necessary to create a trust for the separate use of a married woman, (1 Lead., Cas. Eq., 539;) but as such separate use is in derogation of the common law rights of the husband, it can be recognized only where the intent to create it is "clear and unequivocal." The cases on the subject cannot be

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easily, if at all, reconciled. *An arrangement into three classes, of the modes in which a

separate estate in a wife can be created, has been made by an eminent Chancellor of this State, (Nix v. Bradley, 6 Rich. Eq., 48.) thus:—1st. Where the technical words "sole and separate use," or others equivalent are used; 2d. Where the marital rights are expressly excluded; and 3d. Where the wife is empowered to perform acts concerning the estate given to her, inconsistent with the legal disabilities of coverture. But the same able jurist, in a subsequent case, (Ellis v. Woods, 9 Rich. Eq., 19.) says:—"The only safe and rational rule that can be laid down, as applicable to cases of this kind, is one the enforcement of which must depend on the discreet judgment of the Court. If it appear to the satisfaction of the Court, upon a fair construction of the whole instrument, without wresting the meaning either to sustain the marital rights, or the separate rights of the wife, that there is a manifest intent to create a separate estate, such intent should be effectuated, though no express words of that import should be employed." Each case, therefore, as it occurs, must be decided upon its own circumstances.

In *Wylie v. White*, (10 Rich. Eq., 294,) the testator gave to his son William, "during his natural life, the use and benefit of the following negroes, &c.; the said negroes not to be removed from the State, or be disposed of by him, or any other person whatsoever, but to remain exclusively for the annual support of my said son and family." It was held that these words created a trust, which extended to the wife and children of the legatee, William, and prevented the property from being dealt with by the creditors of William, as his legal property, and the creditors were perpetually enjoined from selling the property under their executions at law. It is true, that in the argument of the Court, some stress is laid upon the prohibition of removal or disposition, and upon the use of the word "annual." But the course of reasoning, and especially the authorities cited in support of the judgment, show that the

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effective words were, "for the *support of my said son and family." In the case before the Court, the gift is to a woman, at the time married, and is declared to be "for her support." These words do not seem merely to express diffusely what is implied in the gift itself, but rather a devotion of the gift to a special purpose, and by analogy to the case of *Wylie v. White*, they import a trust for the support of the feme covert, which can be effectuated only by regarding it as a separate estate. So in *Darley v. Darley*, (3 Atkins, 399.) a gift to a husband "for the livelihood" of the wife, was held to constitute an estate to her sole and separate use. And of what quality is a separate estate in a married woman? It is surely equitable. Such an estate is unknown to the common law. (Adams' Eq.,

243; 2 Story's Eq. Jur., sec. 13, 78, 82; 1 Lead. Cas. Eq., 541; *Ellis v. Woods*, 9 Rich. Eq., 19.) It is the creature exclusively of equity. The instant it ceases to be an equitable and becomes a legal estate, it perishes. "The intervention of a trustee is not necessary to the validity of an estate to the separate use of a married woman. If real or personal property be given to her separate use, her interests will be protected by converting the husband into a trustee." "When the intention appears that the property bequeathed to or settled on the wife, shall be to her sole and separate use, whether it is so given immediately without the intervention of trustees, or to the husband for her, a Court of Equity will effectuate the intention, by converting the husband into a trustee 'for the wife.'" If the words here used in the circumstances of this case, constitute a trust for the separate use of *Celia Ann Singletary*, (and such, in the judgment of the Court, is their effect,) her husband, the present defendant, will be regarded as having taken the legal estate as trustee for her during her natural life. But, "at her death," the trust ceases, and then the slave *Sue* and her increase are "to be the property of the issue of the said *Celia Ann Singletary*." These latter words carry directly to the issue a clear, legal estate. And the life estate

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in the mother being equitable, and the *remainder in her issue being legal, the rule in *Shelley's case* does not apply. (*Austin v. Payne*, 8 Rich. Eq., 9; but see, as to real estate, *Douglas v. Congreve*, 1 Beav., 59.) The issue of *Celia Ann Singletary*, take, as purchasers.

Although not, perhaps, strictly necessary to the conclusion attained, it has been thought the fairer course toward the parties to consider and determine all the questions made in argument at the bar.

It is the judgment of this Court, that under the deed of *Elisha Mellard*, the immediate donee, *Celia Ann Singletary*, took an estate for the term of her own life only, and that the issue of the said *Celia Ann Singletary* took, as purchasers, an estate in remainder after the determination of this her life estate. This disposes of the first ground of demurrer, which denies any right whatever in the plaintiffs, to the negroes *Sue* and *Toney*, or to any share in the same. It is not necessary, at this stage of the cause, to determine what persons are entitled to the estate in remainder, under the designation of "issue," whether all the issue of *Celia Ann Singletary*, living at her death, or only such as was alive at the date of the deed. In either of these cases, *Elisha Mellard Singletary* was entitled at the death of his mother to take. In the one case, he would take one-half of the property, in the other, the whole of it. And this renders necessary the determination of the question made by the defendant's second

ground of demurrer. Is it absolutely indispensable that a personal representative of Elisha Mellard Singletary, should be a party to these proceedings? If so, the plaintiffs cannot go on in the present condition of the pleadings.

It has been suggested on the part of the plaintiffs, that by our legislation, making real property subject to the claims of the owner's creditors equally with personalty, and directing a common distribution of the real and personal property of intestates, the distinction between the two classes of property, which, at the common law, was so deeply drawn, has been virtually abolished. And,

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therefore, that as in reality the legal *title is cast by descent upon the heirs, subject only to a charge for debts, so the distributees of the intestate should be considered as directly succeeding to his legal title in the personalty subject to a like charge. This view of the matter is not destitute of plausibility, but this Court has so often decided that the common law distinction is not wholly abolished, but for many purposes remains in all its force, and that the legal title to the personalty is in the executor or administrator, as the case may be, that such a suggestion cannot be entertained. It is, however, certain, that all the persons really interested in the subject matter of this suit, are parties to it, and now before the Court. Whatever interest Elisha Mellard Singletary took under the deed of his great-grand-father, Elisha Mellard, passed at his death to his father, the present defendant, and his sister, the plaintiff, Celia Ann, in equal shares. It is true that, according to the strict letter of the law, this interest could reach them only through the conduit of a personal representative, but a personal representative intercepts the succession only that the rights of creditors may be protected and provided for. It is not possible that Elisha Mellard Singletary could have owed any debts at his death. He lived to be only eleven years old, and his father, the present defendant, was bound in law to maintain him. (Edwards v. Higgins, 2 McCord, Eq., 16.) Under such circumstances, this child could not contract debts, nor be responsible in property for debts contracted for his benefit by others. To attribute debts to him is the merest fiction. He has been dead almost twenty years, and during all this interval the defendant has had his property in possession, and has received the income thereof; creditors of the child, if such there could be, might at any time during this long period have treated him as executor in his own wrong, and certainly would have done so. Must these proceedings be delayed, and new expense incurred, for the purpose

of making a merely formal party? And for what end? in order that such party, when made, may go through the empty show of re-

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ceiving the share of Elisha *Mellard Singletary, and in the same instant distributing that share between the very parties now before the Court, between whom it could as well be at once distributed? It will not be insisted that such personal representative shall give the usual public notice to creditors, and that these proceedings shall be stayed until twelve months from the grant of administration shall have expired. (A. A., 1789, sect. 27, 5 St., 111.) Yet, if the protection of creditors is the object to be secured by an administration, that would seem to follow.

Cases can certainly be found in our own books, in which it is said that where an infant, (Read v. Read, 8 Rich. Eq. 145; Petigru v. Ferguson, 6 Rich. Eq., 378; Walker v. May, Bail. Eq., 60; Marsh v. Nail, Rich. Eq. Cas., 115; Spann v. Jennings, 1 Hill, Eq. 324; Huson v. Wallace, 1 Rich. Eq., 1.) who has been interested in the subject matter of the suit, has died, and his interest has, therefore, passed by descent to others, it is better that a personal representative of such infant shall be a party; but no case has been cited in which such a course has been made imperative under all circumstances, or affirmed as an invariable rule of practice, nor has any case been adduced in which, under circumstances like the present, such a course has been required. I am of opinion that it is not indispensable that a personal representative of Elisha Mellard Singletary should be a party to this suit, but that the cause may proceed without it.

The demurrer is overruled.

The defendant appealed on the grounds:

1. That the plaintiff had no title in the premises, the whole estate being vested in the defendant by the terms of the limitation in the deed of gift.
2. That there was not a separate estate in Mrs. Singletary.
3. That the personal representative of the estate of the deceased, Elisha Mellard Singletary, was not a party to this suit, admitting that there was a gift to the issue.

Simons, for appellant.
Duryea, contra.

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*PER CURIAM. This Court concurs in the decree of Chancellor Inglis.

The motion is, therefore, dismissed.

O'NEALL, C. J., and JOHNSTONE and WARDLAW, JJ., concurring.
Appeal dismissed.

11 Rich. Eq. *405

*WILLIAM T. O'NEALE v. JAMES DUNLAP and Others.

(Charleston. April Term, 1860.)

[Descent and Distribution \hookrightarrow 117.]

A father being the guardian of his children, and having a sum of money of theirs in his hands, invested it in land, and the amount not being sufficient, paid a balance from his own funds. The title he took to himself, styling himself guardian;—*Held*, under the circumstances, that the balance paid was an advancement, and that the whole of the land belonged to the wards.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 428; Dec. Dig. \hookrightarrow 117.]

[Conversion \hookrightarrow 20.]

The wards having elected to take the land, not the money, *held*, that it must be considered as real estate, and so treated in the distribution of the estates of the wards, some of whom were dead.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 3, 27, 52-55; Dec. Dig. \hookrightarrow 20.]

[Descent and Distribution \hookrightarrow 6.]

The Act of 1851, 12 Stat., 80, amending the Act of 1791, must be read as if it were part and parcel of the Act of 1791, and incorporated in it.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28-32; Dec. Dig. \hookrightarrow 6.]

Before Inglis, Ch., at Charleston, February, 1860.

This case will be sufficiently understood from the circuit decree, which is as follows:

Inglis, Ch. Catherine Dunn, widow of George Dunn, by her last will, which was admitted to probate on the 5th December, 1846, and of which James Dunlap, one of the defendants in this cause, became the qualified executor, devised a lot of land with the improvements thereon, consisting of a dwelling house, &c., situate on Lynch street, in the City of Charleston, to her three nieces, Ann, Margaret, and Elizabeth Dunlap, the infant daughters of the said defendant. For some reason not disclosed by the evidence, this devise did not take effect in specie. Under proceedings, had in a cause wherein Robert Adams and others were plaintiffs, and James Dunlap, in his capacity of executor, and others were defendants, (the record of which

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has not *been put in evidence on the hearing of the present cause,) the lot of land on Lynch street, above mentioned, was sold by E. R. Laurens, Esq., then one of the masters in chancery, on the 20th March, 1851, and purchased by the defendant, James Dunlap, for the consideration price of twelve hundred dollars, and a conveyance thereof was executed to him, under the style of "James Dunlap, guardian."

In March, 1851, James Dunlap was, by the order of this Court, appointed guardian of the estates of his three infant daughters, above named, and entered into bond with his codefendant, A. Dorrill, as his surety, to one

of the masters, in the penalty of six hundred and sixty-four 74-100 dollars, for his fidelity as guardian. If, in the order of the Court, making this appointment, there were any terms of qualification or restriction introduced, they have not been brought to the notice of the Court. It will be assumed, therefore, that it was a general grant of guardianship, and all receipts of money belonging to the daughters, must be referred to the authority to receive thereby conferred. *Crenshaw v. Crenshaw*, 4 Rich. Eq., 14. About the time when this appointment was consummated, or soon thereafter, James Dunlap received from the administrator of George Dunn's estate the sum of three hundred and thirty-two 37-100 dollars, as the aggregate shares of his three wards, "in the personal estate of George Dunn," whether as distributees immediately of that estate, or, through Catherine Dunn, the widow of George, as residuary devisees and legatees, taking under her will parts of the distributive share to which she was entitled in her husband's estate, does not very clearly appear. About the same time he received from master Laurens the sum of seven hundred and fifty-eight 16-100 dollars, as "the shares of his three daughters in the sales money of the real estate of Mrs. Catherine Dunn," and gave a receipt therefor, styled in the cause aforesaid of *Adams et al. v. Dunlap et al.*

The bill in the present cause, which is brought by William T. O'Neale, administra-

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tor of his deceased wife, Eliza*beth, formerly Elizabeth Dunlap, one of the aforesaid three daughters and wards of the defendant, James Dunlap, states, that the consideration price of twelve hundred dollars, expressed in the deed of conveyance of the lot on Lynch street, was the amount to which the three daughters were entitled as devisees of Catherine Dunn. It states, further, the appointment of Dunlap, as guardian of the estates of his three daughters, and his receipt in that capacity of the shares to which, as legatees under the will of Catherine Dunn, they became entitled in the personal estate of George Dunn. And it prays that he may answer the premises, "as fully and particularly as if the same were here repeated, and he thereunto specially interrogated," and that he may account for the monies received by him as guardian. In direct response to these statements, he says in his answer, that the aggregate sum received by him for his daughters, to wit, one thousand and ninety dollars and fifty-three cents, including the amount (\$332.37) received from the administrator of George Dunn, as their share of the personal estate of the said George, &c., and the amount (758.16) received from master Laurens as "the shares of his daughters in the sale money of the real estate of Catherine Dunn," was used by him in paying the

consideration price of twelve hundred dollars, and that the deficiency, to wit, one hundred and nine 47-100 dollars, was advanced out of his own funds. His answer which, in these particulars, is thus made evidence by the plaintiff is well sustained by the circumstances disclosed by the testimony, as exhibited in the master's report.

The three wards, Ann, Margaret, and Elizabeth, all married; Elizabeth, who was the wife of the plaintiff, had died before the commencement of this suit, leaving surviving an infant child and her husband, to whom administration of her personal estate has been granted. Margaret, who intermarried with Thomas Divine, has died during the pendency of these proceedings, leaving her husband, but no issue, surviving. Ann intermarried with John A. Wotton, and is still

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*living. All of these persons, who were alive at the institution of the suit, were made parties thereto. There has been no administration sued out on the personal estate of Margaret Divine, who has died since, and no proceeding, therefore, to revive as to the interest which she had in the subject matter of the suit.

The bill claims a partition of the lot on Lynch street, as the joint property of the three wards, and an account from the defendant, James Dunlap, of the rents of the same, (he having occupied the place since its purchase,) and also an account of all other monies received by him, as guardian, from the administrator of George Dunn, or otherwise.

The evidence satisfies me, that the sum of money, to wit: one thousand and ninety 53-100 dollars, received by the defendant, James Dunlap, for his daughters, constituted the whole aggregate of their several estates. He received and held it in the capacity of guardian. So he regarded, and such, in fact, was the character of his possession. Of his own motion, and without any authority of law, he invested this money in the lot of land on Lynch street, and added thereto of his own funds the further sum of one hundred and nine 47-100 dollars, to complete the purchase money. He, honestly enough, impressed upon the face of his title deed the fiduciary character in which he held the property. If he had done otherwise, and taken the title to himself, without the addition of such description, it would have made no difference, in so far as their money was invested in the purchase. There is, indeed, authority for the proposition, that where such investment of trust funds is wrongful, and more especially where the purchase has been made partly with the trustee's own funds, the beneficiaries can only claim a lien for their money upon the property acquired. *Adams' Eq. (33)* and *Amer. Note; Ib., 143*, 2 *Story's Eq. Jur.*, sec. 1210, 1211; *Ib.*, sec. 1258, 62; *Edmonds v. Crenshaw*, *Harp. Eq.* 224; *Myers*

v. Myers, 2 *McC. Eq.*, 214 [16 *Am. Dec.* 648]; *Zimmerman v. Harmon*, 4 *Rich. Eq.*, 165;

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*Hill on *Trustees*, 97 and 103, 5. It seems, however, more consonant to equity and the rules which here govern the fiduciary relations, as well as more in accordance with the weight of authority, to give to the beneficiary his free choice between the property itself and the restoration of his money invested in it. To the extent of their money, therefore, used in the purchase of the lot in Lynch street, the wards of Dunlap, or their representatives, are entitled to the exercise of this choice in the present instance. But, further, if a father purchase property with his own money, and take the title in the name of his children, "the transaction will be regarded, *prima facie*, as an advancement for the benefit of the children." The presumption thus arising may be rebutted by declarations or acts of the father wholly inconsistent with an intention to give the benefit of the purchase to the children, made contemporaneously with the purchase; subsequent acts or declarations of the father, or any other matter arising *ex post facto*, cannot be admitted for this purpose. Here, the title is taken, not in the name of the children, but of the father, as their guardian, which is stronger evidence, if possible, of an intention to advance the children, as it amounts to an express declaration of trust, and precludes all idea that the purchase was, in his own intention, at the time, for his own benefit. And then, too, in the fact, that this particular property had been devised to his daughters by their aunt, there was inducement, in order that her benevolent purpose should not be defeated, to supplement by the addition of so inconsiderable a sum from his own resources, their means, which, alone, were insufficient for the purchase. It is the opinion of the Court, that the daughters of the defendant, James Dunlap, or those who now represent their interests, are entitled to the whole lot on Lynch street, as the joint equitable property of the three.

The lot having been thus ascertained to be the property of the wards, it follows that the defendant, James Dunlap, having had it in charge, must account to them for the an-

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nual *rent. Indeed, he has himself had the use and occupation of the premises, and they are still in his possession. The Court is informed, at the bar, that the desire of the daughters, or those who represent their interests, is, that this account for rent with each daughter shall not extend further back than to the date of her marriage; for that the one-third of the rent to which each would be entitled, may be deemed to have been rightfully used in her support and education up to that time. When the terms of the devise by Catherine Dunn are adverted to, the course thus indicated seems emi-

rently proper, and the decree will be moulded accordingly.

The deaths of Elizabeth O'Neale and Margaret Divine make it necessary, in order to ascertain the course of devolution of their shares, to determine the nature of the property, in the regard of the Court, whether it is to be treated as realty or as personalty. The question is not free from embarrassment, not so much in reference to the rules of law which must determine it, as to the practical application of those rules. In the form in which the Court finds the property when called to deal with it, it is realty, and the funds of the wards wherewith it was purchased, were, in very large part, the proceeds of real property devised directly to them. A small portion, however, of these funds, is stated to have been their shares in the personal property of George Dunn. In strictness of law, this portion must be treated as personalty, and the shares of the deceased cotenants therein must devolve accordingly on their personal representatives. *Adams' Eq.*, 142. The same course must be pursued as to all that part of the rent which shall be found due to each, which had accrued and was in arrear at her death. 1 Will. on Ex'rs. 733.

Some doubt has been suggested as to the distribution proper to be made of the share of Mrs. Margaret Divine, in this land and in the rent thereof. The several Acts of Assembly, which regulate the distribution of intestates' estates, are to be regarded as con-

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stituting one system, and to be construed together, and so as, if possible, to harmonize the whole. The modification introduced by the late Act, 12 Stat., 80, is to be so applied, that the original statute of 1791 shall read as if the canon applicable to the state of things contemplated by the new Act, stood there as now modified. The share of Mrs. Margaret Divine will, therefore, be distributed—one-half to her husband, Thomas Divine, and the other half, in equal parts, among her father, the defendant, James Dunlap, her sister, Mrs. Ann Wotten, and her niece, the infant, Ella H. O'Neale. So far as the property is personalty, her share must, for the present, go to her personal representative. The defendant, James Dunlap, in his answer, sets up a demand of compensation for the boarding of Mrs. Elizabeth O'Neale and her children, during a large part of the interval between her marriage and her death, and for care and nursing bestowed during her illness, and claims to subject her share in the property, now to be partitioned, to the satisfaction of this demand. Whatever may be due to him on such account, must constitute a demand against the husband personally. Much testimony was introduced at the references before the master, touching the merits of his claim. I have examined it carefully, and although it might

not be easy to make out from it the exact state of the account between the parties, I am satisfied by this testimony, that the plaintiff, William T. O'Neale, is fairly indebted to the defendant, James Dunlap, after all reasonable deductions are made from the amount claimed, in a balance larger than any share to which he is directly entitled in this property. As no decree could be given him, for any ascertained excess of his claim over such share, it is enough to know that an excess exists, without taking its exact measurement. In so far as the defendant, James Dunlap, holds the property in controversy in trust, immediately, for the plaintiff, O'Neale, and that is to the extent of his share in the realty, he is entitled to ask that this Court, before which the plaintiff has brought him, shall not compel him to

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surrender the means which he *has in his own hands, for satisfying, in whole or in part, his just demand. *Morton v. Adams*, 1 Strob. Eq., 72; 1 Story Eq., sec. 640. But Mrs. O'Neale's share in the personalty goes to the plaintiff, not in his own personal right, but in his capacity of administrator, and what shall be his several share in this, cannot be ascertained until he shall have closed his administration and settled the estate. There may be debts to be paid. Certainly there have been expenses attending the administration, and the assertion of the rights and interests which were of the intestate: all of which must be paid, before there can be any distribution. Beyond the share, which the plaintiff, O'Neale, as an heir of his wife, is entitled to take in the realty within the control of the Court, no provision can be made in this cause for compelling him to pay the claim of the defendant, Dunlap, against him.

It is ordered and decreed, that James Tupper, Esquire, one of the masters in chancery for Charleston district, after having given twenty-one days' public notice, by advertisement inserted on alternate days, in one of the daily newspapers of the City of Charleston, do sell, at public outcry, at the usual place of master's sale of real estate, all that lot of land, situate on Lynch street, in the City of Charleston, which is particularly described in the pleadings, on the following terms, to wit: one-third cash, and the residue in two equal instalments, at one and two years, with interest on the whole from day of sale, payable annually, the purchaser to secure the payment of the credit portion of the purchase money, according to the terms, by bond, with two or more good and sufficient sureties, and a mortgage of the premises; that from the cash part of the purchase money, he pay first, all the costs of the proceedings in this cause, except the costs of the references held for the investigation of the claim of the defendant, Dunlap, against the plaintiff, O'Neale, as to

which each of those parties will pay his own costs; that he separate the residue of the purchase money into two distinct funds, in the proportion to each other of \$758.16 to

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\$332.37, holding *and treating the former or larger sum as realty, and the latter or smaller sum as personalty; that he state an account between the defendant, James Dunlap, and each of his three daughters, for one-third of a reasonable rent of the lot on Lynch street, from the date of the marriage of the daughters respectively, until the day of sale; that he regard and treat so much of the said rent, included in each of those accounts with his two daughters, who are deceased, as was in arrear at the death of the said daughters, as personalty, and all the other rent as realty; that he distribute the whole fund which is herein directed to be treated as realty, in the manner following, to wit: seven-eighteenths (7-18) thereof to John A. Wotten and wife, Ann; three-eighteenths (3-18) thereof to Thomas Divine; five-eighteenths (5-18) to the infant, Ella Hamilton O'Neale, to be delivered to her guardian, and three-eighteenths (3-18) to James Dunlap, being one-eighteenth (1-18) in his own right as heir of his daughter, Margaret, and two-eighteenths (2-18) being the share of the plaintiff, W. T. O'Neale, as heir of his deceased wife; that he distribute the fund, which is herein directed to be taken and treated as personalty, in the manner following, to wit: one-third to John A. Wotten and wife, Ann; one-third to the plaintiff, William T. O'Neale, as administrator of the estate of his deceased wife, Elizabeth O'Neale, and the remaining third to the personal representative of Margaret Divine; and that the share which shall fall to the defendant, James Dunlap, in this distribution, be subjected, in the master's hands, to the satisfaction of any claim arising against him in favor of the other parties, or any of them, upon the accounting directed in this decree.

It is further ordered, that the said master do inquire and report, whether the infant, Ella Hamilton O'Neale, has any duly appointed guardian of her estate; if not, who is a fit and proper person to be placed in that trust, and will accept it; what is the probable gross value of her whole estate, what is her present age, and in what amount

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the person appointed *to the guardianship ought to give bond for his fidelity in the trust, with leave to said master to report any special matter.

The defendant, James Dunlap, appealed, and moved that the decree may be reformed, so as to declare that the house and lot in Lynch street is his own property, standing only as a security for the amount that may be due by him, as guardian, or as executor of Catherine Dunn, to his three daughters,

or to their legal representatives. That this amount is correctly stated by the master's report, which ought to be confirmed.

Or, failing in this, that it may be declared he has a lien on the premises for so much of the purchase money as was his own, and did not contribute it as an advancement for the benefit of the children.

And the personalty consists only of the accumulated interest or rents.

And also, to declare that the share of Mrs. Divine, whether it be regarded as realty or personalty, is to be distributed, one-half to her husband, and the other half to her father, James Dunlap, the appellant.

1. Because, the case, as developed by the pleadings and evidence, is not that of a guardian, executor, or trustee, speculating with, or trading upon, trust funds, but the contrary.

The defendant, in good faith, securely and lawfully invested, by way of mortgage, the money of his wards, and thereby saved from defeat the intention of his testatrix, whose bounty it was, and he is ready and willing to account for, and pay over the money that came to his hands, as this Court may direct, or the law require.

2. Because the Act of Assembly, of 1851, does not apply to the distribution of Mrs. Divine's share of the estate, but the same is distributable under the provisions of the Act of 1791.

Campbell, for appellant.

Buist, T. Y. Simons, contra.

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*The opinion of the Court was delivered by

O'NEALL, C. J. In this case we concur in most of the points ruled by the Chancellor's decree. Indeed, he has so well discussed and reasoned out the matters brought in controversy, in that as well as in other cases brought before him, as to save us the labor of re-examination.

In this case, however, we are constrained to differ with him as to the character of the property to which the wards of the defendant, Dunlap, are entitled. When they elect to take the property in which he had invested their funds they must take it, as a whole. It is all realty. The house and lot in Lynch street, by his investment and their election, became their property.

There is no propriety to say that a part of the investment arising from real estate sold should be classed as realty, and a part arising from personal property should be considered personalty. The whole investment made by their father of their funds, and a small part of his own, as their guardian, made the house and lot theirs, and of course it is all realty. So much of the Chancellor's decree as makes a distinction cannot be sustained.

We agree with him, that the Act of 1851,

12 Stat., 80, 81, is to be regarded as part and parcel of the Act of 1791. My view of the effect of an amendment is presented in my dissenting opinion. *Hill v. Connelly*, 4 Rich., 626. It is unnecessary to do more than to express our concurrence in the view there expressed, and which the Chancellor has enforced in this case.

It is, therefore, ordered and decreed, that the decree be reformed in the single particular in which we differ from him, and in all other respects be affirmed.

JOHNSTONE, J., concurred in the result.

WARDLAW, J., concurred.

Decree modified.

11 Rich. Eq. *416

MRS. M. S. MARTIN v. E. W. PETIT and L. F. PETIT.

(Charleston. April Term, 1860.)

[*Estoppel* ⇨86.]

Where the obligor of a bond, when about to re-issue it for the purpose of raising money, represented to the new lender that the bond would be punctually paid at the end of the year: *held*, that such representation did not preclude the obligor from setting up the defence of usury.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 226; Dec. Dig. ⇨86.]

[*Usury* ⇨128.]

Where a bond was originally negotiated at a usurious [interest], and then taken up and renegotiated at a less usurious interest, to another lender, ignorant of the original usury, *held*, that the obligor could not be compelled to pay to the new lender more than the amount he received when he first negotiated the bond.

[Ed. Note.—Cited in *Cooke v. Pool*, 25 S. C. 596.]

For other cases, see *Usury*, Cent. Dig. §§ 280-283; Dec. Dig. ⇨128.]

Before Inglis, Ch., at Charleston, February, 1860.

This case will be sufficiently understood from the circuit decree.

Inglis, Ch. In January, 1856, Edmund W. Petit, one of the defendants in this cause, being under the necessity of raising a sum of money wherewith to meet demands then pressing upon him, applied to J. E. P. Lazarus, a broker, who had been in the habit of doing business for him, to negotiate on his behalf, a loan of \$5,000. Proposals for this end were duly advertised, and an offer in reply was received from one W. K. Stewart, to advance the required amount for one year, at a discount of ten per centum, as the consideration therefor, in addition to the lawful interest of the whole sum. Thereupon, on 15th day of that month, the defendant, E. W. Petit, made his bond of that date, conditioned for the payment of \$5,000 on the 15th day of January, 1857, with the interest on the said sum, payable semi-annually; and to se-

cure the payment of the same, according to the condition, by deed of the same date, mortgaged an improved lot on Hasell street, in the City of Charleston, particularly described in the pleadings. This mortgage was duly

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recorded. The bond was *made payable to the broker, and he was likewise the grantee in the mortgage. On the same day on which these securities bear date, they were, each, by endorsement duly made, assigned by the nominal payee and mortgagee to the lender of the money, W. K. Stewart, and the defendant, E. W. Petit, received the sum of \$4,500, of which he paid \$50 to Lazarus as his commissions for his services as broker in negotiating the loan. The interest was paid regularly and promptly by E. W. Petit, according to the condition of the bond during its currency.

As the year of credit was about expiring, E. W. Petit was advertised by Lazarus of the necessity of being prepared to pay the bond at its maturity; not being provided with the means to do this, he employed the same broker to negotiate a new loan of the same amount upon other security, with a view to discharge the former. Proposals were again advertised, but this time without success. "Petit desired Lazarus to raise the money" for him, in order to take up the bond: Lazarus knowing that the plaintiff sometimes had money for investment, offered the bond "for sale," as it is said, to Mr. Aiken, the plaintiff's agent. A negotiation between the plaintiff and Petit was thereupon carried on, through Mr. Aiken on the part of the former, and the broker, Lazarus, on the part of the latter.

The bond was already past due, the condition broken, but a new currency was, as the result of the negotiation, given to the old securities for a new period of another year, in consideration of a discount of seven per centum, in addition to the lawful interest payable semi-annually as before. There was, at this point, no negotiation between the plaintiff and the assignee and holder, Stewart. The latter did not, either personally or by agent, sell the bond to the plaintiff; he only required payment from the obligor, Lazarus, in this second transaction, as in the first, was acting as the agent of Petit, from whom, in each instance, he received his compensation for the service rendered. This

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negotiation was consummated on the 10th February, 1857, when the plaintiff paid into the broker's hands, as the net proceeds of the bond, now issued anew, the sum of \$4,650, and Petit paid the balance, \$350, together with the interest in arrear from the date of the maturity of the bond, to wit, twenty-six days. The semi-annual interest on the whole sum was duly paid by Petit, on the 18th August, 1857, at the expiration of six months, and again on the 19th March, 1858, at the

expiration of twelve months from the date of the re-issue, or bargain with the plaintiff, to wit: February 10th, 1857.

In May, 1858, the mortgaged premises were sold to L. F. Petit, who is made a party defendant in the cause; and he, afterwards, in November of the same year, sold and conveyed with warranty against incumbrances, to a third person, who is not made a party.

E. W. Petit having failed to satisfy the bond according to its condition as modified in the regard of the parties, and having ceased even to pay the semi-annual interest, the plaintiff has filed her present bill to enforce the payment by decree of this Court, and, if necessary, by a foreclosure of the mortgage security. The defendant, Edmund W. Petit, after having derived from these several transactions, originated by himself, and into which the other parties have been decoyed, at his instance, all the benefit for which, in his circumstances, he can hope, now repudiates them, and interposes between himself and the demands of those who, in his extremity, relieved him on terms, certainly in a commercial community not obnoxious to censure, the defence of usury. The law permits him to do so. The other defendant, L. F. Petit, being a purchaser for value of the mortgaged premises, and a vendor with warranty, bound to his vendee to remove the incumbrance, naturally and reasonably desires to do this, at as little cost to himself as possible, and he puts up the same defence. The law accords to him this privilege. The duty of the Court is to administer the law.

The disguises which men's purposes put on

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may not be *permitted to cheat the Court, when called to pass judgment on the legal character of their acts. No doubt, "bona fide notes and other securities are subjects of legitimate traffic," and perhaps this is generally known among those who trade in money. It seems quite probable that the defendant, E. W. Petit, and those too perhaps who dealt with him, designed to rescue their several bargains, now passing under review, from the imputation of usury, by clothing them with the semblance of such a traffic. But it is without controversy, that the transactions of 15th January, 1856, in which the existence of the securities before the Court had its origin; and the subsequent transaction of the 10th February, 1857, wherein there was imparted to them a new vitality for a further term, when their real nature is discerned through their outward form, was, each of them, in fact, tainted with usury. The bargain made between the defendant, E. W. Petit, and W. K. Stewart, through the agency of Lazarus, was usurious. The bargain made through the same agency, between the same defendant and the plaintiff, was equally so, in the quality of the transaction, though not in its extent.

Where bonds, or other securities, are originally usurious, the taint of usury, and the

reprobation of the law consequent thereupon, follows them even into the hands of an innocent holder. And so in the instance before the Court, if the plaintiff, on the 10th February, 1857, had in fact purchased this bond of Petit, and W. K. Stewart, the assignee, she must have taken it subject to the infirmity wherewith the original usury had affected it, however ignorant she might have been of the real character of its origin. The question how far, as between her and E. W. Petit, this infirmity might have been, in effect, cured by any misrepresentations or assurances on his part, whereby she was entrapped in the purchase, which would have, in this Court at least, precluded him from setting up this defence, is not intended to be touched. Here the interest of the purchaser claims protection.

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*If, however, E. W. Petit had, on the 10th February, 1857, borrowed \$5,000 from the plaintiff, at seven per centum discount, and for the securing the re-payment thereof, had delivered and made to her a new bond of that date, conditioned for the payment of that sum at twelve months, with interest semi-annually, and a new mortgage of the lot on Hasell street; and with the money thus raised, and the addition from his other resources of such further sum as was necessary, had satisfied and extinguished the present bond and mortgage, it is apprehended that such new bond and mortgage would not in that case have been, in any sense, tainted with the vice of the original securities.

In what does the real nature of the transaction of the 10th February, 1857, between the plaintiff, and the defendant, E. W. Petit, differ from the case supposed? The fact, that, in order to avoid the expense of new papers, or for convenience or other cause, the parties, instead of passing new securities, chose to set up again the old ones, and give them a new term of probation, cannot, as it seems to the Court, change the substance of the transaction, or transmute its legal character, though it may embarrass the mind in its efforts to apprehend it. Contemplate all the circumstances of the transaction as we may, it comes at last to this—the negotiating a new loan by Petit from the plaintiff, the taking up by him of the old securities by payment thereof in full, effected chiefly by means of this loan, and the putting those old securities anew into currency and circulation, by their delivery to the plaintiff with the formal assignment of the last holder. If the plaintiff had in fact bought this bond from the assignee, Stewart, by the payment to him of its full amount, she would, as has been seen, have been entitled to recover from Petit only the amount actually received by the latter from Stewart, reduced by all the payments made in the meantime. If having so bought it, after its maturity, she had agreed to forbear, and had forborne the debt for another year for the additional discount of seven per

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centum, the *premium for such forbearance, and all subsequent payments, must have gone that much further to reduce the recovery. But the actual transaction does not seem to be either the one or the other of these supposed cases. The plaintiff lent or advanced her money directly to the defendant, Edmund W. Petit. Mr. Aiken, the agent of the plaintiff, in his note of 23d August, 1858, addressed to the defendant, E. W. Petit, says: "Mr. J. E. P. Lazarus, from whom, as your authorized agent, I purchased, in February, 1857, a bond of yours for \$5,000." Mr. Petit himself says, that "on the 10th February, 1857, he paid Lazarus \$50, commissions for his services in getting the money for him"—and that "Lazarus was his agent in this matter." And Mr. Lazarus says it was at the request of Mr. Petit that he (Lazarus) tried to negotiate the bond. The bond produced is the one he negotiated with Mr. Aiken to enable Petit to pay Stewart the bond, Mr. Petit gave; "he was authorized by Mr. Petit to get a loan, or the extension of the bond for one year more."

The Act of Assembly, A. A., 1830, 6 Stat., 409, now in force on the subject of usury, does not make void the bond, note, or other security given for a usurious consideration; on the contrary, so much of the former Act as so provides, is, by the present Act, expressly repealed. The bond, &c., now stands as security for the re-payment of the amount or value actually lent and advanced.

The present is not the case of a borrower seeking the interposition of the Court for his relief against a usurious contract, and therefore the familiar principle of equity, affirmed in *Jones v. Kilgore*, 2 Rich. Eq., 64, cited in the master's report, and designed for cases of that kind, does not apply.

The usurer, or lender, is here, seeking to enforce the usurious contract, and the statute has declared in positive terms, that "the principal sum, amount, or value, lent or advanced, without any interest, shall be deemed and taken by the Courts to be the true legal debt

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or measure of damages, to *all intents and purposes whatsoever, to be recovered without costs."

It will have appeared from what has been already said, that in the opinion of this Court, the plaintiff is the lender, and the defendant, E. W. Petit, the borrower, from her; the principal sum, amount or value lent, or advanced is the sum (\$4,650) actually received by Petit from the plaintiff, on the 10th February, 1857; and that for the re-payment of this sum the bond and mortgage were, by the agreement of the parties, to stand, as security. \$350, in two equal parts, intended as interest, have been received by the plaintiff. To this state of facts the provisions of the statute are to be applied.

It is adjudged and decreed, that the plain-

tiff, M. S. Martin, do recover against the defendant, E. W. Petit, the sum of \$4,300, without interest, and without costs, and have leave in the usual manner to make the mortgage security effectual for enforcing the payment of the same; and that for this purpose such further orders as are necessary may be taken by the plaintiff at the foot of this decree.

The complainant appealed on the ground:

It is respectfully submitted that the defendants are not entitled to set up the defence of usury upon the case made by the evidence, because whatever might have been the nature of the dealing between Stewart, the former holder of the bond, and the obligor, yet the latter and his assigns were estopped by his conduct and assurances from setting up such a defence afterwards against the innocent assignee who had taken the bond upon the faith of this.

The defendants also appeal on the ground:

Because it is respectfully submitted, that they are entitled (in addition to the discount allowed on the bond) to the further discount of \$500, being the difference between the amount specified in the condition of the bond, and that actually received at the time of its execution.

Mitchell, for complainant.

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*It is submitted, on behalf of the appellant, that whatever may have been the rights of the original parties to the contract, the present defence cannot now be set up against the complainant.

It may be admitted, without interfering with the positions taken on behalf of the complainant, that as a general rule, the assignee of a bond takes it in the condition in which it was, as between the original parties, and subject to the same equities; and therefore, that any objection on the ground of usury would follow it, even in the hands of a bona fide assignee for value; but then to enable the obligor and his assigns to take any benefit from the application of this rule, it must appear that he has not lost it by any subsequent assurances or dealings which would make it fraudulent or unconscientious to set up such defence.

We present it as a well-settled rule of equity jurisprudence, that one who relies upon the intentional representations or conduct of another, in a matter of business, shall be protected against any subsequent disavowal of the party making such representation, or any claim inconsistent with it; and this principle may even be applied to the protection of one who has relied upon the mere passive conduct of another.

The earliest application of this was probably to the protection of the purchasers of land against those who, having claims, were held bound to expose such claims at the time of the purchase.

"There is no principle better established in

this Court, or one founded on more solid considerations of equity and public utility, than that which declares that if a man knowingly, although he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal rights against such person. It would be an act of fraud and injustice, and his con-

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science is bound by this equitable estoppel." *P. Ch. Kent. Wendel v. Van Renselaer*, 1 Johns. Ch., 354.

Here, it will be seen, the principle is held to extend to an instance of mere passive acquiescence on the part of the claimant.

To the same effect is the case of *Higginbotham v. Burnett*, 5 Johns. Ch., 184. And the principle is held to extend even to a case in which the party setting up a claim alleges ignorance of his title. *Storrs v. Barker*, 6 Johns. Ch., 166.

But the principle is not confined to purchasers of land, but governs wherever the circumstances warrant an application.

"It is said to be a very old head of equity, that if a representation is made to another person going to deal in a matter of interest, upon the faith of that representation the former shall make that representation good, if he knows it to be false. To justify, however, an interposition in such cases, it is not only necessary to establish the fact of misrepresentation, but that it is a matter of substance, or important to the interests of the other party, and that it actually does mislead him." *Story Eq.*, 191.

"If any man, upon a treaty for any contract, will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of bargain, it is a fraud; it misleads the parties contracting on the subject of the contract." *P. Lord. Ch., Neville v. Wilkinson*, 1 Bro. C., 546.

It is difficult to suppose a case in which, to use the expression of Chancellor Kent, there could be "more solid considerations of equity and public utility" for the application of the principle, than in that of one dealing for a bond on the faith of the representations of the obligor, made to persuade him to the purchase.

In the case of *Holbrook v. Colburn*, the claim to relief was founded on the application of this principle, the plaintiff alleging that he had taken the bond in question on the

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faith *of a written representation, made at the time that the bond was executed—that the obligor had no discount, &c. The Court held that the principle did not apply to the case presented, but affirmed the principle generally. "If, however, the obligor, from fraud, negligence, or folly, represent himself to be liable on a bond to one about to deal for assignment, (and perhaps the consequen-

es may be the same as to any substituted purchaser who acts on the faith of the representation,) or even if the obligor, in the full knowledge of his defence, acquiesces in an assignment without disclosure of his defence; such representation or concealment will amount to an estoppel in pais upon the obligor from setting up his defence. It is indispensable to such estoppel that the obligor should induce, promote, or encourage the assignment, and that the assignment should be accepted in consequence of his representation or concealment." *Wardlaw, Ch., [Holbrook v. Colburn]* 6 Rich. Eq., 300.

Now, all the conditions indicated by Mr. Justice Story, as well as the opinion in *Holbrook v. Colburn*, for the application of the principle, will be found in the present case.

Mr. Aiken, the plaintiff's agent, was induced to take the bond upon the faith of the assurances of the obligor, through his agent; indeed, he would not take the bond until he had this assurance, that the bond would be paid in a year; here was the dealing upon the faith of the representation which induced that dealing.

It may be said, however, that there was nothing in these representations specially excluding the defence now set up, but neither the reason of the rule, nor the precedents, require this; indeed, the least consideration will make us see that this is always out of the question; to suppose the inquiry pointed to this or that particular defence, "supposes a knowledge of it to exist;" the inquiry, therefore, from the condition of things, must always be general, and any assurance which induces the dealing, requires the interposition of this protection. The assurance that the

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bond would be paid in *the year, carried with it the exclusion of all exception or objection on the part of the obligor. Nor can it make any difference that Lazarus, the broker, besides being the agent of the obligor, was also to some extent the agent of Stewart, the former holder of the bond; for though the latter did not know the mode by which his money was to be got, yet as the bond belonged to him when he assigned it in pursuance of the bargain, he ratified it to that extent.

It may, perhaps, be contended, that there is something in the special defence of usury which will preclude the application of this general principle. It seems hard to suppose that the statute of usury was intended to give effect to fraud. Nor let it be said that this would apply to the application of the statute itself; in such case, both parties know that they are entering into a contract which the law avoids, so that neither party is misled, and therefore there can be no fraud.

But the case under consideration is essentially different; it is admitted to be legal and unobjectionable to deal for a bond in existence, on the best terms on which it can be obtained. Everything appeared to be legal and

regular in the present case; although it would now appear that Stewart did not know how the money was to be obtained, yet it was his property, and, therefore, in legal contemplation, could only be offered on his behalf; he ratified this by assigning it subsequently. The assurance that the bond would be paid was the strongest form in which the legality of the bond could be affirmed. Our own decisions, even at law, quite exclude the defence set up, and that such will extend its protection to screen one in the perpetration of a fraud against an ignorant and innocent purchaser, coming in subsequent to the original contract.

"It is a clear and long established rule of law, that no man can take advantage of his own wrong. He who violates a law, comes with a bad grace to ask to be restored to rights which he had surrendered or lost by his illegal act. And for this reason, he who

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pays money on an illegal consideration, *cannot maintain an action to recover it back." *Miller v. Kerr*, 1 Bail., 6.

But the following decision seems to meet precisely the present case:

Though a note made to raise money, and sold at usurious discount, is usurious and void, yet, as bona fide notes and other securities are subjects of legitimate traffic, if an indorser of a note made to raise money at an usurious interest, represent to a purchaser that it is a business note, &c., and the maker is present and acquiesces, it is a fraud on the purchaser, and they are both liable. *Odell v. Cook*, 2 Bail., 59.

And this decision, too, must have been before the change in the law, showing more indulgence to contracts subject to a charge of usury. It would, therefore, be allowing the defendant to perpetrate a fraud, if, after drawing the plaintiff to purchase this bond, he were allowed to set up a defence of this sort.

Nor can the purchaser be in a better situation than the obligor; the bond was assigned to the complainant, 10th February, 1857, and the premises were conveyed to the purchaser, 8th November, 1858, with full notice by record of the amount claimed by the complainant.

It is, therefore, submitted, that the complainant is entitled to a decree for the full amount due on the bond and mortgage.

Macbeth & Buist, contra, cited: *Payne v. Tresvant*, 2 Bay, 23; 1 McC., 350; *Willard v. Reeder*, 2 McC. Ch., 369; 1 McM., 229; *Stork v. Parker*, 2 McC. Ch., 396; *Clark v. Hunter*, 2 Sp., 83; 1 Rich., 52; 2 Rich., 74; *Coughman v. Drafts*, 1 Rich. Eq., 414; 6 Stat., 409; 1 Strob., 466.

The opinion of the Court was delivered by

JOHNSTONE, J. The Chancellor has properly observed, that this is not a case where

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the borrower of money at *usurious interest comes to be relieved from the literal performance of his contract: but a case where the holder of the contract comes into Court to enforce it according to the legal effect of its terms. In such cases, the contract is enforced only according to its legal validity.

The Chancellor has concluded, from the evidence, that the sum advanced by Mrs. Martin was by way of loan to the obligor of the bond, and not by way of purchasing the instrument from Stewart; and that the bond was continued and passed over to her at an usurious discount, as her security for this loan. We cannot discover that, in drawing this conclusion of fact, he has erred: and, therefore, according to the settled practice of this Court, his decision must stand.

Assuming the correctness of this position, the Chancellor's legal deduction is unquestionable, that the debt contracted by the borrower is not to be measured by the face of the bond, but by the amount actually advanced on it. So the statute of 1830, 6 Stat., 409, expressly declares: and the statute is the law of the case.

Here it may be permitted to make a few observations upon the connection between this statute and the pre-existing statute of 1777, 4 Stat., 364, which it partially repeals and modifies. The latter makes the reservation of a greater interest than seven per cent. per annum upon loans or forbearance, unlawful; and declares all securities created for such purpose to be utterly void; and goes on to provide a forfeiture of treble the value of the loan: making the borrower competent to prove the offence, in any suit, brought on the bond, &c. The statute of 1830, does not repeal this prior statute generally, or throughout, but only so much of it as imposes the penalty of treble the amount loaned, &c., and so much as declares the securities taken to be utterly void; and provides that the lender may recover the principal, or sum actually loaned, forfeiting the residue of the security as well as all interest and costs. That is, a loan at a rate exceeding seven per cent. per

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annum, is left unlawful, *as it was before, and the usurious interest, and even lawful interest, are forfeited. It is a restriction of the former enactment avoiding the whole instrument; it is only partially avoided.

As I have said, the Chancellor has correctly restricted Mrs. Martin to the principal advanced by her. This was the legal consequence of her own act of usury. And so far we approve his decree.

But the defendants have appealed, because he did not further restrict it by the amount actually loaned by Stewart, the original holder of the bond.

The bond was created for the purpose of raising money: and such securities, being tainted with usury, (though now, since the Act of 1830, only partially tainted,) have

been uniformly held to carry the statutory blight with them into the hands of all persons who come in as privies to the contracting parties, however innocent they may be.

As the bond, in Stewart's hands, was affected by his usury, it was impossible for his assignee to take the bond from him for more than it was legally worth to him. The transfer did not baptise it of that usury. It was good, under the statute, only for the money he actually loaned, without interest.

It is not perceived how any effect can be imparted to the bond in the hands of the assignee, different from what it had in Stewart's hands. It was the old contract, vitiated and reduced as it was by the first act of usury, not changed in terms or in character, which passed over to a new owner. If Stewart had sold it to Mrs. Martin, her contract of purchase would have been good to make her legal owner of the security; but it would still have been a security, under the statute, only for the amount Stewart advanced on it.

This is admitted to be the effect of a long list of decisions on the subject, from *Payne v. Trezevant*, 2 Bay, 23, and *Solomons v. Jones*, 1 Treadway, 144, to the present time.

But the case of *Odell v. Cook*, (see a col-

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lection of cases, 3 *Stat., 783,) is relied on, on the other side. There is but a very imperfect note of the case to be found. It represents that "when the indorser of a note, made to raise money at an usurious interest, represents to a purchaser that it is a business note, made for a bona fide consideration, and the maker is present, and acquiesces, it is a fraud upon the purchaser, and they are both liable." It would be very unsafe to rely on a case so loose as this, in opposition to our otherwise unbroken current of decisions.^a

As an authority for the position that Stewart could have changed the effect of the bond by any representations he could have made, the case is totally unsupported. As an authority that it would have made the obligor more liable on the bond, had he represented it as untainted with usury, it is in direct conflict with *Solomons v. Jones*. And it must be recollected that in this case, when Mrs.

^a If this case is understood, it related to an original emission of the security; and it was held that the maker and endorser, by misrepresentation, conspired to sell it to a purchaser, instead of borrowing money on it. If the case is applicable, it is only applicable to the transfer of the bond to Stewart. But the Chancellor settles that matter by his conclusion of fact, that that was not a sale, but a loan.

Martin comes to claim her legal rights, she must not stop short of evidence sufficient to change the law of the instrument. But the evidence is, not that the obligor represented the bond to be good or invalid, usurious or otherwise, but simply promised to pay it punctually, according to the new usurious contract he was about to make, not with a purchaser, but a lender.

If by any representations a borrower of money can make, he can take the taint of usury from his vicious contract, he has discovered a method by which he may evade the statute; and it is set aside and repealed, not by the legislature, but by an individual.

The effect of all this, however, is only to reduce the principal of the bond, not by taking off it both the discounts deducted by Mrs. Martin and by Stewart, but only the larger

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*of the two, so as to reduce the bond to lowest point of principal. By adding to the larger of the two discounts all the other payments actually made on the bond, the sum legally due on it will be ascertained.

It is ordered, that the decree be modified accordingly: and let the cause be remanded to the circuit for taking the necessary orders.

O'NEALL, C. J., concurred.

WARDLAW, J. In this case I concur with the Chancellor throughout, and of course do not assent to the modification of the decree.

The Act of 1830, 6 Stat., 409, repeals so much of the Act of 1777, 4 Stat., 363, as renders the security taken upon a usurious contract absolutely null and void, and consequently a usurious bond now represents *prima facie* the true sum actually lent, and stands as fairly before the Court as a new bond would if taken on a fresh forbearance or loan. The general presumption as to the amount originally lent arising from the face of the bond, is fortified in this case by the fact, concluded by the Chancellor, who is mainly responsible for the determination of disputed facts, that the obligor actually represented to the plaintiff, in the course of dealing for the bond, that the bond spoke the truth as to the sum of the obligation. The plaintiff actually lent and advanced the sum of \$4,650, when she acquired the security, and forbore the payment of it; and for that sum, deducting subsequent payments, she is entitled to a decree without interest and without costs.

Decree modified.

11 Rich. Eq. *432

*THE STATE ex relatione P. T. GERVAIS, JR., and Others, v. THE CITY COUNCIL OF CHARLESTON.

(Charleston. April Term, 1860.)

[*Navigable Waters* ◊18.]

[H] for special injunction to compel the City Council of Charleston to reestablish a public landing, which they had obstructed, or substitute another, equally as good, in its place, dismissed for want of clear and satisfactory evidence that the right existed.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. § 54; Dec. Dig. ◊18.]

[*Nuisance* ◊80.]

Courts of Equity will not, it seems, grant an injunction to restrain a public nuisance, unless the right be established by clear and determinate evidence.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. § 192; Dec. Dig. ◊80.]

Before Dargan, Ch., at Charleston, February, 1858.

This case will be sufficiently understood from the circuit decree of his Honor, Chancellor Dargan, and the opinion delivered in the Court of Appeals. The circuit decree is as follows:

Dargan, Ch. The City Council of Charleston converted White Point into a garden, and, in 1834, extended it to Meeting street, and afterwards to King street, surrounding it, on the side of the water, with a sea-wall, and doing away with liberty of resorting there for a harbor for boats, but leaving a flight of steps on the water side to admit passengers. In 1846, the inhabitants of John's island and James' island addressed a memorial to council, complaining of the delay in providing for them a landing on Ashley river, in lieu of that which they had enjoyed at the foot of Meeting street. The City Council, without admitting their obligations, proposed to establish a public landing at the foot of King street, if the islanders would bear half the expense, which they refused, and the subject continued to be pressed upon council, without any settlement, until 1853. In February of that year, the islanders had retained counsel, and through them addressed a communication to the city, demanding, as

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a *right, a low-water landing on Ashley river, and, in case of a refusal, requesting a reference to the city attorney for an appearance to a bill or information. The communication was referred to a committee, who, after some delay, reported an ordinance "To establish a place of landing at the foot of Council street," which was adopted on the 28th of October, in the same year, and is in these words:

"Be it enacted by the Mayor and Aldermen in City Council assembled, That the south end of Council street be, and the same is hereby established as a place of landing for persons and boats, for the use of the inhabitants of the city and the surrounding country."

The end of Council street is inaccessible, except at high water. A mud flat extends from it to the river. Some years ago the City Council purchased for a street a strip of this mud flat, fifty feet wide, from the end of Council street to the point of intersection with a line drawn from the end of Gibbs street. On some private maps, Gibbs street and Council street are represented as extending to the point of intersection, but not on the map in the city hall. Mr. Carr, one of the members of council, gave evidence that he looked upon the end of Council street to be, of right, at the intersection with Gibbs street, but, in fact, terminating at the high land. After passing this ordinance, the City Council hired, for a time, the right of landing at Moreland's wharf, for the islanders, but took no further measures to carry out a landing at Council street, or to make a permanent arrangement. And the parties not being able to agree, this bill was filed in October, 1855.

The relators rest their case upon a right confirmed, as they say, to the inhabitants of John's island and James' island, by the Act of 1733, which is set forth at large in the bill. The first section establishes two ferries, one over Stono river, the other over Ashley river, from Gabriel Manigault's to White Point, in Charleston, or as near thereto as may be. The fourth reciting that roads

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and causeways will be necessary to the ferries, and their low-water landings, authorizes the commissioners of roads to lay out good and sufficient landing places to the several ferries hereby established. The ferries were vested for seven years in the grantees named in the Act. There is no evidence of the subsequent use of the ferries. The use of the road to the ferry of Stono is attested by the journal of the commissioners of roads of St. John's, Colleton. There is evidence of the use of the landing at Manigault's; and much testimony was taken as to the use of the foot of Meeting street, which is by White Point, as a landing, prior to 1834.

The relators' claim is for a public landing, in place of the landing which the City Council have excluded them from, at the foot of Meeting street. If they were entitled to a public landing at the foot of Meeting street, or elsewhere, the closing of it against them would entitle them to have satisfaction, either by removing the obstruction, or by furnishing another landing in its place. This proposition is too plain to be denied. The city do not claim an exemption from the rule, but found their defence on other grounds. They say, first, that there never was a low-water landing at the foot of Meeting street. And, secondly, that if there was, this Court has no jurisdiction of the question of satisfaction.

Before we decide whether the relators had such a right as they claim, it is well to see

what a public landing is. Wharves, quays and piers belong to the *jus publicum*, in ports and harbors, and the repair and preservation of them are on the same footing as the construction and preservation of highways on land: Lord Hale, *de Portibus Maris*, 83. A highway or a wharf may be free, or subject to toll. In the hands of a subject, toll is a franchise, and the right of passing without toll a privilege or liberty: Mayor of London v. Lynn, 1 Bos. and Pul., 487. The privilege may be proved by grant or prescription. In this case, it is in proof that the market stuff or produce of the relators has, time out of mind, been brought in boats to the western

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side of the city and *landed at the foot of Meeting street, without paying toll. And if the right was claimed on the ground of prescription, there would be a strong case for it upon the evidence. But the Act of 1733, P. L., 137, 9 Cooper, 79, removes the question from the province of evidence to that of authority. The first section establishes, over the Ashley river, a ferry "from Gabriel Manigault's to the White Point, in Charleston, or as near thereto as may be." The fourth section recites that causeways and roads, to the low-water landings at the ferry, will be necessary, and directs the commissioners of roads to lay out good and sufficient roads to such landing places. The evidence of Mr. Rivers and Mr. Burden shows that the mail route from Charleston to Savannah, before the revolution, took this direction. The Act of 1785, P. L., 391, 9 Cooper, 299, authorizes the City Council to continue East Bay street to the extremity of White Point, and it is natural to look for a public landing at the terminus of a public road, when it terminates at the water. It is admitted that, until 1834, there was freedom of access to the city at the foot of Meeting street, which is understood to be very near or adjoining what was called White Point, and it is proved that boats lay there, and that it was a common resort for the islanders. It is objected that Meeting street was not a low-water landing, but it seems to have been a good landing at half-tide, and the islanders, at low water, used Turnbull's wharf, alongside, and paid no toll; this usage, therefore, is consistent with the fact, that a public landing, at or near White Point, was established by law. In Judge Evans' Compilation, sec. 53, it is said that "though the statute of limitations will not run against a public right, and non-user merely will not destroy the character of a public highway, yet, if it were obstructed and enclosed for twenty years, a legal authority to obstruct it might be presumed." There was no obstruction of this public landing before 1834, and there is no ground to presume an authority to obstruct since that time, for the relators and City Council have

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been negotiating ever *since for an equivalent. If anything is to be presumed, it is that

the City Council engaged to give the public as good a landing as that which they had closed, if not a better. There is no ground, therefore, to assume either that the relators had no right before 1834, or that the right has been since relinquished.

But the main point of the defence is the want of jurisdiction. It is said that if the closing of Meeting street against the relators be a wrong, an indictment will lie. This may be true, but it is not enough to oust this Court of jurisdiction that there is a legal remedy. It must be shown that the legal remedy is sufficient. The relief, which the relators seek, is clearly one which the Court of Sessions cannot give. The Court of Sessions is competent to try the question of nuisance, and punish the defendant if convicted. But the remedy which the relators seek is entirely different. The City Council are elected periodically, formerly every year. The persons who are in office one year, are not so again unless re-elected. The judgment of the Court might authorize the relators to break down the sea-wall, but when that is done their object is not obtained. They wish the place put into condition for a low-water landing. They seek not abatement, but construction. And the Court of Sessions has no means of enforcing its judgment, but by fine and imprisonment. The fine and imprisonment, however, fall on the head of those against whom the bill is found, who may or may not be in possession of the means or the power of the council, when the case is tried. Such a remedy is plainly inadequate. In all civil suits the judgment is against the corporation. It would ruin the credit of the corporation, if the only remedy of a creditor consisted in the right of imprisoning the ex-mayor or his aldermen. Where abatement is all that is necessary, the proceeding by indictment may do, because the work of destruction is so easy, that the prosecutor may

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very possibly carry that on at his own *expense. It is very different when the interests of justice call for reparation.

But it is very questionable whether an indictment would lie in this case at all. The right of the relators to a public landing, is not inconsistent with the right of the city to change the landing. There is no doubt that a highway may be changed, if upon a writ of *ad quod damnum* it be found that the new way is as beneficial to the public as the old. 1 Russell, 452. The same is the law as to ports and passages. Hale *de Portibus*, 87. Considering the large powers vested in the city, it may well be doubted whether it is necessary for the city government to have resort to any preliminary measures to authorize them to make a change over public property, where no private rights are invaded.

The very name *ad quod damnum*, is well nigh obsolete, and nothing is more common than for such changes to be made by tacit

consent. If an indictment had been preferred against the City Council in 1834, it is far from clear that it would have been considered a proper remedy. At all events it is much easier to presume a license to substitute a new landing for the old, than to presume a surrender of their rights by the public for nothing.

It is agreeable to reason to presume in favor of legality where the act is not plainly illegal. It is not favorable to a corporation invested with high civil faculties, to reject a benignant construction in order to take the character of a wrong-doer. If this case had been instituted recently after the occlusion of Meeting street, there is no doubt the city would have taken credit for the intention of giving the relators an accommodation fully equal to what they were depriving them of. We do not need an *ad quod damnum* to persuade us of this. The city has admitted the obligation from time to time in various ways: by dedicating the foot of King street to the use of the islanders; by proposing to repair at joint expense; by the ordinance for es-

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tablishing the end of *Council street as a landing; and by paying an annual sum to the owner of Moreland's wharf, for the license of the relators to pass.

But why is it said that chancery has no jurisdiction in this case. If the question of nuisance merely is to be tried, the Court of Sessions is the proper tribunal; and if the objection was confined to this, that no decree should be made against the City Council, without affording them an opportunity of trying, at law, their right to stop up Meeting street, there would be some authority for it. But the rights of the parties growing out of questions of nuisance, afford many occasions for the jurisdiction of this Court. If all depended on the question of nuisance or not, it would be fair to give the city an opportunity of trying it at law. Yet in cases of purpresture and nuisances to ports or harbors, the criminal view of the question is so little resorted to, that the books hardly furnish a precedent for an indictment for suffering a public landing to be ruinous, and the most usual course for redressing such evils seems always to have been by decree or order emanating from chancery. Hale, 87. And it is not only by injunction, but by decree, to pull down erections already made, that chancery interferes. Eden on Injunctions, 223.

The difficulty of jurisdiction being removed, the justice of the case depends on the right of landing at White Point. If the relators were entitled to a low-water landing there, and the city had the right to make a change for a new landing, they are bound by contract. If they made the change without authority, then they are bound by the obligation that arises from the right of the party, who is wronged, to demand satisfaction. I shall, therefore, declare the relators entitled to a low-water landing at the foot of

Council street. The decision of the right will, in all probability, lead to a compliance by the city. If the City Council, however, on being called upon, shall refuse to proceed to make the landing, or evade the diligent performance of the duty, an order will be

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made *directing one of the masters to inquire what will be a reasonable sum for the cost of the work, and the relators will be at liberty to contract for such work and raise the money by process against the defendant.

Let the city pay the relators' costs, and comply with their rights as declared in this decree.

The respondents appealed on the grounds:

1. Because the islanders never had by right, or in fact, any low-water landing at the foot of Meeting street, or anywhere else: nor was there ever at any time any wharf or head projected to low-water mark for their use.

2. Because the Act of 1783 did not establish a permanent public landing, but it established a ferry in certain individuals for a limited time: And if there was a place of landing incident to the ferry, it ceased with the ferry privilege from the expiration of the time limited, or from nonuser, or from non-compliance with the conditions of the grant.

3. Because the city charter of 1783 which vested in the City Council "any vacant low-water lots fronting any of the streets," operated as a repeal of any ferry or landing privilege that may have been previously established by Act of Assembly, or by any user or prescription.

4. Because the erection of such a solid and permanent obstacle to the enjoyment of the easement claimed, as the battery or sea-wall, without hindrance or protest from the islanders, would have operated as a release or extinguishment of the right if the same had ever existed.

5. Because the landing at the foot of Council street is as good a high-water landing as the islanders ever had.

6. Because, if the islanders ever had a right of landing at the foot of Meeting street, it has been lost by nonuser or discontinuance.

7. Because the remedy of the relators, if they have any, is at law: and this Court is without jurisdiction in the premises.

Porter, City Attorney, for appellant.

Petigru, contra.

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*The opinion of the Court was delivered by

WARDLAW, J. We are with defendant on most of the grounds of appeal. The jurisdiction of the Court of Equity in the matter of controversy, called in question by the 7 ground, need not be generally contested: for it is sufficient to determine that it should not be exercised under the circumstances of this case. Judge Story, Eq. Jur., 924, a, says, that Courts of Equity will grant an

injunction to restrain a public nuisance only in cases where the fact is clearly made out, upon determinate and satisfactory evidence: for if the evidence be conflicting, and the injury to the public doubtful, that alone will constitute a ground for withholding this extraordinary interposition. He cites the case of *Earl Ripon v. Hobart*, Coop. Sel., Ca., 333, 3 Mylne & Keene, 169, in the course of which Lord Brougham says: "It is to be always borne in mind, that the jurisdiction of this Court over nuisance by injunction at all, is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the part of the learned Judges to use it; even in cases where the thing or act complained of was admitted to be directly and immediately hurtful to the complainant." Lord Eldon seemed to think there was no instance of injunction to restrain nuisance, without trial, Att'y Gen. v. Cleaver, 18 Ves., 211, and see 3 Meriv., 687, 688, and although this cannot now be maintained, still his doctrine has not been modified beyond the extent indicated by Chancellor Walworth, 6 Paige, 563, "If the thing sought to be prohibited is in itself a nuisance, the Court will interfere to stay irreparable mischief, where the complainant's right is not doubtful, without waiting the result of a trial." It may be further remarked, that the remedy sought by the plaintiff is to compel the City Council to pull down the Battery, a permanent obstruction erected at White Point, on the waste at the foot of Meeting street, or alternatively to build up a landing at low-water, at the foot of Council street, and the Chancellor has decreed for

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the relators, that the Council shall make the landing at the foot of Council street, and if this be refused, that the relators may contract for the work, and raise the money by process against the defendant. Now, the proper office of an injunction, is to inhibit or restrain some act not rightful, proposed to be done, and it is not according to the course of the Court to direct the defendant to proceed actively—to perform some particular act, such as to pull down blinds, 1 Ves., 543, to fill up a ditch, 1 Ves., Jr. 140, or to repair banks, 10 Ves., 192, although the same result may be obtained sometimes by inhibiting opposite conduct. *Eden on Injunc.*, 238, 9. But we recur to the point of the insufficiency of the plaintiffs' proof.

It would be very tedious to scrutinize, in detail, the particulars of evidence; and we shall express our conclusions on the facts, in general terms. There is not a tittle of proof, that the inhabitants of James' island or John's island, in right or fact, ever had a landing at low-water mark at the foot of Meeting street or of King street. No wharf or head projected to low-water was ever erected at the foot of either street; although, possibly, if we may rely on vague tradition, the necessity of such structure was superseded

anciently by the bluff at White Point, until this bluff was swept off by the great hurricane in the summer of 1752. There is evidence that the inhabitants of the islands landed at high tides, or half tides, and for a long time, at the foot of one of the streets named—but at low-water they were accustomed to go round to East Bay. The strongest testimony as to the use of a landing on South Bay is, that of K. Burden, who deposes: "My father used one of these landings on South Bay for his small island opposite, and for his plantation on Burden's island, from 1768, about nine years; and from his plantation alone until the enemy took Charleston in 1780. He died in May, 1785. He used one or other of these landings on South Bay till the time of his death; my mother used one of them during life, and

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her children and child*ren's children have continued the use up to the present time. I have used Council street as a high-water landing frequently, but frequently had to go to South Bay at low tides. The foot of Meeting street was considered a public landing, but Gibbes', McKenzies', and the foot of King street were also used." Now, this demonstrates that no use had fixed on a definite spot, nor was exacted and yielded as a right; and that the whole was probably merely permissive and vague, springing from the sentiments of good neighborhood, and the desire of inviting custom on the part of the city authorities. We may conjecture, that the use, such as it was, had its origin in the Act of 1733, 9 Stat., 79, establishing two ferries, one called John's Island ferry, and the other the James Island ferry—but this Act was limited in its duration to the term of seven years, gave right of toll to individuals and imposed duties on them, and fixed the landing on the Charleston side very indefinitely—"to the White Point in Charleston, or as near thereto as may be." Then the 5th section of the Act of 1783, the charter of the city, 7 Stat., 99, vested in the corporation, "any vacant low-water lots fronting any of the streets," and of course merged and extinguished any easement in them not granted by the State, or afterwards acquired by grant from the city, or adverse use for twenty years. *Thomas v. Daniel*, 2 McC., 354. It was adjudged in New York, that the public have not the right to use and occupy the soil of an individual adjoining navigable waters as a public landing and place of deposit of property in its transit; although, such user has been continued for more than twenty years with the knowledge of the owner, 20 Wend., 111; 22 Wend., 425. Whatever may have been the right of the islanders as to the foot of Meeting street before 1834, this has been apparently abandoned or extinguished by the non-user of the right by them for more than twenty years, and their acquiescence until the filing of their bill, October 19, 1855, since 1834

in the erection by the City Council then of.

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the battery, a permanent and solid sea-wall or structure, presenting an absolute obstacle to their enjoyment of the supposed easement. The same term of twenty years, necessary to raise the presumption of the grant of an easement from enjoyment, will raise the presumption of its release or extinguishment, in case of nonuser, especially if this be entire and complete, and caused by an obstacle defeating its exercise, erected by the owner of the soil: 3 Kent, 9 ed., 585; Taylor v. Hampton, 4 McC., 96 [17 Am. Dec. 710]; Evans' Road L., sec. 53. It is not claimed by the bill, that the relators have acquired any right to a landing at the foot of King street as a substitute for the landing at the foot of Meeting street: and, in fact, in a few years after 1834, less than twenty, the battery was extended over the waste fronting King street. Some negotiations ensued between the islanders, through their counsel, and the City Council, which resulted, so far as we know, in no other recognition of the right of the relators, than that contained in the Ordinance of October 28, 1853, that the south end of Council street be established as a place of landing for persons and boats for the use of the inhabitants of the city and of the surrounding country. This Ordinance must be interpreted according to the fair import of its terms; for there is nothing in the circumstances under which it was passed, to point the application of it to anything not within its popular acceptance; and the canons of construction allow us no greater latitude. A landing at the end of Council street means a landing in the existing state of the water and highway; and the words cannot be legitimately extended to include, by implication, any obligation on the part of the Council to prolong the street, or erect a wharf accessible in all conditions of the tide. The proof is, that Council street terminates before reaching Gibbes street, and that it was never contemplated to extend it beyond the point of intersection with Gibbes street: that at its present termination, there is a good high-water landing, and that the extension of the street to low-water mark would involve heavy expenses,

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*and intrusion upon private estate. On the whole, the relators have not satisfied us, by determinate and clear evidence, that they had ever, or anywhere, legal right to a low-water landing, or to a much better landing than the foot of Council street now affords.

We may regret this controversy, but it is our function to determine lawful rights on issues properly made, and not to give pragmatic and unauthorized advice.

Ordered, that the decree be reversed, and the bill be dismissed.

JOHNSTONE, J., concurred.
Decree reversed.

II Rich. Eq. *445

*Ex parte ABRAM WILSON.

(Charleston. April Term, 1860.)

[*Insane Person* ⚡9.]

Inquisitions of lunacy are usually executed at the residence of the supposed lunatic, or in the vicinage; but that is a matter within the discretion of the Judge or Chancellor ordering the commission; he may order it to be executed in another district.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 17; Dec. Dig. ⚡9.]

[*Insane Person* ⚡9.]

The traverse of an inquisition of lunacy should, as a general rule, be tried in the district where the commission was executed; but that, also, seems to be a matter of discretion with the Judge or Chancellor ordering the traverse.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 17; Dec. Dig. ⚡9.]

Before Wardlaw, Ch., at Charleston, June, 1859.

The petitioner, who resided in Colleton district, was found to be a lunatic, by an inquisition held in Charleston, on the 17th March, 1859; and this was a petition for leave to traverse the inquisition. His Honor granted the order, and directed the issue, when made up, to be tried in Charleston district.

The petitioner appealed, and moved this Court to modify the order, and direct the issue to be tried in Colleton.

McCrady, Campbell, for appellant.
Hayne, Miles, contra.

Authorities cited: Smith v. Petigru, 2 Strob. Eq., 322; ex parte Baker, 19 Ves., 340; Cooper, 205; ex parte Smith, 1 Swan., 6; 2 Ves., 401; in re Nugent, 3 Mol., 517; 12 Eng. Con. Ch. R., 594; ex parte Hall, 7 Ves., 261, 254; Shelf. on Lunacy, 122; 14 Eng. Ch. R., 38.

The opinion of the Court was delivered by

O'NEALL, C. J. From the earliest cases of which we have any account in this State,

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the commission in the nature of a *writ de lunatico inquirendo has been executed at the alleged lunatic's residence, or in the vicinage. This was regarded as a convenient practice, both for the sake of the supposed lunatic, his family, friends, and the witnesses. But it is by no means so fixed and settled a rule as not to be departed from. Circumstances may make it necessary that it should be executed elsewhere. It is entirely a matter of discretion with the Chancellor or Judge ordering the inquisition.

Here, I have no doubt, the convenience of all was consulted, by having the inquisition executed in this city. Ordinarily, I should say, the traverse ought to be tried where the inquisition was found. That is more in harmony with the course of proceeding, and preserves the record in the same Court. But I have no doubt it may be tried in the juris-

diction where the alleged lunatic lives. On the present occasion, it has been so earnestly pressed upon the Court, and the Chancellor who allowed the traverse having, in this Court, of which he is a member, assented to the change of venue to Colleton district: it is, therefore, ordered, that the order allowing the traverse be so modified, that the traverse be made, docketed, and tried in Colleton district, at the next, or

any subsequent term of the Court of Sessions of the peace, at which it may be practicable to try the same, and that the Judge presiding at the trial be requested to certify the verdict to the Court of Equity for Charleston district.

JOHNSTONE and WARDLAW, JJ., concurred.

Order modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

AT COLUMBIA, MAY TERM, 1860.

JUDGES PRESENT:

HON. JOHN B. O'NEALL, CHIEF JUSTICE.

" JOB JOHNSTONE, ASSOCIATE JUDGE.

" F. H. WARDLAW, ASSOCIATE JUDGE.

11 Rich. Eq. *447

*MICHAEL WILLIS and Others v. JOHN JOLLIFFE and Others.

(Columbia. May Term, 1860.)

[*Slaves* ⚡22.]

In 1854 E. W. executed his will, by which he directed his executors to take his slaves Amy and her seven children, to Ohio, and there emancipate them; and the rest of his estate, real and personal, he devised and bequeathed to his executors in trust, for Amy and her children. In 1855, E. W. left this State for Ohio, taking with him Amy and her children, and intending to emancipate them there himself. He arrived at a wharf in Cincinnati, and, in a few minutes after landing, died betwixt the landing and the hack in which he was about to proceed with said negroes to his lodgings:—*Held*, That by the act of E. W. in taking Amy and her children to Ohio, with a view to emancipate them, they became ipso facto free, and, therefore, that the trusts of the will in their favor were valid.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 92-111; Dec. Dig. ⚡22.]

[*Slaves* ⚡22.]

There is nothing in the policy of the laws of this State against a master's taking his slaves to a free State, and there emancipating them himself.

[Ed. Note.—Cited in *Dingle v. Mitchell*, 20 S. C. 212.

For other cases, see *Slaves*, Cent. Dig. §§ 92-111; Dec. Dig. ⚡22.]

[This case is also cited in *Magee v. O'Neill*, 19 S. C. 185, 45 Am. Rep. 765, as to public policy.]

Before Wardlaw, Ch., at Barnwell, February, 1858.

The circuit decree of his Honor, the presiding Chancellor, is as follows:

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*Wardlaw, Ch. Elijah Willis, a native of South Carolina, settled early in life near Williston, in Barnwell district, on the South Carolina Railroad, and was domiciled there

thenceforth until his death, May 21, 1855. He there accumulated considerable property, consisting chiefly of lands and slaves.

August 18, 1846, he signed an instrument purporting to be his will, whereof his brothers-in-law, Fanning and Phillips, were named as executors, and whereby he disposed of his estate among his brothers and sisters and their children, his nearest of kin. He never married, and about the date of this instrument, he began to live in concubinage with one of his female slaves, named Amy, who bore, during their intercourse, several children.

He executed, in duplicate, his last will, February 23, 1854, in the office of Jolliffe & Gitchell, attorneys-at-law, in the City of Cincinnati, Ohio, whereof he appointed Edward Harwood, Andrew H. Ernst and John Jolliffe, all of Hamilton county, Ohio, executors, and thereby revoking all former wills, disposed of his estate as follows:

1. He directs his just debts and funeral expenses to be paid out of his estate, by his executors, as soon after his death as they should find it convenient.

2. He bequeaths to his executors his slaves, Amy and her seven children, Elder, Ellick, Philip, Clarissa Ann, Julia Ann, Eliza Ann and Savage, with any other child or children to which the said Amy may, at any time hereafter, give birth, and the children and descendants, if any there may hereafter be, of any of said above-named slaves or persons. The said executors to bring or cause said persons and their increase to be brought to the State of Ohio, and to emancipate and set them free in said State of Ohio.

3. He devises and bequeaths his whole

estate, of whatever description, and wherever found, to his executors, or to such of them as should act, and the survivors or survivor of them, or to his administrators,

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if his executors should fail to act, to *hold in fee simple, with full power to sell and convey in fee simple, his real estate at public or private sale, and at such times and on such terms and securities as to them may seem fit; also, with full power to sell all or any part of his personalty, except the slaves above named, and any child or children which may be hereafter born to any of said slaves.

4. He bequeath to his executors, or administrators, as the case may be, all his monies, stocks, mortgages, bonds, and other securities for debt, all his household and kitchen furniture, and all his implements, tools and materials for planting.

5. "I direct that from the net proceeds of the sales of said real estate and personal property, and of the monies, goods, chattels and effects, of whatsoever nature, herein devised to my executors; my said executors, or the survivors or survivor of them, or any administrator under this will, shall bring, or cause said Amy and her children to be brought to the State of Ohio, as hereinbefore provided, and after paying the necessary expenses of administration and settlement of my estate, shall, at some suitable place, within some one of the free States of this Union, purchase such lands, and at and for such price or prices as to them may seem best, and take deeds for said lands to, and in the name of such emancipated persons as above provided; and that, in taking such deeds, care be taken that each of said persons shall have a full and equal share of said real estate, quantity and quality considered; said executors or administrators to devote the whole of the residue of the funds of my said estate remaining in their hands, after the payments above provided for, to the purchase of said lands, and stocking and furnishing the same, and placing said persons in possession thereof; and in the event of the death of one or more of the above named persons, leaving any child or children previous to the period of the purchase and distribution of such lands, such

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child or *children shall succeed to, and take the share or shares of its or their parent or parents."

6. He authorizes his executors, or any of them, to employ agents and attorneys, for reasonable compensation, to proceed to South Carolina or elsewhere, for the settlement of his estate, with power, as substitutes, to do all that all or any of the executors could do; and further provides, that if one or two of the executors shall fail to act, all the power conferred on the executors, including the power to sell, shall be vested in the third, as if he had been named sole executor.

In May, 1855, Elijah Willis left his home in Barnwell, for Cincinnati, taking with him Amy and her mother, and Amy's children, the eldest three having been begotten by a man of color.

He arrived with them at a wharf in Cincinnati, in the steamboat Strader, and, having disembarked, he died betwixt the landing and a hack, in which he was about to proceed with said negroes to lodgings. Soon after the news of his death reached South Carolina, namely, June 12, 1855, the will of 1846 was admitted to probate in common form.

Previously, May 23, 1855, the last will of 1854 was proved in Cincinnati, and Jolliffe alone qualified as executor—Harwood and Ernst having renounced the office. Briefly afterwards, Jolliffe propounded the will of 1854, for probate, in Barnwell, South Carolina, and by consent of all concerned, without adduction of proofs, a decree pro forma was made by the ordinary, refusing probate. An appeal was taken to the Court of Common Pleas, for Barnwell, and heard before Judge O'Neill, at Fall Term, 1855, when the verdict of the jury was against the will. On further appeal to the Law Court of Appeals, that Court ordered a new trial. The new trial resulted in a verdict for the will, and the next of kin acquiesced in this verdict. Jolliffe then qualified as executor in South Carolina.

In May, 1855, when testator was leaving the State for Cincinnati, and on his journey

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thither, he stated that his *purpose was to take the slaves to a free State, and there emancipate them, and also stated the further purpose to return to Barnwell after a short absence. There is no evidence of his intention to change his native domicil, except as this may be inferred from the removal of Amy, and his expressed desire to sell out here, if he could make sale on terms satisfactory to himself:—this was not affected.

At an earlier date, testator removed these slaves for some months, beyond the limits of this State, and for the same end. In 1853, he made a trip with them to Baltimore, and brought them back to Barnwell. It can hardly be disputed that his purpose then was to emancipate them, and settle them without the State; but from some motive, probably suggested by the interest or desire of the slaves, his purpose was changed or retarded.

The evidence adduced on the trial of this case is voluminous, and consists principally of the depositions of witnesses resident abroad, taken by commission; and much of it relates exclusively to the issue of probate, for which it was originally procured. See [Jolliffe v. Fanning] 10 Rich. L., 186.

The foregoing statement of facts is a summary of all that is deemed material in the case, on the questions now presented for judgment.

The plaintiffs, the next of kin of the testator, affirm that Amy and her children were slaves at the death of testator, and, consequently, that the 5 clause of the will, directing investments for the benefit of Amy and her children, is void under the provisions of our Act of 1841, to prevent the emancipation of slaves, and for other purposes, 11 Stat., 154. The 4 section of this Act enacts, "That every devise or bequest to a slave or slaves, or to any person upon a trust, or confidence, secret or expressed, for the benefit of any slave or slaves, shall be null and void;" and the other sections, in substance, avoid—1, any bequest, gift or conveyance, intended to take effect after the death of the owner, for the removal from the State of any slave, with a view to emancipation;

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*2, any gift of a slave, on a trust, that the donee shall remove such slave from the State with the purpose of emancipation; and 3, any bequest, gift or conveyance of a slave on the trust, that such slave shall be held in nominal servitude only; and the Act declares that the personal representatives, donee or trustee, as the case may be, shall be liable to account for the value of such slave, in the first section, to the creditors and distributees of the person making the will, and in the second and third sections, to the distributees or next of kin of the donor or grantor.

The defendant Jolliffe, the executor, insists that Amy and her children were in the condition of free persons at the death of testator, and were consequently capable of taking by devise or bequest. If these legatees, Amy and her children, had abided in South Carolina until the death of testator, the 3 clause of the will, bequeathing these slaves to the executors on the trust that they should be taken to Ohio, and there set free, would have been in direct contravention of sec. 1 of the Act of 1841; and if they had been given to an agent on the trust to remove them from the State, with a view to their emancipation abroad, sec. 2 would have avoided the gift; but the owner himself took them to Ohio, after having declared his purpose to manumit them, and settle them in some free State, and it is argued for the defendant that this exercise by the owner of the *jus disponendi* escapes all the provisions of the Act, and that the intended beneficiaries became free and competent the moment they touched the soil of Ohio.

The question in the cause is, whether Amy and her children were free persons or slaves by the law of South Carolina, at the death of testator.

It was faintly suggested and argued, that the domicile of Elijah Willis and his legatees was in Ohio at the date of his death, and it is well to settle this point before proceeding to the discussion of the principal matter.

He was born and bred in this State; here

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he acquired his *habits, opinions, and estate, and here were his creditors, debtors and kindred, his mansion, plantation and growing crops, and all his property. He never resided in Ohio, and had no house there, and when he left Barnwell for the last time, avowed his purpose of returning within a few weeks.

The native domicile is changed only by residence abroad for an indefinite term, however short, and it readily reverts. Two things must concur to constitute domicile, residence, and the intention to make the place of it the home of the party, *animus manendi et factum*; but actual residence is not indispensable to retain a domicile once acquired, for it may be retained *animo solo*, by the mere intention not to change it for another by one transiently inhabiting elsewhere. *Sto. Conflict of Laws*, 44, 47, 48; *Bradley v. Lowry*, *Speers Eq.*, 1 [39 Am. Dec. 142]; *Petigru v. Ferguson*, 6 Rich. Eq., 380; *Bemfide v. Johnstone*, 3 Vesey, 200. It seems plain that the domicile of testator, at his death, was in South Carolina. Domicile can be attributed to Amy and her children only on the postulate that they were free persons. If they became free simply by breathing the atmosphere of Ohio, doubtless that State is their native domicile,—as their birth-place as persons, contradistinguished from chattels. The personal status of a party in the country of his domicile, adheres to him abroad, while his domicile is unchanged.—*Sto. Conf. Laws*, 51-2, 60-4-5-6. Considered as chattels, Amy and her brood have no situs, and follow the person of their owner, and are governed by the law of his domicile, for the maxim is, in *domicilii loco*, *mobilia intelligantur existere*.—*Sto. C. L.*, 377; *In re Erwin*, 1 Croup. and Jerv., 156. The law of the owner's domicile determines in all cases the validity of every transfer, alienation or disposition of personal property made by him, whether *inter vivos*, or to take effect *post mortem*. *Sto. C. L.*, 383. *Sill v. Worswick*, 1 H. Black, 690. *Birtwhistle v. Vardill*, 5 Barn. & Cr., 438. *LePrince v. Guillemot*, 1 Rich. Eq., 212. If Amy and her children were slaves at the death of testator, (when the will is contemplated as uttering its di-

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rec*tions,) they must be treated, in the view of law, as abiding in South Carolina, wherever in space their bodies might be; and the direction to remove them, although they were actually in Ohio, must be interpreted as a direction to remove them from this State. As the will, in this case, directs the lands to be sold by the executors, the effect in this Court is to convert the whole estate into personalty controlled by the law of the domicile. *Fletcher v. Ashburner*, 1 Br. C. C., 497; 1 W. and T. L. C., 565, *Drayton v. Rose*, 7 Rich. Eq., 328 [64 Am. Dec. 731]; *Perry v. Logan*, 5 Rich. Eq., 202. This point of equitable conversion, however, is not important in

its consequences, for considering the real estate in South Carolina unchanged in its character, it must be governed by the law of the State in which it is situated. It is important, however, to fix the domicile and citizenship of testator in South Carolina, in reference to his duty to obey the laws and subserve the policy of the sovereignty to which he owed allegiance. In many particulars, one in his lifetime may satisfy and supersede the provisions of his last will, by himself performing the acts which, in the uncertainty of his continued existence, he had directed his representatives to perform after his death, and he may do some things, personally, which he could not empower his executors to do. Manumission, by will, of a slave, in this State, is absolutely unlawful. By our Act of 1800, 7 Stat., 443, the legislature declared that no emancipation of any slave shall be valid or lawful, except it be by deed, and according to the regulations therein prescribed: And in case any slave shall be hereafter emancipated, or set free otherwise than according to this Act, it shall, and may be lawful for any person whomsoever, to seize and convert to his or her own use, and to keep as his or her property, the said slave so illegally emancipated or set free. And it was enacted, in 1820, 7 Stat., 439, that no slave shall hereafter be emancipated but by Act of the legislature. In May, 1835, two of the three Judges then constituting our Court of Appeals, without the

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concurrence of Chancellor *Harper, and reversing the circuit decree of Chancellor De Saussure, held in *Frazier v. Frazier*, 2 Hill Eq., 304, that these Acts applied only to emancipation within the State, and that a testator might authorize his executors to remove a slave from the limits of the State, and emancipate him abroad. In December, 1835, a new organization of the Courts of Appeals was adopted, which, with certain changes introduced in December, 1836, still subsists; and in 1841, in the Act applicable to this case, the legislature dispersed any lingering doubt that our policy was against emancipation ubique. Even this Act does not in terms inhibit the owner of slaves from taking them abroad, and setting them free beyond the limits of the State; for South Carolina does not claim, what would be extravagant in any political community, general extra-territorial jurisdiction, and she acknowledges the citizen's right to change his domicile. An unlimited inhibition of this sort would seem to be arrogant, and might serve to prevent a proprietor of slaves from removing himself and them for any purpose, however lawful. But any State has the right to prevent fraudulent evasions of her laws and policy by her own citizens ubicunque, whenever the delinquent citizens, or the subject, come within her jurisdiction; and her judges should co-operate in promoting such policy. Is it not as much against the spirit

of the Act of 1841, and equally injurious to the interest of the community, for the master to remove his slaves from the State with a view to their emancipation, as for him to direct his donee or executor to consummate the act? The Act avoids any devise or bequest to a slave indefinitely as to place, and any gift of a slave for the end of emancipation by deed or otherwise, and all measures to defeat its scope are substantially prohibited. The object of the legislature, in all its enactments concerning slaves and free persons of color, appears to be to check the diminution of slaves, and the growth of free persons of color in our midst or our vicinage.

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The evils of *colonies of free negroes, near our borders, are well stated in *Fisher's negroes v. Dobbs*, 1 Yerger, 119.

In speaking of the policy of the State on this subject, it is not intended to express dissatisfaction with the view on this point, presented by Judge Withers in this case on the issue of probate, 10 Rich. L., 196, nor with judge Evans' remarks in *O'Neill v. Farr*, 1 Rich. L., 89. The policy of the State is ascertained by the declarations of the sovereign power in the Constitution established by the State, and by the enactments of the legislature, to whom the Constitution has committed all legislative power. Judges are not permitted to tread on the "arena of politicians, nor to ascertain the will of the people, however monotonous the subject, and the consequences involved," although, individually, they may suppose such will or opinion to be irregularly pronounced throughout "the limits of the State," if this will has not been certified by the Constitution and statutes. Clearly, a distinction exists between the policy of a particular statute and the policy of the State. In interpreting a statute, we trace its history, and consider the old law, the mischief and the remedy, and thus ascertain the force of its provisions; but if the law be silent on any given subject, Judges, whose office it is to declare and not to make law, cannot ascertain nor change the law by any speculative considerations as to the fitness of a change, nor from any irregular pronouncement of popular wishes, and must conform to the Constitution and statutes. The policy of the State, however, in the judicial enforcement of its will, is not confined to the enactments of special statutes, and may be ascertained from the general course of constitutional legislation. *Dwar. on St.*, 597. It cannot be doubted, from the whole course of our legislation on this subject, that the policy of the State is against emancipation of slaves, and the immigration of free negroes among us, and their settlement within reach of contagion to our slaves. In *Vinyard v. Passalaigne*, 2 Strob. L., 536, the Court of Errors granted a new

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trial because the *jury had presumed a legislative act of emancipation, and affirmed

the principle that such presumption is contrary to our policy and laws, although the general legislative power, conferred by the Constitution, is not restricted in this particular, and instances of emancipation by the legislature, and of judicial presumption of private acts not against policy, frequently appear. The same principle had been previously recognized in relation to divorce, in *McCarty v. McCarty*, 2 Strobl. L., 6 [47 Am. Dec. 585]. The case of *Hinds v. Brazeale*, 2 How. Miss. R., 837, is instructive on this point—and, indeed, on most of the questions in the cause. Elisha Brazeale, of Mississippi, took one of his female slaves to Ohio and emancipated her there by deed, which was recorded both in Ohio and Mississippi. She was educated in Ohio, and she abided there until she attained maturity. He then brought her back and had a son by her; and the three lived many years in Mississippi, until the death of Brazeale there. By his will he confirmed the deed of emancipation, and gave the whole of his estate to her and her son. Some of his next of kin from North Carolina, by bill in equity in Mississippi, claimed the estate, and, as a part of it, the woman and her son. The Court, by C. J. Sharkey, decided that the deed of emancipation was invalid, and the woman and her son still slaves of Brazeale's estate—that the devises and bequests to these slaves were void, and the heirs of testator entitled to the property. The C. J. says: "To give validity to the deed of emancipation, would be a violation of the declared policy of the State. The policy of a State is indicated by the general course of legislation on a particular subject, and we find that free negroes are deemed offensive, because they are not permitted to emigrate hither," &c. Such, too, is the policy South Carolina declared in the Act of 1835, 7 Stat. S. C., 470, and other statutes. Again, he says: "The state of the case shows conclusively that the emancipation had its origin in an offence against morality, pernicious and detestable as an example. But, above all,

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it seems to have been planned *and executed with a fixed design to evade the rigor of the laws of this State. The acts of the party in going to Ohio with the slave, and returning himself immediately to this State, point with unerring certainty to his purpose and object. The laws of this State cannot be thus defrauded of their operation by one of our own citizens." Again: "As we think the validity of the deed must depend upon the laws of this State, it becomes unnecessary to inquire whether it could have any force by the laws of Ohio. If it were even valid there, it could have no force here." If these be sound doctrines, they must control the present controversy, for, with the exception that the woman and her children in Willis' case, have not returned to South Carolina, the circumstances here tending to establish emancipation are far feebler, especially in

the formality of the emancipation and the length of the residence of the legatees in Ohio, while the testator was living.

The last remark of the Chief Justice ap-
positely leads to further discussion of the question, whether the law of South Carolina, or the law of Ohio, should govern the decision of this matter in this forum. The subject of litigation is personalty, and by the comity of nations is considered, generally, to be regulated by the law of the State in which is the owner's domicile. The validity and construction of a contract, as the lawfulness of any transaction, are usually governed by the law of the place where the contract was made or the thing done; but if a contract be made in one State to be performed in another, the general rule is, that the construction and force of the contract are determined by the law of the State where it is to be executed. [*Touro v. Cassin*] 1 N. and McC., 173, n. a. to 2 ed. [9 Am. Dec. 680]; [*Allen v. Watson*] 2 Hill, 319; [*Ayres v. Audubon*] Id. 601. According to this view, as the testator lived in South Carolina, and his will was intended to operate on property which, for the most part actually, and in the whole constructively, was in this State, the construction and force of his will must depend on our law. In *Mary v.*

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Morris, 7 La. R., 135, a bequest of *freedom to a slave, made by a citizen of Georgia, was held void by the Court of Louisiana, in a suit by the slave for her freedom in Louisiana, because the laws of Georgia inhibited emancipation by will, although this mode was permitted in Louisiana. It is the opinion of most foreign jurists, (Sto. Con. L., c. 4, *passim*.) that personal laws regulating the capacity and status of persons, when they have once attached upon a person by the law of his domicile, follow the person everywhere, as a shadow, so long as his domicile remains unchanged, and are of universal obligation, even in relation to transactions in any foreign country, where the regulations may be different. Thus a minor, a married woman, or any other person who is deemed incapable of transacting business (*non sui juris*) in the place of domicile, will be deemed incapable everywhere, not only as to transactions in the place of domicile, but as to transactions in every other place. *Ib.*, sec. 65. Such personal laws exert their authority wherever the party goes to contract, and extend over all his property, wherever or under whatever customs it may be situated. *Ib.*, sec. 51, a. If we adopt, however, the modification of this doctrine, by Huber, which is approved by Judge Story, *Ib.*, sec. 98, and by Chancellor Kent, (2 K., 451, Lect. 39), the bearing on this case will be the same: "No nation is under obligation to give effect to the laws of any other nation, which are prejudicial to itself or to its own citizens; and in all cases every nation must judge for itself what foreign laws are so prejudicial or not. Every independent community will judge for itself,

how far the comitas inter communitates is to be permitted to interfere with its domestic interests and policy." "It is a maxim that locus regit actum, unless the intention of the parties to the contrary be clearly shown. It is, however, a necessary exception to the universality of the rule, that no people is bound to enforce, or hold valid in its Courts of justice, any contract which is injurious to its public rights, or offends its morals, or contravenes its policy, or violates a public

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law." On this moderated view it is the duty of tribunals in South Carolina to decide according to its laws and authenticated policy, however different might be the opinions of the government of Ohio. According to the teaching of the foreign jurists, the Courts of Ohio should conform their judgments as to personal capacity and condition, and the attendant rights of property, to the prescripts of the country of domicile; but, conceding the exception, that transactions relating to property actually being within her limits may be judged in that State according to her domestic interests and policy, she cannot legitimately dispute the exercise of authority and judgment proceeding on the same principle in another State, as to property within its limits. The testator acquired no domicile in Ohio; and South Carolina, in becoming respect to herself, cannot recognize any sovereign and extra-territorial right in a foreign State to transmute what is considered here a chattel into a free person, capable of descent and purchase here, because this being has touched foreign soil. Such foreign State may claim fitly some lawful rights under such circumstances, but a pretension like this is preposterous. In *Strader v. Graham*, 7 B. Mon., 635, it was held, that when a citizen of Kentucky visited Ohio with his slave, the relation of master and slave existing under the laws of the former State, is not thereby disturbed; and T. A. Marshall, C. J., in delivering the opinion of the Court, remarks, that the judgment proceeds on the principle that the slave was never free, and not on the ground that having become free by the visit, the condition of slavery re-attached by return to a slaveholding community. The case was taken to the Supreme Court of the United States—[*Strader v. Graham*] 10 How., 82 [13 L. Ed. 337], and affirmed: Taney, C. J., declaring that Kentucky alone had the right to determine the status or domestic and social condition of the persons domiciled within its territory, except as restrained by the Constitution of the United States. Judge Story (Conf. L., 472 a, 4 ed.) remarking on the case of *Mahorne v. Hoe*, 9 Sm. & Mar., 347, says: "A pertinent illustration as to the effect of

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*a will abroad, when its provisions conflict with the prohibitory laws of another State, recently occurred in America. A person domiciled in Virginia, by his will made and

executed in that State, directed that certain of his slaves, then being in Mississippi, should be emancipated and sent to Africa. By the law of Virginia, such a disposition was valid; by the law of Mississippi it was not. The Courts of the latter State held the will inoperative as to the slaves in that State, because it contravened the public policy of the State as declared by an express statute, and was not embraced in the general rule of comity, regulating the law of domicile." The local policy of the United States is enforced in her Courts even in relation to foreign patents and copy rights.

It is quite plain that Amy and her brood are considered free persons by the constituted authorities of Ohio. The Constitution of that State, pursuing the ordinance of 1787, provides that slavery, or involuntary servitude, except for crime, shall not exist in her territory; and experts in the law of that State, examined by commission in this case, depose that no form of emancipation is prescribed by her statutes, and that one a slave elsewhere becomes a freeman eo instanti, on being voluntarily introduced by a former master. It is a fact of some significance, that Jolliffe, the executor, after the death of testator, not content with the ipso facto manumission by contact with the soil and atmosphere of Ohio, executed formal deeds of emancipation to the legatees in question. His deeds could not make them free, nor consummate an incomplete condition of freedom; *Bazzi v. Rose*, 8 Mart. La. R., 149; but after the decision of *Anderson v. Poindexter*, 6 Crutchf. O. R., 622, it can hardly be questioned, that his acts were there merely in "ridiculous excess," attempting "to throw a perfume on the violet." It was held by the Ohio Court in that case, in December, 1856, after the *Dred Scott* decision was known there, as manifested on pages 641, 644, 674, 723, that a slave sent into Ohio for a few hours, for a doctor, from Campbell county,

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Kentucky, about a mile from the Ohio river, coterminous of the two States, ipso facto became free, notwithstanding he returned to Kentucky, and served his master for years afterwards. Mr. Jolliffe was the counsel of those claiming under the negro. Bartley, C. J., dissented from the majority of the Court on the main point, in a very able and learned opinion. It may be true that this case might have been decided on another ground, in which all the Judges concurred—the incompetency of the slave to contract by the law of Kentucky—but almost the whole of the argumentation by the Judges was as to the freedom of Poindexter, and the case affords unmistakable evidence of the strength of judicial opinion there on this point. The opinions of the majority abound in denunciations of slavery, and explicitly adopt the dogma of modern illuminati, that there can be no property in men.

Lord Coke has instructed us that no man can be wiser than the law. And Lord Stowell has pronounced from the seat of judgment, when treating of the slave trade, *Le Louis*, 2 Dod., 249, that "no Court can carry its private apprehensions independent of the law, into its public judgments on the quality of actions. It must conform to the judgment of the law, and acting as a Court in the administration of the law, It cannot attribute criminality to an act when the law imputes none. It must look to the legal standard of morality; and, upon a question of this nature, that standard must be found in the law of nations, as fixed and evidenced by general and ancient and admitted practice—by treaties, and the general tenor of the laws and ordinances, and the formal transactions of civilized States," &c. And in the case of *The Antelope*, 10 Wheat., 120 [6 L. Ed. 268], Marshall, C. J., pursues the same train of thought, saying, among other things: "Slavery has its origin in force, but as the world has agreed that it is a legitimate result of force, the state of things that is thus produced by general consent, cannot be pronounced unlawful. Throughout the whole extent of the immense continent of Africa, so far as we know its history, it is still the law of nations

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that *prisoners are slaves. Whatever might be the answer of a moralist to the question as to the propriety of participating in the slave trade, by purchasing the beings who are its victims, a jurist must search for its legal solution in those principles of action which are sanctioned by the usages, the national acts, and the general assent of that portion of the world of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as a test of international law, the question is decided in favor of the legality of the trade; and a jurist could not say that one engaged in it was punishable in person or property." If all this be true as to the foreign slave trade, how much less can the lawfulness of slavery, as it exists in South Carolina, be doubted by her Judges. Personal slavery arising out of forcible captivity, is coeval with the earliest periods of the history of mankind. It is found existing, and so far as appears, without animadversion, in the earliest and most authentic records of the human race. It is recognized by the codes of the most polished races of antiquity. Under the light of Christianity itself, the possession of persons so acquired has been in every civilized country invested with the character of property, and secured as such by all the protections of law. Solemn treaties have been framed, and national monopolies eagerly sought to facilitate the commerce in this asserted property; and all this with all the sanction of law, public and municipal. *Le Louis*, 2 Dod., 250; *Wildm. Int. L.*, 10. I must be consistent with nature, for in some form or other it is inevitable; and, in fact, prevails universally.

Without expatiating on a theological question, it may be safely affirmed that slavery is not contrary to the divine law promulgated in the Holy Scriptures. It was sanctioned and regulated under the Mosaic dispensation, *Exod.* xxi, 4, 5, 6; *Exod.* xxii; *Levit.* xxv, 44-46; and the duties growing out of the relation of master and slave, without a word of animadversion on the relation itself, are

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distinctly taught in the *New Testament. *Titus* ii, 9; 1 *Ep. Pet.* ii, 18; 1 *Tim.* vi; *Col.* iii, 22; *Eph.* vi, 5; *Ep.* to *Phil.*

Property in men, as it exists here, does not imply, as Blackstone defines slavery, "absolute and unlimited power in the master over the life and fortune of the slave;" and merely includes the right of the master to "the perpetual service of the slave," which he treats as lawful, and "no more than the same state of subjection for life which every apprentice submits to for a term of years." 1 *Bl.*, 423, 424, 127. He says that "pure and proper slavery," where "the life and liberty of the slave are in the master's disposal, cannot subsist in England;" nor did it ever subsist in South Carolina. A master has no such property here in the flesh and blood of his slave as empowers him to treat the slave in any respect simply as a brute, as by taking his life, or exercising cruelty towards the inferior owing service. He cannot kill and eat his slave as he may his lambs and ducks, for cannibalism does not prevail, and murder of a slave is capitally punished, and any unlawful killing meets its appropriate pain. He cannot beat the slave cruelly, nor exact from him excessive labor, nor withhold the necessary food, raiment and lodging, nor abandon him when sick or superannuated; for all these are misdemeanors. Our Act of 1740, 7 Stat., 396, declares that all negroes and all the issue of their females, who are, or shall be in the province, shall be and remain forever slaves, and be deemed, held and adjudged to be chattels personal, to all intents and purposes whatsoever; and this enactment has never been abrogated or changed, but it applies to them exclusively as property, and their bifold character as property and men, is fully recognized by our laws; and in our domestic servitude, the humane treatment and comfort of the inferior in relation are as well secured as in the organization of labor in any country.

Blackstone wrote before the celebrated decision of Lord Mansfield, in *Somerset's case*, in 1771, 20 *How. St. Tr.*, 1; *Lofft*, 1; 11 *St. Tr.*, *Harg.*, 340; and, as we derive the com-

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*mon law and most of our institutions from England, it is not inappropriate to examine, with more minuteness, the varying condition of the law there on this particular subject. This point has been carefully and ably discussed by Lord Stowell, in *The slave Grace*, 2 *Hagg. Ad. R.*, 94; *Chilton*, C. J., in *Atwood*

v. Beck, 21 Ala. R., 602; Bartley, C. J., in Poindexter's case, *supra*, and by Mr. Benjamin, Senator from Louisiana, in his speech in the U. S. Senate, March 11, 1858; and these jurists furnish the materials of most of the following remarks on this topic: In *Pearne v. Lisle*, in 1749, 1 Amb., 75, L. C. Hardwicke says, that "though the statute of tenures had abolished villeins regardant to a manor, a man might still become a villein in gross;" and Lord Mansfield, in *Somerset's case*, seems to approve the doctrine. Villeinage in gross in England is identical with slavery in South Carolina, in many respects, differing mainly as to the civil remedies of serf and slave on the master; and this sort of villeinage was adopted by our Act of 1712. The villein in gross, with his issue, owed service to his master for life, and could be sold and transferred like a chattel. In his learned argument for *Somerset*, 20 How. St. Tr., 36, Mr. Hargrave says: "The condition of a villein had most of the incidents of slavery in general. His service was indeterminate, and such as his lord thought fit to require. He knew not in the evening what he was to do in the morning; he was bound to do whatever he was commanded; he was liable to beating, imprisonment, and every other chastisement his lord might prescribe, except killing and maiming. He was incapable of acquiring for his own benefit, the rule being *quicquid acquiritur servo, acquiritur domino*. He was himself the subject of property; as such, saleable and transmissible." This is an apt description of our slave. It is said that limited serfdom still exists in England, among the bondagers of Northumberland.—*So. Qu. Rev.*, vol. 1 (N. S.) 83—quoting as authority Howitt's *Rural Life in England*.

African slavery was formerly recognized in

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her Courts. In *Smith v. Brown*, 2 Salk., 666, 2 Ld. Raym., 1274, S. C., plaintiff declared in indeb. ass. for the price of a negro sold in London, and had a verdict; and, on motion in arrest of judgment, Holt, C. J., held, that "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave;" and he directed that the declaration should be amended by stating, that the negro sold in London was, at the time of sale, in Virginia; and that by the laws and statutes of that colony, negroes are saleable as chattels. Then the Att. Gen. said they were inheritances, and transferable by deed only, "and nothing was done." In *Smith v. Gould*, *ib.*, (1707,) which was *trover pro uno Æthiope vocato a negro*, after verdict for plaintiff, on motion in arrest of judgment it was argued, (with no other plausibility than that chattel and cattle have the same derivation, and originally had the same meaning,) that the owner had not an absolute property in a negro; he could not kill him as he could an ox; (the argument for the plaintiff is sensible and learned,) and the Court said, "men

may be the owners, and, therefore, cannot be the subject of property." (What logic!) "Villeinage arose from captivity, and a man may have *trespass quare captivum suum cepit*, but cannot have *trover de gallico suo*," for his Frenchman. And, says the reporter: "The Court seemed to think that in *trespass quare captivum suum cepit*, the plaintiff may give in evidence that the party was his negro, and he bought him." This case seems to hold that *trespass*, not *trover*, should be brought for the recovery of a negro. In *Chamberlain v. Harvey*, 1 Ld. Raym., 146, (1695,) an action of *trespass* for taking away a negro was dismissed, because the averment *per quod servitium amisit* was omitted in the declaration. In *Butts v. Penny*, 3 Keb., 785, 2 Lev., 201, (1675,) which was *trover* for ten negroes, it was held that the action should be sustained, as there was sufficient property in negroes, they being usually bought and sold among merchants in India, and being infidels; yet the case was postponed to the next term, and no final judg-

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ment *appears. And in *Jelly v. Clive*, (1693,) cited 1 Ld. Raym., 147, it was held that *trover* would lie for negroes, "for they were heathens, and, therefore, a man may have property in them; and that the Court, without averment made, would take notice that they were heathens." See *Co. Litt.*, 116, b; *Calvin's case*, 7 Rep., 33; *Fable v. Brown*, 2 Hill, Eq. 390; *Swinburn*, 84; *Mirror*, c. 2, sec. 28. In a case, 3 Mod. R., 120, 189, Sir Thomas Grantham "bought a monster in the Indies, which was a man of that country, which had the perfect shape of a child growing out of his breast, as an excrescency, all but the head, and brought him to England, and exposed him to the sight of the people for profit. The Indian turned Christian, and was baptized, and was detained from his master, who brought *homine replegiando* for his recovery;" and Sir Thomas had relief. Lord Hardwicke said, in *Pearne v. Lisle*, *supra*, "I have no doubt that *trover* will lie for a negro slave; it is as much property as any other thing. The case in 2 Salk., 666, *Smith v. Gould*, was determined on a want of proper description. It was *trover pro uno Æthiope vocato negro*, without saying slave; and the being negro did not necessarily imply slave. The reason said at the bar to have been given by Lord C. J. Holt in that case, as the cause of his doubts, viz: That the moment a slave sets foot in England, he becomes free, has no weight with it, nor can any reason be found why he should not be equally so when he sets foot in Jamaica, or any other English plantation. All our colonies are subject to the laws of England, although as to some purposes they have laws of their own. There was once a doubt whether, if negroes were christened, they would not become free by that act; and there were precautions taken in the colonies to prevent their being baptized, till the opinion of Lord Talbot and myself, then Attorney General, and Solic-

itor General, was taken on that point. We were both of opinion that it did not at all alter their state." Lord Stowell, in the case of *Grace*, 2 Hag. Ad. R., 115, cites, without ap-

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proval, the re*marks of Lord Ch. Northington, in *Shanley v. Harvey*, 1 Eden, (1762,) that "a negro may maintain an action against his master for ill usage, and may have habeas corpus if restrained of his liberty," founding himself on the "wise saw," that as soon as a man sets foot on English ground, he is free. The notion of purification and enfranchisement by simple contact with the soil or atmosphere of England, is unintelligible. There has been no special endowment of its air or earth since the long sway of slavery there has ceased. Mr. Christian, n. 6, 1 Bl. Com., 127, supposes that the obligation of negroes is not to the soil and air of England, but to the efficacy of the writ of habeas corpus. And C. J. Bartley remarks, 6 Crutch., 695: "There is nothing in the physical properties of either the soil or atmosphere of Ohio which can have any such effect on the civil state and condition of a person."

Lord Mansfield, in *Somerset's case*, used no such phrase. He held there on habeas corpus, that the return of the cause of detention of a negro in irons aboard a ship, made by the commander of the ship, and not by the owner of the slave, was insufficient; the return stating that the negro was the slave of Charles Stewart, of Virginia, and had fled from his service in England, and had been committed to the custody of the captain, to be kept and conveyed to Jamaica, and there sold. The judgment was pronounced with reluctance and hesitation, after urgent exhortations to the parties to compromise or apply to parliament. By the statutes of Virginia, then and long afterwards of force, slaves were not chattels, but inheritable and transmissible as real estate. The master of the slave was staying in England for a long and indefinite term, and he might be regarded as domiciled there. This eminent Judge says, in delivering the opinion of K. B.: "The only question before us is, whether the cause on the return is sufficient? That return states that the slave departed, and refused to serve, whereupon he was kept to be sold abroad. So high an act

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of dominion must be recognized *by the law of the country where it is used. The power of a master over his slave has been extremely different in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions and time itself, from which it was created, are erased from memory. It is so odious that nothing can be suffered to support it but positive law." Now, the mandatory judgment in this case—the *ideo consideratum est*—is simply that so high an act of

dominion as the keeping in irons and sending abroad a slave for sale, to a country different from the master's domicile, could not be supported by the law of England. It cannot be ingenuously questioned that Lord Mansfield intended to discredit negro slavery in England; but some of the inferences from his opinion, drawn by Judge Story, Chief Justice Shaw, and others, may be fairly disputed. What was meant by the phrase "positive law," in this opinion, is sufficiently explained in the case of *Aves*, 18 Pick, 119. "By 'positive law,' in this connection, may be as well understood customary law as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence, or by the legislative act of a State, and which derive their force and authority from such acquiescence or enactment, and not because they are the dictates of natural justice, and as such, of universal obligation." Lord Mansfield does not review and overrule the previous cases, and does not dispute the tenet that there may be property in a slave in England. On the contrary, he approves, or to use his own phrase, "we pay all due attention to the opinion of Lord Hardwicke and Talbot," above quoted, and says: "contract for the sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of inquiry, which makes a very material difference;" and

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concludes, "what*ever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and, therefore, the black must be discharged." Indeed, he could not have determined that there was no property in a slave, except by overturning much of the common law, and usurping legislative authority.

Before the American Revolution, and until the Act of Parliament of 1807, 47 Geo. III, c. 36, abolishing the slave trade after March 1, 1808, so far as the English colonies were concerned, the statutes and treaties and orders in council of Great Britain, demonstrate the anxious persistence of that government in the establishment of slavery in her American colonies. In the reigns of the Stuarts, royal charters were granted to companies of merchants, with peculiar privileges, to carry on the trade in Africans; but the merchants generally, by their petitions, and the House of Commons, by their resolutions, insisted that "all had a natural right to engage in the business;" and in 1697, by Stat. 9 and 10 William III, the monopoly was greatly relaxed, the statute declaring in the preamble that "the trade was highly beneficial and advantageous to the kingdom." About this time a question arose in the Privy Council as to the true character of the slaves thus exported, which was referred to the twelve Judges,

and they, with Lord Holt at their head, returned this answer: "In pursuance of his Majesty's order in council, hereunto annexed, we do humbly certify our opinion to be, that negroes are merchandise." At the peace of Utrecht, in 1713, an assiento, or contract, which had been made between Spain and the Royal Guinea Company of France, for the supply of slaves to the Spanish colonies, was transferred to Great Britain; and by an article in the treaty, the exclusive right of that nation to supply the Spanish colonies with slaves, to the number of four thousand eight hundred annually, for thirty years, at a fixed price, was carefully secured. In 1732, by 5 Geo. II, c. 7, of force in South Carolina, 2 Stat., 570, negroes were declared assets for

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the satisfaction of debts in *the British plantations in America, and for this purpose liable to be seized and sold as personalty. In 1749, Stat. 23 Geo. II, c. 31, declared "the slave trade to be very advantageous to Great Britain, and necessary for supplying the plantations and colonies thereunto belonging with a sufficient number of negroes at reasonable rates," and annulled the monopolies in the trade. In 1760, South Carolina passed an act prohibiting the further importation of African slaves; but the act was rejected by the Crown, the Governor was reprimanded, and a circular was sent to all the colonies, warning them against presuming to countenance such legislation. Cong. Globe, 1857-8, 1066. It is said that twenty similar acts of the legislative assembly of Virginia, while a province, met with the same veto. In 1774, a bill for the same end passed the two houses of Massachusetts, which Governor Hutchinson refused to sign, because forbidden by his instructions; and his successor, General Gage, refused his assent to a like bill, and for the same reason. 41 N. Am. Rev., 189. In 1775, after the clangor of arms had resounded in the Revolutionary war, Earl Dartmouth, Secretary of State, replied to a remonstrance of a colonial agent: "We cannot allow the colonies to check or discourage in any degree a traffic so beneficial to the nation." In the Declaration of Independence, as written by Mr. Jefferson, (this portion was expunged by his colleagues on the committee,) the tirade against King George III, rises in virulence on the topic of the slave trade; the most subdued remark being: "He has prostituted his negative for suppressing every legislative attempt to prohibit or restrain this execrable commerce." At the date of this declaration, slavery prevailed in every one of the colonies which thereby became independent States.

After this review of the ante-revolutionary course of adjudication and legislation in England, it may be fairly concluded that slavery was recognized there as an institution of property, according to the common law, especially as that law was applied in administering the affairs of the colonies.

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*Indeed, this sort of property was recognized in the English Courts long afterwards. One who had been a slave in the West Indies, who continued in his master's service in England, was held not entitled to recover wages on any implied promise. 3 Esp. R., 3; see also, 2 Hen. Bla., 511. Lord Stowell, 2 Hagg. A. R., 120, cites the case of Williams v. Brown, where a slave fled from Grenada to England, and there entered into a contract with the captain of a ship bound to Granada, to serve as a seaman during a voyage to and from the West Indies. On the arrival of the ship at Grenada, the slave was discovered and reclaimed by his master, who subsequently manumitted him for a price paid by the captain; whereupon, the freedman contracted to serve the captain for three years. On their return to England, the manumitted slave sued the captain for his wages for the voyage, and it was held he was not entitled to recover. That, although, according to Lord Alvanley's phrase, "this runaway was as free as any of us in England," on reaching her territory, without further ceremony, he was still a slave in Grenada, under the necessity of obtaining manumission there—that he enjoyed freedom in consequence of that ceremony, and without it must have remained a slave in Grenada. Lord Stowell says: "I have heard the case sometimes quoted as almost amounting to a direct recognition of the freedom of the slave, on account of his having been in England, when nothing can be more clear than that it is, in every respect, a direct decision to the contrary of the four Judges,"—Alvanley, Heath, Rook and Chambre. See, also, The Woodbridge, 1 Hagg., 71. In Madrozo v. Willis, 3 Barn. and Ald., 353, in 1820, the plaintiff, a subject of Spain, sued in the King's Bench the defendant, a captain in the royal navy, alleging that plaintiff's brig, lawfully cleared for a voyage in the slave trade, from Cuba to the coast of Africa, had been seized off that coast with force and arms by the defendant, together with three hundred slaves, and other goods aboard, which were converted to defendant's use, and the

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plaintiff deprived *of great gains, which would have accrued from taking them to Cuba. The only question on circuit was as to the amount of damages; and Sir C. Abbott, C. J., afterwards Lord Tenterden, doubting whether the plaintiff was entitled to recover, in an English Court of Justice, the value of the slaves, directed the jury to find separately for each part of the damage; and the jury found for plaintiff, £3,000 for the deterioration of the ship's stores and goods, and £18,180 for the supposed profit of the cargo of slaves. On a motion in Banc for a rule nisi, to reduce the damages to £3,000, the whole Court refused the rule, and affirmed the right of a foreigner, not inhibited by the laws of his own country from car-

rying on the slave trade, to recover in a British Court the value of his slaves. Sir W. D. Best, afterwards Lord Wynford, in the course of his opinion, cites the cases of the *Fortuna*, the *Donna Marianna*, the *Diana*, in the Court of Admiralty, 1 Dodson A. R., 81, 91 and 95, and the *Amedie*, before the Privy Council, 1 Acton, 204, (and see *Le Louis*, 2 Dod., 236,) as establishing that the subjects of countries which permit the prosecution of this trade, cannot be legally interrupted in buying slaves in Africa, and making it clear that the trade is not condemned by the general law of nations. The conclusion expressly drawn by Bayley, J., is inevitable, "that he (the plaintiff) had a legal property in the slaves." Reference is made to the opinion of Best, J., principally for the reason that, in *Forbes v. Cochran*, 2 Barn. and Cres., 448, he indulges in a rhapsody obiter, about making fast the bars of the prison of slaves, and riveting well their chains; "for the instant they have broken their chains—they have escaped from their prison—they are free." The judgment in *Forbes v. Cochran*, 1824, although not approved even to its regular extent, is merely that the owner, a British subject resident in Florida, then a Spanish colony, could not maintain an action in the King's Bench against British admirals in command of a squadron on the North American station, for harboring slaves which had escaped from

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the owner's plantation near the river St. John, and gone on board a man-of-war belonging to the squadron; when Sir George Cockburn, commanding the ship, permitted the owner to use persuasion to the slaves to return, but refused to employ force for this end. As Holroyd, J., expresses the principle, "when a party gets out of the territory where slavery prevails, and out of the power of his master, and gets under the protection of another power, without any wrongful act done by the party giving that protection, the right of the master, which is founded on the municipal law of the particular place only, does not continue, and there is no right of action against a party who merely receives the slave in that country without doing any wrongful act." In 1827, twenty years after Great Britain, for her subjects, had abolished the slave trade, the case of the slave *Grace*—2 Hagg. Ad. R., 94—was presented for judgment to Lord Stowell, one of the most eminent men that ever adorned the bench, for genius, scholarship and judicial learning, particularly in the law of nations. *Grace* was a slave in Antigua, came to England in the service of her mistress, and resided there for some time, and then went back to Antigua. In her suit she complained that, being a free subject of his Majesty, she had been unlawfully exported from Great Britain to Antigua, and there kept as a slave. Her right to sue, and her title to permanent freedom, depended on her

residence in England, for there had been no formal act of manumission, although the learned judge states that such acts are commonly executed in England. It was decided that, whatever might be her condition in England while she abided there, she was always a slave in Antigua, and remitted to her original status on return to the domicile of her mistress. The opinion is instructive throughout, and some passages will be quoted, applicable to this case, and saving labor. "Slavery never was in Antigua the creature of law, but of that custom which operates with the force of law; and when it is cried out *malus usus abolendus est*, it is first to be

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proved that, even in the consideration of England, the use of slavery is considered as a *malus usus* in the colonies. Is that a *malus usus* which the Court of the King's Privy Council, and the Courts of Chancery, are every day carrying into full effect in all considerations of property, in the one by appeal, and in the other by original causes; and all this enjoined and confirmed by statutes? Still less is it to be considered *malus usus* in the colonies themselves, where it has been incorporated into full life and establishment; where it is the system of the State, and of every individual in it." "Instead of being condemned as *malus usus*, it was regarded as a most eminent source of the nation's riches and power. It was at a late period of the last century, (referring to the *Somerset* case,) that it was condemned in England as an institution not fit to exist here, for reasons peculiar to our own condition; but it has been continued in our colonies, favored and supported by our own Courts, which have liberally imparted to it their protection and encouragement. To such a system, while it is supported, I rather feel it too strong to apply the maxim, *malus usus abolendus est*." This was said some six years before this description of property was confiscated in the colonies by the statute 3 and 4 William IV, c. 73. "The system of slavery in our West India colonies was perfect in every part as to the adequacy of the means to produce the intended effect, and not to be thrown out of use because it was incapable of being used in the full extent in England. With the laws of the colonies it could be conciliated, and there it was in no wise deficient in compelling the obedience of its subjects; whereas, in England it was impotent, and the law could not borrow those instruments from a foreign law which were necessary to make the system work properly. This may have occasioned one great difference between the two systems. The fact simply is, that it never happened that the slavery of an African, returned from England, has been interrupted in the colonies in consequence of this sort of limited liberation conferred upon him in England.

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There *has been no act nor ceremony of

manumission, nor any act whatever that could even formally destroy those various forms of property which the owner possessed over his slave by the most solemn assurances of law, such as pledging him, or selling him for the payment of the owner's debts, or making any other use of him that the law warranted. Such rights could not be extinguished by a mere silence, or by his country's declining to act in such a conveyance. Slaves have come into this island, and passed out it in returning to the colonies, in the same character of slaves, whatever might be the intermediate character which they possessed in England; and this without any interruption, or without any doubt belonging to their character in that servile state." "Manumission is a title against all the world. Manumissions are not uncommon in England, and always granted when there is any intention of giving the party an absolute title to freedom."

Lord Stowell communicated a copy of this opinion to Judge Story, and the latter, September 22, 1828, wrote in reply: "If I had been called upon to pronounce a judgment in a like case, I should certainly have arrived at the same result, though I might not have been able to present the reasons which led to it in such a striking and convincing manner. It appears to me that the opinion is impregnable. In my native State, Massachusetts, the state of slavery is not recognized as legal, yet if a slave should come hither, and afterwards return to his own home, we should certainly think that the local laws would re-attach upon him, and that his servile character would be reintegrated. I have reason to know that your judgment has been extensively read in America, (where questions of this nature are not of unfrequent discussion,) and I never have heard any other opinion but that of approbation of it expressed among the profession of the law." 1 Stor. Life, &c., 558. The doctrines of Lord Stowell apply with peculiar force to the States of this Union, having common origin, history and general interests, con-

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*stantly dealing with each other in matters of business and kindness, and confederated by a compact which, in its spirit at least, obliges each State to respect the peculiar condition and rights of the people of every other State. That comity which between distinct nations is considered a part of the voluntary law of nations, is, in the United States, in many instances, strict duty under the supreme law.

At the time of the adoption of the Federal Constitution, slavery was maintained in all the States of the Union except Massachusetts, although incipient measures of emancipation had been taken in Connecticut and New Hampshire. This instrument of government, so excellent in its structure, so much perverted and misused practically, recognizes and endeavors to secure the right of

property in all citizens owing obedience to its prescripts. The preamble of the Constitution declares one great object of the peoples of the States in ordaining the Constitution, to be to establish justice; and the Constitution itself provides that no person shall be deprived of his property without due process of law; that private property shall not be taken for public use, without just compensation; that the people shall be secure in their effects, as well as persons, against unreasonable searches and seizures, and that warrants shall exhibit probable cause, supported by oath or affirmation, and shall particularly describe the place to be searched, and the persons or things to be seized; that no State shall pass any law impairing the obligation of contracts; that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States; that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people; that the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people; and that the Constitution shall be the su-

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preme law *of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. Can it be supposed that in all these safeguards of property, that species of it which was regarded in many of the States as the most valuable of all personality, was intended to be excepted or ignored?

The three provisions of the Constitution, which have most direct reference to slaves as property, remain to be mentioned. 1. In the apportionment of representatives and direct taxes among the several States, to the number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, must be added three-fifths of all other persons. Slaves are necessarily meant by "other persons." 2 Sto. Com. Con., 107-114. In ascertaining the proportion of a State in the privilege of representation, and the burden of direct taxation, free persons of color are reckoned as many as the same number of whites. Apprentices are carefully included in the class of free persons, lest the property of masters in them for a term of years should be held to degrade them to the innominate class, fractionally represented and taxed, where the right to service is perpetual. Slaves are certainly enhanced in value as chattels, in the slaveholding States, by the fact, that they constitute the only kind of property that enters into the basis of federal representation; and possibly one reason why their immigration to other States by furtive abduction or lawful removal is tolerated,

may be that there they count in representation as man and man, without fractions. Taxes, as a word, is almost confined in meaning to imposts on property; and in the imposition of direct taxes on property only, our brethren of the soi disant free States would not clamor if slaves were included—and, possibly we, not they, would murmur if poll taxes were imposed on them as persons. 2. No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such

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service or labor *but shall be delivered up on claim of the party to whom such service or labor is due. However much this clause has been evaded and obstructed in its proper operation, it has never been disputed that its principal application is to slaves, although others held to service, such as apprentices, may be embraced. 3 *Sto. Com. Con.*, 677. And any reasonable definition of property must include an owner's title to the servitude of a party for life, and the servitude of his issue as an incident. The 6 article of the ordinance of 1787, under which the opposition to involuntary servitude in Ohio originated, and the Constitution of Ohio itself, admit that such servitude may be imposed on a party after conviction in punishment of crime. This article contains a clause for the rendition of fugitives, from whom labor or service is lawfully claimed in any one of the original States. 3. The migration or importation of such persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year 1808, but a tax or duty may be imposed on such importation, not exceeding \$10 for each person. No amendment of the Constitution, which may be made prior to the year 1808, shall in any manner affect this clause. 3 *Sto. Com. Con.*, 202-4. It is matter of history that this provision was introduced into the Constitution in special reference to the slave trade, and that it was the result of a compromise of conflicting opinions; some of the States, for example South Carolina, being opposed to all prohibition of the trade by Congress, and other States wishing a speedier extinction of the trade. The words of the clause, interpreted in the light of the circumstances surrounding the convention, plainly denote and permit the importation of slaves for the next twenty years; and it would be inexplicable in reference to any other class, why the privilege of importation should be confined to existing States, in avoidance of conflict with the policy of the cotemporaneous ordinance; and to such of the States as should think proper to admit them, implying contrariety of policy

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among the States, which did not exist as *to any other class of immigrants besides slaves; and why Congress should be allowed to impose a tax on the importation, (carefully lim-

ited in amount,) whereas immigration in general, so far from being taxed, was greatly encouraged. Reference has been made already to Mr. Jefferson's anathema of the slave trade, in the original draft of the Declaration of Independence; yet that State paper, as written by him, approved by the committee, and adopted by Congress, denounces George III, among other things, for refusing to pass laws to encourage the migration of foreigners to these States. Congress certainly understood this clause of the Constitution to relate to the importation of slaves, for it passed laws eagerly in advance, to go into effect January 1, 1808, to inhibit this trade. It may be remarked, passing,ly, that this clause, the entire scope of which is to restrain Congress from adopting a particular measure before a fixed time in future, altogether negative and restrictive in its character, has been perverted by construction to grant the power to Congress to enact the measure after the time fixed. Some provisions of the Constitution, in execution of the object declared in the preamble, "to insure domestic tranquility," may refer to slaves strictly in the aspect of human agents, as the power of Congress to provide for calling forth the militia to suppress insurrection, and the guaranty of the United States to protect each of the States, on proper application of its legislature or executive, against domestic violence; but these, in no sense, contradict or impair other provisions regarding slaves as property.

It is quite true that the Constitution does not at all employ the word slaves; but if it recognize the thing, to use Swinburn's phrase, "it skilleth not of the name." Its redacteurs resort to euphemism, and in deference to prejudice and fanaticism, describe slaves as persons held to service, and other candied words. This nicety, however, has been seized as proof that its framers repudiated property in slaves. Thus, in the course of judgment in

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Poindexter's case, it is said: * "The Constitution of the United States regards and acts upon slaves as persons, and not as property," p. 665. Let us look somewhat at contrary statements. Governor McDuffie uttered the sentiment, that slavery is the corner-stone of our republican edifice, and Governor Hammond, in his letters to Clarkson, endorsed it without reserve. Judge Baldwin has used stronger language. In *Johnson v. Tompkins*, 1 *Bald.*, 597, he says: "Slavery is the corner-stone of the Constitution; the foundations of the government are laid and rest on the right of property in slaves, and the whole structure must fall by disturbing the corner-stone." In *Prigg v. Pennsylvania*, 16 *Pet.*, 539, Judge Story says: "Historically it is well known that the object of this clause (for rendition of fugitive slaves) was to secure to the citizens of the slaveholding States, the complete right and title of ownership in their slaves as property, in every State in the

Union into which they might escape from the State where they were held in servitude. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing, the rights of the owners of slaves." Tilghman, C. J., in *Wright v. Deacon*, 5 Serg. & Raw., 63, says: "Whatever may be our opinion on the subject of slavery, it is well known that our Southern brethren would not have consented to be parties to a Constitution, under which the United States have enjoyed so much prosperity, unless their property in slaves had been secured." In the convention of New York, Alexander Hamilton stated that the Union could not have been formed without the incorporation of the guaranties demanded by the South on the subject of slave property. Elliott's Deb., 212. See also, Madison Pap., 1006, 1389, 1392, 1396. In *Dred Scott v. Sandford*, 19 How., 433, 411, 451, [15 L. Ed. 691] the Supreme Court says: "The right of property in a slave is distinctly and expressly affirmed in the Constitution." The main point of decision in the last case is, that a negro held in slavery in Missouri under its laws, taken by his master for tem-

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porary *residence into a State where slavery is prohibited by law, and thence into a territory, acquired by treaty, where slavery is prohibited by an Act of Congress pronounced to be unconstitutional, returning with his master and resuming his residence in Missouri, is still a slave in conformity to the decisions of that State. *Scott v. Emerson*, 15 Mo. R., 576; *Sylvia v. Kirby*, 17 Id., 454. All the general doctrines on the subject are discussed with great ability and affluence of learning.

It cannot be questioned, after this decision, that if Amy had returned to South Carolina she would still be a slave, notwithstanding Ohio, as Lord Stowell says of England, may condemn slavery for reasons peculiar to her condition; but she has not returned, and the question recurs, did she become free by mere landing on the northern shore of the Ohio river? She was a slave when she left South Carolina. She continued a slave throughout her journey to Ohio, it being through a slave region; she was not manumitted in Ohio by any formal act of her master; her master did not express in any form, after she reached Ohio, his purpose, transient or settled, to make her free, and of course the burden of proving her freedom is upon her and her representatives. If she became free de jure, at any place, by any act, she must be adjudged to be free here; for although a free negro may subject himself to some pain and disadvantage, under our Act of 1835, by voluntary return to our territory, he does not by any Act of the Legislature, or decision of the Courts, forfeit his title to freedom. Mere immunity from capture, or casual and temporary security in a place of refuge, or her

condition in the contemplation of Ohio, imports nothing. "When a strong man armed keepeth his palace, his goods are in peace; but when a stronger than he shall come upon him and overcome him, he taketh from him all his armor wherein he trusted, and divideth his spoils." A pirate on board of his ship at sea, is free in some sense, so long as he is unassailed by any force sufficient for his cap-

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ture. A murderer who *flees the State and secretes himself abroad, is not for the time liable to arrest, but he is still a criminal. Formerly, even in our fatherland, one who took refuge in a sanctuary was protected from arrest while there, but he was not thereby acquitted or pardoned of charges against him, and he continued in his previous condition. The question is not whether Amy is safe from seizure at a particular place, but whether she is rightfully free ubique. It is not whether the remedy of her master is suspended, and his right for the time locally obstructed in enforcement, but whether his right is extinct and ended. Now, if Amy would be a slave on return to this State, (and Judge Story, C. J. Shaw and the Supreme Court concur in that dogma,) the conclusion can follow logically and legitimately, only from the proposition that she was always a slave here, whatever may have been her practical liberty of action abroad. The notion of C. J. Shaw, in *Commonwealth v. Aves*, 18 Pick., 193, that if a slave waives the protection of the laws of Massachusetts, and returns to the State where he is held as a slave, his condition is not changed, is altogether untenable, for there can be no waiver in such case. As a slave he can make no contract, nor exercise any choice of domicile, nor even bargain for his freedom. In *Willis v. Bruce*, 8 B. Mon., 548, it was held that the promise or executory contract of a master to and with his slave to emancipate the slave, could not be enforced at law nor in equity; and our cases of *Fable v. Brown*, 2 Hill Eq., 378, and *Skrine v. Walker*, 3 Rich. E., 263, recognize the invalidity of an executory contract made by or with a slave. As a freeman, he could not assume, nor as a freedman resume the condition of slavery, unless perhaps as he might be authorized to do so by some special law of the State to which he returned. There is a law in Virginia which enables a free person of color, when his choice is judicially ascertained, to become a slave and claim the protection of his chosen master. There is no statute, nor judgment, nor custom to this effect in South Carolina. A slave

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returning *hither from a non-slaveholding State would be adjudged a slave, yet for the reason that he was never otherwise than a slave.

In this case of *Aves*, a slave was voluntarily brought by his master from Louisiana to Massachusetts, on a visit of four or five months, and it was ruled that the slave was

so far free that he could not be compelled, against his will, to return to New Orleans, and that the master was not entitled to remedy under the stipulation in the Constitution for the rendition of fugitives. The cases of an owner passing through Massachusetts with his slave from one slaveholding State to another, and of an owner with his slaves landing in Massachusetts by accident or necessity, and remaining no longer than necessary, are specially reserved from opinion. So far as the judgment proceeds on the construction of the clause in the Constitution for rendition of fugitives, it is certainly justified by the words, if not the spirit, of the clause, and seems to be supported by the previous cases of *Butler v. Hooper*, 1 Wash. C. C. R., 699; *Ex parte Simmons*, 4 Wash. C. C. R., 396, and others before and since. In strictness, a slave voluntarily and unnecessarily taken by his master into a non-slaveholding State and detained there, is not in the category of a slave escaping from the State where he is held to service. It is not clear that any point besides this was adjudged in the case, although there are dicta in the learned and elaborate opinion for and against the views commonly entertained by the tribunals of the slaveholding States. The C. J. approves the remark of Holroyd, J., in *Forbes v. Cochran*, supra, in speaking of the effect of bringing a slave into England, that "he ceases to be a slave in England, only because there is no law which sanctions his detention in slavery," and expresses himself as to persons coming within the limits of Massachusetts: "if such persons have been slaves, they become free, not so much because any alteration is made in their status or condition, as because there is no law which will warrant, but there are laws, if they choose to

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*avail themselves of them, which prohibit their forcible detention or forcible removal;" and that it follows from this principle, that if they waive the protection of these laws, and return to the place where they are slaves, their condition is not changed. C. J. Shaw admits that slavery is not contrary to the law of nations, and that the Courts of Massachusetts cannot pronounce void, upon their notions of morality and policy, an Act in respect to slavery, done within a State where slavery exists, if the sovereign power of the place pronounce the Act lawful; and by way of instance, mentions that a suit might be maintained in Massachusetts on a note given in New Orleans for the price of a slave, and that the consideration would not be invalid. Judge Story quotes this opinion in full, n. 3, sec. 96, Conf. L., but at sec. 259, n. 2, questions the law of the instance put. Aves' case, as to the effect of the voluntary introduction of slaves into a non-slaveholding State, was followed in *Naylor's case*, 3 Mete., 72, in *Jackson v. Bullock*, 12 Conn. R., 38, and in other cases.

It is not gainsayed that if a master take

his slaves from South Carolina to Ohio, and establish his domicile there, the slaves are free by our law. To this effect is the decision of *Guillemette v. Harper*, 4 Rich. L., 186; and so also are the cases *Rankin v. Lydia*, 2 A. R. Marsh., 468; *Dunsford v. Coquillon*, 14 Mart., 401, and other Louisiana cases. When the new domicile has been acquired, which may be after very brief residence, where the animus manendi et factum concur, 1 Bin. 349, the locus penitentiae is gone, and the master cannot redintegrate his former slaves to their servile state by resuming his original domicile and carrying them with him. Nor is it necessary to contest in this case, although it is not perceived how this can be effected without fraudulent evasion of our Act of 1841 and State policy, that if a master send his slave to a non-slaveholding State for permanent residence, this fact may be equivalent, quoad the slave, to the master's change of domicile, and enable the slave to acquire a separate domicile, from

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the dissolution of the relation of *master and slave, of protection and obedience. This has been held in some of the slaveholding States which have no such enactment as the Act of 1841, as in *Bland v. Dowling*, 9 Gill and J. Md. R., 19; *Louis v. Calarrus*, 7 La. R., 170; 9 La. R., 473; 11 La. R., 499; 13 La. R., 341; *Ross v. Duncan*, 1 Free. Mississippi C. R., 587, and in this State, before 1841, in *Frazier v. Frazier*, 2 Hill C., 304. But see *Hinds v. Brazeale*, supra. Nor is it intended to dispute the opinion, not judgment, of Taney, C. J., in *Groves v. Slaughter*, 15 Pet., 449 [10 L. Ed. 800], 14 Curt., 148, that "the power over this subject (slavery) is exclusively with the several States, and each of them has a right to decide for itself whether it will or will not allow persons of this description to be brought within its limits from another State, either for sale or for any other purpose, and also to prescribe the manner and mode in which they may be introduced, and to determine their condition within their respective territories; and the action of the several States upon this subject cannot be controlled by Congress, either by virtue of its power to regulate commerce, or any other power conferred by the Constitution of the United States." Slaves are undoubtedly persons, though they be chattels, and Ohio, for her people, may regulate or prohibit their importation or migration, and determine their status within her borders: as South Carolina may take the same course in respect to them or to free persons of color. It is a matter of internal police, not of trade. But neither State can control the other within the limits of the latter, nor fix the absolute status of such a party in variance with the law of the domicile. It would be in violation of the power of Congress to regulate commerce among the several States, for Ohio to inhibit by statute the introduction of cotton from Georgia, iron from Pennsylvania,

or manufactures from Massachusetts; yet, as to mere commodities, especially if Congress has made no regulation, she may lawfully pass health laws, inspection laws, and laws regulating ferries, &c. [Gibbons v. Ogden] 9 Wheat. R., 203, 209 [6 L. Ed. 23]; [Willson v. Black Bird Creek Marsh Co.] 2

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Pet. R., 245 [7 L. Ed. 412]. *Slaves are not mere commodities. But if the power of Congress over commerce were not held to be exclusive, Ohio would have the same right to exclude or admit on terms, a negro as a chattel, that Lapland would have concerning a camel, or Oman concerning a reindeer, "for reasons peculiar to her condition." It is not consistent with that comity which obtains even among distinct and distant nations, that inasmuch as the Southern States have granted prodigally to the common government the control of commerce, the co-States should determine for South Carolina and the rest, that a sentient and intelligent thing shall not be deemed a chattel in the South, because it is likewise a person. The stipulation that the citizen of one State shall have all his privileges in all the States, has lost its savor and its vigor.

Conceding, then, all these doctrines, however disputable, and that as their result, a slave becomes free on touching the territory of a non-slaveholding State to which the master has changed his domicile, it is utterly denied that freedom to the slave results from the transit of the master and slave over the territory of a non-slaveholding State, or the sojourn of the master with the slaves within its limits, for a reasonable time, *animo revertendi*. Any State may properly guard against the abuse of its hospitality by unacceptable visitors, who, under the pretence of temporary residence, avail themselves too long of the protection of the local sovereignty; and exemption from the loss of domicile and its incidental rights, is affirmed to continue only for a reasonable time, to be ascertained by the circumstances of every particular case. Necessarily there is some indefiniteness in the application of reasonable time to sojourn; but no more than there is when it is applied to required notice, and in many other instances in the common law. At the time when the Constitution of the United States was adopted, this right of transit and temporary residence of the citizen of one State with his property throughout the States, was the customary law of the States; and the Constitution, so far from

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abolishing or abridging this *right, expressly provided that the privileges of a citizen in one State should be co-extensive with the Union, and that fugitive slaves, wherever they might be throughout the Confederacy, should be restored on proper claim. Judge Kane said, in the Wheeler case, "I know of no statute of Pennsylvania which affects to divest the rights of property of a citizen of

North Carolina, acquired and asserted under the laws of North Carolina, because he has found it needful or convenient to pass through the territory of Pennsylvania; and if such a statute can be found, I am not aware that it can be recognized as valid in a Court of the United States." Bartley, C. J., says in the Poindexter case: "Until recently, the right of transit of a master with his slave, in travelling through Ohio, was not questioned. In the intercourse of the people of Ohio with the people of Kentucky and Virginia, since the organization of the State government, it has been a very common occurrence for a slave to be sent into this State on an errand, or to pass through the State on a journey with his master; and the acquiescence in this common practice most manifestly negatives the prevalence of any such well-settled and well-known rule in Ohio as that mentioned;" namely, touch and be free, without exception as to sojourners and travellers. This case of Poindexter was the first in Ohio that rejected the exception; and there the ruling was not indispensable to the same result of the cause. In Illinois, where the Constitution prohibits slavery, it was held by the Supreme Court, in Willard v. the People, 4 Scam., 461, that a slave does not become free by going into the State for the purpose of passing through it, and that such entrance is not the introduction of slavery into the State. In the slaveholding States coterminous with Ohio, the course of decision has been uniform. In Marlowe v. Kirby, 12 B. Mon., 512, it was held that, though a State might have the right to declare the condition of every person within her limits, the right only exists while that person remains there. She has not the power of giving a condition or status to a per-

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son temporarily *within her limits, which will adhere to the person everywhere; but on the return of the person to the place of his domicile, he will occupy his former position; if a slave, that of a slave. And that in case of the removal of a slave into Ohio temporarily, who returns with or to his owner of Kentucky, the effect upon the status of the slave is to be determined by the law of the latter State, and not that of the State where the slave had been. To the same effect are Strader v. Graham, supra; Collins v. America, 9 B. Mon., 565, 14 Ib., 358. In Lewis v. Fullerton, 1 Rand. Va., 15, it was held that a slave going from Virginia to Ohio, with the consent of his master, for a temporary purpose, *animo revertendi*, does not thereby acquire title to freedom in Virginia, although by judgment in Ohio on habeas corpus, such right in the slave had been declared. The case of Dred Scott which, however condemned in Ohio, is law here, maintains the same general doctrine.

It is argued for the executor that, conceding the soundness of this doctrine in the main, it is inapplicable to this case, which is

within an exception to the rule, because before the slaves reached Ohio, their master had repeatedly announced his settled intention to emancipate them, as his motive for conveying them thither. This is really the special and distinguishing point of this case; and it has been carefully and deliberately considered.

Intention is defined by Webster, the fixed direction of the mind to a particular object, or a determination to act in a particular manner; and it is distinguishable from motive, that which incites or stimulates to action, and from attempt, which is an inchoate effort towards action. In legal contemplation, intention means the purpose or design with which a wilful act is done, characterizing the act; yet it is properly inferred, that one who does an act wilfully intends the natural and proximate consequences of the act, although unforeseen. An attempt to commit a crime is in many cases of itself a misdemeanor, and in treason it has been held, that a

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*mere imagination of the heart, evinced by some overt act towards effectuating it, is equally culpable and punishable as if carried into execution; but a bare criminal intent, expressed in words, gestures or otherwise, without further proceeding to the crime contemplated, is not punishable. The same principle is applicable to contracts, and all dealings cognizable in Courts. Intention alone is utterly insufficient and inadequate. 14 Jno., 324; 19 Jno., 53. An intention to give, sell, or manumit, is not a gift, sale, or manumission. Every intention or purpose is revocable. A formal distinction is sometimes made between a transient purpose and a fixed purpose, and such epithets serve well enough to indicate the comparative feebleness and strength of the determination for the time being to do the thing, but they lead to confusion if employed or understood to intimate a difference in the nature of purpose. In strict propriety of speech, no bare intention is fixed, in the sense of being unalterable. It must be either abandoned or executed, and in both cases ceases to be intention. In the present case, the general intent of the testator to take Amy and her children to Ohio and emancipate them, was repeatedly expressed, but he said nothing as to the time and mode of emancipation. He never intimated the purpose of setting them free by the mode of visiting with them the land of Ohio, and there is no proof of any act or speech towards emancipation, not even of the continuance of his general intent, after his arrival there; indeed, he died almost instantly after leaving the steamboat Strader. It is quite consistent with all his declarations proved, that it was his purpose to emancipate these slaves, by formal deed, months after his arrival there, provided, after examination of all the circumstances, he remained of the same mind.

The question is as to his purpose after he

reached Ohio, not before. The condition of adhering to it, or the right to retract it, applies as well to a purpose of emancipation, as to any other purpose; and adherence to it can be demonstrated only by some sufficient

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and irrevocable act. On a former *occasion, when he visited Maryland with the same view, Willis did retract, and the locus penitentie still abided in him when he touched Ohio. By our law emancipation can be accomplished only by the legislature, and the master has no power by any act of his within the limits of the State, to achieve such purpose; and, surely, when it is asserted that a master has emancipated his slaves by something done abroad, Courts of the State should be fully satisfied of the completeness of the foreign emancipation. A will for most purposes speaks at the testator's death, or as it has been quaintly expressed, "utters his last words." 1 Ves. Sr., 53. In the present instance, the testator directs his executors to emancipate Amy and her children, and the acting executor pursued the direction, and delivered to them formal deeds. In *Simonton v. Wigg*, Charleston, January, 1858, where certain slaves were sent by their master from South Carolina to Cuba, a slaveholding country, for the purpose of making them free, it was adjudged by the law Court that they were not free. In *Cross v. Black*, 9 Gill and J., 198, a master started with his slaves to a non-slaveholding State for the purpose of setting them free, but changed his mind before reaching his destination. Held, that this was not emancipation, as there was no consummation of his purpose.

It is adjudged that Amy and her children were not free persons at the death of testator, and consequently that the bequests for their benefit are void by 4 sec. A. A. 1841.

Since *Morris v. Bishop of Durham*, 9 Ves., 399, 10 Ves., 522, it has been the rule, that when a trust has been imposed, and no beneficial interest is designed for the trustee if the trust fail for any cause, the trustee shall not hold for his own benefit, and a trust results to the grantor or his next of kin. In *Johnson v. Clarkson*, 3 Rich. Ex., 305, a testator gave his estate to his executor on trusts or conditions for the benefit of his slaves, which trusts were void by the Act of 1841, and it was held, that no beneficial interest was given to the executor, and that a trust resulted to the next of kin of testator. *Abercrombie v. Id.*, Ala. R., 489; 3 Atk., 72. It

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follows *that the next of kin of Elijah Willis are entitled to the estate given ineffectually by his will, for the benefit of his slaves Amy and her children.

No issue is made by the pleadings as to the liability of the executor, regularly a party, for the value of the negroes in Ohio, and the question has not been considered.

It is ordered, that a writ of partition be

issued under the direction of the commissioner, to divide the lands and slaves of the testator among his distributees, in the proportions prescribed by the Act for distributing the estates of intestates.

It is further ordered, that the parties to the cause have leave to apply at the foot of this decree for such further directions and orders as they may deem expedient.

Extracts from the testimony read on the hearing of the cause, at Barnwell, February Term, 1858.

I. Certificate of Character.

South Carolina—Barnwell District:

This is to certify to all whom it may concern, that we are well acquainted with Mr. Elijah Willis, of the District and State aforesaid, and that he is a gentleman of unimpeached character and standing. He has stated to us his intention of taking on a lot of negroes to Maryland, with a view to putting them at trades in that State, and has desired of us this certificate, which we cheerfully give.

(Signed) Johnson Hagood,
Com. in Equity, Barnwell Dist.
Angus Patterson.
R. C. Fowke,
Ordinary, Barnwell District.
V. J. Williamson.
J. L. Davis,
Clerk of Court.
Wm. R. Halford,
Sheriff Barnwell District.
L. O'Bannon,
Magistrate.
J. J. Ryan.
A. P. Aldrich.
H. D. Duncan.
F. F. Dunbar.
George W. Moye.

8th June, 1852.

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*II. Admission of Counsel.

It is admitted that Amy and her children are now residing in Ohio, in the enjoyment of whatever rights they acquired by being carried there, or under the deeds executed by John Jolliffe for their emancipation. It is also admitted, that Willis carried the above persons, in 1852 or '53 to the City of Baltimore, and brought them back to Barnwell after a few months. Also, that there is no person in Ohio claiming them as slaves.

Aldrich & Owens.
Bellinger & Bauskett.

4th February, 1858.

Jonathan Pender, of Barnwell district, sworn.—Witness knew Elijah Willis for thirty-five or forty years before his death, during which time he lived within thirteen or fourteen miles of the said Willis. Witness and he were always friendly, and he often stopped at witness' house. He had lent witness money once or twice in his life. Witness

traded at Williston, and was frequently there, where he met Elijah Willis. Williston was E. Willis' P. O., the place where he did his country trading. E. Willis had no lawful wife or child; was an industrious, money-making man. Witness had been at E. Willis' house as often as five or six times in his life. On one occasion he saw a negro woman named Amy, whom Wm. Kirkland had owned, and some three or four mulatto children. This is the woman whom Willis was said to keep as a mistress, and these were the children said to be the offspring of the connection. It was so generally reported and believed in the neighborhood, and there was a great deal in Willis' own behavior to confirm the belief. On the occasion alluded to, witness saw him with one of the children in his lap; witness took dinner there that day, and thought Willis, during the meal, in giving them the best victuals from the table, and in

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other ways, treated them as his own children; it was then that one of the small ones got in his lap. Witness had heard of Willis' connection with Amy several years before the day he was at Willis'. He had seen Amy trading largely, and as freely as a white woman, at Williston, at James Willis' store. James was a nephew of Elijah Willis, and would make much of Amy, in order to induce her to take up goods, calling her Aunt Amy, and saying to witness, with a wink, "now I am going to make a big bill." Elijah Willis' relations lived in the Williston neighborhood, and around E. Willis'. I saw Amy at James Willis' store making purchases, on one occasion, when James Willis told me she had ridden there in his uncle Elijah's carriage. Something like four years ago, in the court house square, at Barnwell, on a sale day, Willis said to witness, "I have travelled a great deal and spent a heap of money to fix my business." He then asked me, particularly, "if I knew any one who would buy out his possessions in Barnwell—lands, negroes, stock, and everything else; that he would sell out low, and he was then going to act under the advice of Henry Clay." The conversation was here interrupted. Before this, in that conversation, Willis also said that he had been acting under the advice of others about his business, and had found that it would not do. What business he alluded to particularly, he did not say; I thought he referred to Amy and her children. I have never seen Amy and her children in this State since Willis' death, nor have I heard of their being here. James Willis, a month or so after Elijah Willis' reported death, told me that he and Michael Willis had been on to Cincinnati; and afterwards, Michael Willis told me the same thing. James Willis told me that the man who had died there was Elijah Willis, and that they went to where he was buried, in a negro-graveyard. I asked why they did not fetch his body home,

and he replied, "he carried himself there, and he may lie there." I think James Willis told me he saw Joliffe there—that he was kindly treated by him.

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*Cross-examined.—Witness' well is a public place, good water, and many persons stop there in passing. I borrowed money from Willis but twice; this was several years ago; it is five or six years since I dined at E. Willis'. I had lost my way in going to Reason Woolley's, and happened there accidentally. I have seen other white men take up their little negroes in their laps—some coal black little negroes. I think Willis' property was in market several years before his death—a good while before my conversation with him at Barnwell. I am pretty certain Willis did not mention Amy or her children in that conversation.

Direct, resumed.—I dined at Willis' on 30th March, 1852.

Reason Woolley, sworn.—Witness has known Elijah Willis for forty years; lived in one mile of him for ten or fifteen years before his death. Witness knew Amy; went to Willis' house often; worked a great deal for him; witness and Willis were usually very friendly; sometimes a little at variance, not long. Willis and Amy lived in the same house; slept in the same house; as witness saw; they did not sleep in the same bed; several mulatto children: Amy had five mulatto children after Willis bought her; two of them died; Willis carried off three; Willis called the children his; he treated the children as his own; acted as a father towards them; eat at his table, nurse them, &c. He has seen Amy eat at Willis' table after he had done eating. Willis knew that it was generally reported that he kept Amy, and the children were his. Witness never heard him deny the report. Amy traded considerably at Williston; generally at James H. Willis'; generally upon credit when Willis was from home. Witness has purchased goods for her at James H. Willis'; the goods were charged to Elijah Willis. Saw Amy riding in Willis' carriage once. He went with her, and left her at the house of his brother's widow till he returned home. Witness knows about the last time Willis left the State; he carried Amy and all her children—three black and three white ones—and Amy's mother; he

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said he was *going to carry them to Ohio, to Cincinnati; he said he wanted to go and carry them and free them, so they could have the benefit of his property. She (Amy) wanted to come back with him; he said to her, that when he got her out of South Carolina she should never come back again. He said he would come back in three weeks if he had good luck, and then he intended to sell all his property—make a clean sweep. He said he was doing well here, but he could not remain here and free his children, and let them

have his property. He said he did not intend his people to have one cent of his property, if he could help it. He said, if he stayed here his relations would make slaves of Amy and her children; he said his relations were gaping for his property, but they should not have it. Amy and her children, and her mother, the night before they started, came to witness' house, and told him and his wife good-bye. Willis and Amy, and her mother and children, took the car next day for Augusta. Witness went to Willis' house the morning he left; did not tell him good-bye; had no heart to do it; did not want to part with him. Willis wanted witness and family to go with him; offered witness to pay his expenses, and settle him better than he then was; said witness' wife had been so good amongst his children in time of sickness, he wanted her to go with him; witness told him his wife could not go, because she could not ride in a car or carriage. Willis never returned; none of Willis' party that he carried off ever returned. Amy had a brother, a mulatto, named Gilbert; was nearly white; Willis told witness that when he came back he would carry Gilbert, and free him.

Cross-examined.—Willis had been trying to sell his property before; three or four years before he finally left, Willis carried Amy and her mother and children off; and before, about three years before he left the last time, Amy and her family were gone about two months, and then Willis went and brought them back. Willis never told witness where he carried them, or why he

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brought them back. Had not advertised his property for sale the last time he went. Heard Willis say he had right smart of money owing to him. Amy was not handsome. Amy had several husbands before she took up with Willis. Willis said as soon as he could come back, and make a clean sweep, he would leave.

Direct, resumed.—Willis said he had as much property as he wanted; that he should never need the half of what he had. Amy's last husband is still on Willis' plantation; his name is Albert. Willis was distressed when one of the children died; Dr. Harley attended it.

Depositions of Ary Woolley.

The witness answers and says: She did know Elijah Willis, of Barnwell district, now deceased, at least twenty-five (25) years, and has lived near him, the said Elijah Willis, during the whole term of her acquaintance, and never at any time during her acquaintance with him lived further than four miles from him, and a good portion of the time herself and husband (Reason Woolley) were in the employment of said Elijah Willis, and not living more than from half to three-fourths of a mile from his residence in Barnwell district.

Second Interrogatory.—Witness answers and says: That she has often and repeatedly heard Mr. Willis say that he intended to carry a family of colored persons he had, known as Amy and her family and children, to some country where they would be free. Witness says she could not tell any particular time or date, as she repeatedly heard him make such declarations, and the last time she heard him speak of taking Amy and her family off was some time in the spring of 1855, when he was making preparations to carry them off to Cincinnati, and did go off with them.

Third Interrogatory.—Witness answers and says: That Mr. Willis did, some weeks previous to his leaving this State with the family of colored persons referred to, tell

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her his *object for taking them off was to carry them where they would be free, and to provide for them.

Fourth Interrogatory.—Witness answers and says: That a negro woman named Amy, and her mother Celia, or Cely, and three black children and three mulatto children, constituted the family of colored people that Mr. Willis carried with him to Ohio. Witness says Mr. Willis always claimed to be the father of the mulatto children and treated them as such, and Amy as his woman, but never heard him call her his concubine, but she certainly was such, and was so looked upon.

Fifth Interrogatory.—Witness answers and says: She knows that Amy was the reputed concubine of Elijah Willis, or in other words, his housekeeper, who seemed to manage his housekeeping, and acted pretty much as man and wife. Witness says she was intimately and well acquainted with Mr. Willis, and Amy and her family, and often heard Mr. Willis pity the condition of the mulatto children, and said what he intended to do with and for them by taking them to Ohio, where they would be free, and then could and would provide for them.

Witness further says: That Mr. Willis did leave his residence in Barnwell district with Amy and her family, as mentioned in the fourth interrogatory, to carry them to Cincinnati, in the State of Ohio, and wished her, the witness, and her family, to go with them, which she declined doing on account of her infirmity. Since which time she has not seen Mr. Willis, nor has he returned, and hears and believes that he is dead, and that he died in Cincinnati, in the State of Ohio.

Examination of William Knotts.

1. The witness says he knows Michael Willis, but does not know the plaintiff.

2. The witness answers and says, that he knew Elijah Willis intimately from the year

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1827 to 1833, during which *time he viewed him as a friend, and saw him occasionally from that time up to his death.

3. Witness says that some time in the year 1850 or '51, Elijah Willis sent for this deponent to come to his house, and consulted him upon the propriety of making a deed of trust to this deponent of all his property, to be held by him in trust, for the support and benefit of two colored women, and the children of the younger of the two women; that he did not wish these two women and the children ever to become slaves.

4. Witness says that upon the proposition of Mr. Willis to him of this deed of trust, he advised him not to make it at all, but if he wished these persons to be free, he had better take them out to a non-slaveholding State, to which he said, "I think that would be a good idea."

5. Witness says he knew Mr. Willis about twenty-three years.

6. Witness says he was a man of strong mind, determined will, and fully capable of attending to his affairs, as far as this deponent could judge.

7. Witness says he has answered in the sixth interrogatory.

8. Witness says he knew all the persons intimately as named in the interrogatory, excepting Dr. Joseph J. Harley and James Willis, the younger. His acquaintance with them refers only from the year 1828 to 1833.

9. Witness answers and says, that he is not able to answer this question, as he is not able to judge of the relative strength of the minds of the persons.

10. Witness says that at the conference referred to, Mr. Willis' health was bad, but was of sound and disposing mind, as persons of his age and health.

To the first cross-interrogatory witness says, that he knew him intimately from the years 1827 to 1833, as he was then his neighbor; since then deponent moved from there, and only saw him occasionally afterwards.

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*2. Witness says he only saw him occasionally, as above stated, and can only judge of the state of his mind from the conference above alluded to, at which time he stayed with him one night.

3. Witness says he saw no change in his mind when he occasionally met him, only such change as age and sickness might produce.

4. Witness says that Mr. Willis did send for him at the time alluded to, to come and buy his land and negroes; that when deponent went there, Mr. Willis told him "that although he sent for him to purchase his lands and negroes, he only wished to see him to consult with him to make this deed of trust, above mentioned," and this was the only interview on business.

Depositions of Willison B. Beazley.

1. Witness knew the late Elijah Willis, in Barnwell district, South Carolina, for about the period of fourteen years. Witness was

merchant and post-master at Williston, a railroad village in Barnwell district, and in both of these capacities had dealings with said Elijah Willis, who was a planter, and owned a saw mill, residing about five miles from Williston.

2. Witness cannot say that the said Elijah Willis ever told him directly or positively what he intended to do with certain colored people of his; but on several occasions, for a period of about one year previous to the death of said Elijah Willis, said Elijah Willis did converse with said witness about selling his plantation, negroes and stock, with a view to moving to a free State, on account of his colored family he was raising; seemed to regret his course of life; the disrespect he had brought on himself, and thought it best he should move, with said colored family, to some free State. He wanted witness to find him a purchaser; offered to sell to witness his lands, other negro slaves, stock, growing crop and produce on hand, for thirty-five

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thousand dollars. Witness took two weeks to consider the proposition, but finally declined the purchase. These were the circumstances which led to these frequent conversations.

3. Elijah Willis finally left Williston, on the railroad cars, (on the Western train of cars,) with a colored family, a mulatto woman named Amy, her children, and Amy's mother, a black woman, about the first of May, in the year eighteen hundred and fifty-four or fifty-five, witness is not distinct now in his memory which year, but thinks the latter. He left unexpectedly to witness. Elijah Willis came into Williston the day he left, some three hours before the cars left, and his wagon, with the family alluded to, came about two hours before the cars left. They unloaded their baggage at the usual car landing, in front of witness' store. Said Elijah Willis came into witness' store, asked for his letters and papers, and store account, as he wished to settle, as he was going away. Witness did not have them drawn off, and said Willis then told him to have them ready, as he would be back in about three weeks. He did not speak farther then as to the object of his journey. That was the last time, when he bid him good bye on the cars, witness ever saw Elijah Willis.

4. The colored people I have referred to in previous answers were a mulatto woman called Amy, her mother, a black negro, name not recollected, two black children of Amy, (the oldest of her children about grown when Elijah Willis left the State,) names not recollected, and four children of Amy who were mulattos, thinks they were all girls, names not recollected. The last four were generally considered, in the neighborhood, to be the children of said Elijah Willis. Elijah Willis never told witness in so many words that Amy was his concubine, or that

any of her children were his, but spoke of them in the manner described by witness in his answer to the second interrogatory hereinbefore asked, which is hereby referred to as an answer to this part of this interroga-

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tory. Witness further says, that *said negro woman, Amy, generally traded in Williston, bought largely for a negro, often had plenty of money, and frequently bought without cash, on credit. The merchants generally let her have what she wanted, gave her a copy of the bill, and the next time the old man, Elijah Willis, would come to Williston, he would pay all such bills without objection or inquiry.

Depositions of John H. Howard.

1. The witness answers and says, I did know E. Willis for five or six years immediately before his death. I was his agent to sell lumber, and he visited me about twice a year.

2. Witness says, I had two conversations with him in relation to certain colored people. On the occasion of one of his visits, in the year 1854, I think, he expressed great anxiety about these people; his mind was very much disturbed about them. He asked my advice what he had best do about them to get them free. I told him he could not free them in this State. On the occasion of his visit in 1855, in March or April, he said as he could not do so in this State, he had determined to take them to Ohio, and free them there; that he had been to Ohio, and had made arrangements to take them to Cincinnati.

3. Witness says, I don't know under what circumstances he finally left the State. I have stated all I knew of his intentions, and the object of his journey, in the answer to the second interrogatory.

4. Witness says, the colored people were Amy and three mulatto children; he named Amy, but he did not mention the names of the three children; Elijah Willis spoke of them as his colored concubine and children.

James Meredith, examined by commission. —I knew Elijah Willis ten or twelve years before his death, as a citizen of Barnwell district, S. C., and often saw him travelling on the railroad, I being a conductor.

About the month of April, 1855, as well as

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I remember, *Elijah Willis took passage on the upward train of cars on the South Carolina Railroad, having with him a family of negroes. In reply to a question, asked by me, E. Willis stated that he was not taking them to Hamburg for sale, but was on his way to Cincinnati, Ohio, with them, and my recollection is that he spoke of them as his family. He had, as baggage, several new trunks, and no such luggage as negroes usually carry. The negroes were all dressed in much better style than is usual with negroes; and Mr.

Willis sat with them in the car nearly all the time. He entered the cars with them at Williston. I do not remember to have heard him speak of them at any other time.

My belief is, that on the occasion referred to in the foregoing answer, E. Willis finally left the State of South Carolina. Nothing more than is stated in the preceding answer was said by him as to his intention, nor as to the object of his journey.

Depositions of Dr. John G. Guignard.

1. I was acquainted with Willis twenty years or more.

2. We occasionally visited each other. I had very few professional calls to his place previous to 1850, and not very many since.

3. His business appeared well conducted, his habits regular, and his ability fully sufficient for the management of his business.

4. About five years or more previous to his death, he appeared to become reserved and melancholy in social intercourse.

5. Elijah Willis, about two years, more or less, previous to his decease, took occasion to spend a night with me at my residence. We were not incumbered by company, and as it were tete-a-tete; he conversed freely, stating that his situation was apparent to his neighbors, distressing to him. That the connection he had formed was evidently unpleasant to his relations and acquaintances,

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and disreputable. He wished to place the cause of his disquietude on some small farm, remote from this region, where they could be in society of their own class. He had an idea of purchasing a small farm in Tennessee for them. I recommended placing them in the neighborhood of Norfolk, Virginia, where about two thousand or more free persons of color resided, and an ineffectual attempt for their expulsion had been made before the legislature of Virginia. He expressed himself under obligation to me for the recommendation or suggestion, and, as I understood, was governed by it so far as soon afterwards to carry the slaves alluded to, viz: Amy and children, to Virginia, for the purpose of settling them. But little communication was held between us afterwards. I did, on one occasion afterwards, at his house, in presence of F. W. Matthews, suggest to him in strong terms the propriety of shaking off his connection with Amy, and endeavoring to regain his proper position in society.

6. I had some business transaction with him early in May, 1855. He stated to me that he would travel abroad soon, and return in a few weeks, and probably occupy the summer, as he did for a year or so past, in travelling.

James M. Gitchell, sworn.—The paper marked A (the will) is in my own handwriting. It was written under the immediate direction and supervision of Elijah Willis.

Said Elijah Willis came to the office of Jolliffe & Gitchell, in the City of Cincinnati, Ohio, on the day previous to the date of the will, and introduced himself as Elijah Willis, of Barnwell district, in the State of South Carolina, and said that his object in coming to Ohio was to make his will, and provide for certain persons whom he held as slaves in South Carolina. That he desired to make those slaves his heirs, and wished to find some persons of property and character in Ohio, who would consent to act as his executors. Mr. Jolliffe recommended several persons, and finally went with Mr. Willis to see Messrs. Ernst and Harwood, who agreed to act as executors, and with whom Mr. Willis

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seemed to be satisfied. When the will was being written, Mr. Willis insisted that Mr. Jolliffe should act as one of the executors. He, at first, declined, but finally consented at the urgent solicitation of Mr. Willis, and his name was inserted as one of the executors. Elijah Willis was present during the time said paper (the will) was being written, and read it himself after it was finished. Said paper was executed in duplicate, either copy to be and have the effect of an original, and one copy was retained by Mr. Jolliffe and myself, at the request of Mr. Willis, and the other taken by himself.

Mr. Willis told me at the time said paper A (the will) was being written, and after its execution, that it was his purpose to have Amy and her seven children, Elder, Ellick, Philip, Clarissa Ann, Julia Ann, Eliza Ann, and Savage, the persons named in said paper, as his heirs, brought to the State of Ohio, and set free. On parting with Mr. Willis, he told me that he would return to South Carolina, and so arrange his business there as to bring the persons named to Ohio himself, and that he thought he should be in Cincinnati with them in about one year from that time. After that, I saw or heard nothing further from Mr. Willis until I heard that he had died upon the wharf, and I saw his corpse at the Dumas House, in this city, on the 21st day of May, 1855.

Thomas Ewing, Jr., sworn.—I am a practising lawyer in the State of Ohio. There is no statute in the State of Ohio relative to emancipation or manumission that I know of. In my opinion, where a slave is brought into this State, or comes into it by or with the consent of the owner, such slave is emancipated (without formal act or deed of emancipation) by operation of the common law. I believe that such is the opinion of gentlemen of the legal profession in the State of Ohio. I never heard a contrary opinion expressed by any member of the profession here. I believe that there have been decisions by the inferior Courts of this State to that effect. But I have been unable to ascertain that the question has ever been pre-

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sented to the Supreme Court of the State, and have been unable to find any decision upon the question in any of the Reports of its decisions.

WILLIAM C. McDOWELL, sworn.—I am a lawyer, practising in Cincinnati, Ohio. In Ohio there is no statute on the subject of either emancipation or manumission. Nor is there, so far as I know, and I have made some examination on the subject, any case upon that subject reported in our Supreme Court Reports. I take it that no formal act of emancipation, by deed or otherwise, is required in the State of Ohio; the law being, as I understand it, that the moment a slave, with the consent of his master, comes into the State, he is thereby free. Section 6 of Article I of Ohio Constitution provides that "there shall be no slavery in this State, nor involuntary servitude, unless for the punishment of crime."

From this, and the common law on the subject, it is universally held by the lawyers here, so far as I know, that when a slave is in Ohio, by his master's consent, he is thereby freed. I have understood that the Supreme Court of Ohio on the circuit, viz: in Warren county, Ohio, held the same doctrine. But decisions of that Court on the circuit are not reported in our Reports. The law was so held by Judge Norris, of the Common Pleas Court, in a circuit adjoining this county. I regard the law upon that subject to be without doubt, as I have just indicated.

ALEXANDER H. MCGUFFEY, sworn.—I am a practising lawyer in the State of Ohio. I am not aware of any law of Ohio in regard to the emancipation or manumission of slaves. No formal act of emancipation, by deed or otherwise, is requisite. Our Courts have uniformly held, that if a slave is brought into Ohio, by consent of his master, he is thereby emancipated.

WILLIAM CULLUM, sworn. (Dec. 5th, 1855.)—I saw a man with his family on the Strader, who was said to be Elijah Willis, of South Carolina. He was a large man and fleshy; about forty-five or fifty years of age.

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The clerk of the boat told me that was his name. I do not recollect the time; it was last summer.

I talked with him, and asked him where he was going with the colored family. He said he was going to Ohio, to set them free, and school the children. There were five or six children, two a good deal older and darker than the rest; and then there was the mother of the family, who was a dark yellow woman. The younger children were light mulattoes. One was an infant, and the others between three and ten years of age. Mr. Willis said, too, that he was going to buy them a farm; but whether he did so or not, I don't know. I asked him if the children

were his own. He said he was the father of part of them.

ROBERT S. DUMING, sworn.—I did see a person representing himself to be a Mr. Willis, who came upon the boat "Jacob Strader," of which I am the clerk, and at Louisville. He gave his name to me, to be entered upon the books, as Mr. Willis, and paid for a passage for himself, and a colored woman and some colored children, from Louisville to Cincinnati. This was some time in May, 1855, as well as I can recollect. I never take any colored persons upon the boat when brought by a stranger to me, without referring the person bringing them to the captain of the boat. I referred Mr. Willis to him, before giving him passage, and the captain came to me and said it was all right, and the colored persons were then received as passengers. He told me that the woman and children were his.

CHARLES E. CIST, sworn.—I am a practising lawyer in the State of Ohio. There is no law of Ohio in the statute book as to emancipation or manumission.—Our Courts have uniformly held, I believe, that no formal act of emancipation, by deed or otherwise, is necessary. There is no decision in the printed Reports of the Supreme Court in Banc, (which is the only State Court whose Reports are printed by authority, I believe,) upon the subject.

EDWARD HARWOOD, sworn.—I did decline to

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qualify as executor of Elijah Willis. The written renunciation is on file in the Probate Court, and I have no control over it.

MR. WILLIS came to my laboratory with a letter of introduction from Mr. Jolliffe to me, about that time, (February, 1854.) He informed me that he had asked Mr. Jolliffe to give him an introduction to two persons, one of whom was myself, requesting me to act as his executor. He stated that he had a family of colored persons in South Carolina, a part of whom were his own children, and that he wished to bring the family to Cincinnati, and free them. He stated that he considered himself worth in the neighborhood of \$75,000, which property he wished to settle upon his family. He said that he was inclined to apoplexy, and was liable at any moment to be called away, for which reason he wished to make his will, and asked me if I was willing to act as his executor. Before answering him that I was willing, I asked him if he had other slaves besides this family. He said he had. I then stated to him that if he expected to be taken away suddenly, and expected me to act as executor in selling them, I could not consent to do it. He said I should not have anything of that kind to attend to; that he intended to make arrangements with reference to them himself, at once. I urged him to liberate them, and he left the impression on my mind

that he would seriously consider the question.

He made known to me his desire, in case he should be taken away, in reference to the disposal of his property for the benefit of his family. He said that he wished them located on Western lands, in the farming business, either in this State, Illinois, or Wisconsin. He said that he hoped that his life would be spared long enough not to give me any trouble in reference to the family; that his only object in making a will, and having executors, was to provide for the contingency of a sudden death. He came to my office in a buggy, and after our conversation together, requested me to accompany him to

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see Mr. Ernst. I went with him, *but Mr. Ernst was not at home, and Mr. Willis returned to his boarding house. I saw him but once afterwards, and that for but a moment, until I saw him in his coffin.

I necessarily looked at him with a good deal of interest and care, to know what kind of a man I was in company with on such an important occasion. I got the impression that he was a careful business man, perfectly sound in mind.

Andrew H. Ernst, sworn.—Was appointed executor, but renounced and declined to qualify on the will.

I first saw Mr. Willis at the Broadway Hotel, where I called at his request, and where he broached the subject on which he wished to see me. He told me that he had a family in South Carolina, which he wished to free, and that he wanted to make arrangements to bring them away. He gave me to understand the condition of the family—that the children were his children by a colored woman, and that he wanted to transfer them to a free State, with his property. The object of his visit seemed to be for that purpose; he not having fully determined in his own mind what course to take to accomplish his end. He wished to acquaint himself with the character of parties who would execute his purposes in regard to the disposition of his family and his property in case he was unable to carry out his purposes himself. He asked me whether I would act as one of his executors, in case he should not live to carry out the object himself. My interview with him led me to regard him as a man of sound mind. His plans seemed to be well arranged. I think my interview fully justifies me in saying that he was then a man of sound and calculating mind.

The defendant, John Jolliffe, appealed on the grounds:

I. Because the negro woman Amy, and her children, were not slaves, but free persons of color, at the death of the testator; and were, therefore, competent legatees, under said will.

And to sustain the above ground, he submitted the following propositions:

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*1. That there is no law in South Carolina, either by statute or otherwise, nor any State policy in regard to slavery, on which the Courts can found their judgments, or of which they can take cognizance or judicial notice, that prohibits a citizen of this State from removing his slaves from this to any other State, either to enhance the value of their labor, if to a slave State, or for emancipation, if to a free State; and that any judgment to the contrary is against law, and in derogation of the rights of the owner of slaves.

2. That if an owner voluntarily takes his slave to a State or country where slavery is known to be prohibited, with an expressed and avowed intention that such slave shall never return, but remain there for the sole purpose, and none other, of being free, and leaves such slave in the free State or country, by death, or otherwise, then the slave is ipso facto free; and that there is no law in South Carolina, or elsewhere, to the contrary.

3. That it is the duty of South Carolina, as one of the Confederate States of this Union, to concede to the other States the same power and authority of sovereignty which she claims for herself, of declaring and maintaining the status and condition of all persons, whether white or African, voluntarily coming within their borders for permanent residence; and a judgment to the contrary assumes and arrogates to ourselves more than we are willing to concede to the other States, having equal dignity and sovereignty.

II. Because, while Amy and her children, and their former master, were within the limits of the State of Ohio, there was not only no Constitution or statute law, providing for their slavery, but the most solemn and positive Constitutional law, to the effect that a master taking his slave, voluntarily, into Ohio, manumission takes place as effectually as if by deed; and although this case is to be tried in our Court, the South Carolina law retires, and leaves the question to be decided exclusively by the Ohio law.

III. Because the decree is predicated mainly on the basis that Willis, in Ohio, and up to

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the time of his death, had *the power and the right to bring Amy and her children back to South Carolina—and thus to reintegrate them into their original state of slavery. But to this view we submit, as a conclusive answer:

1. If Willis had such right and power, then, not having exercised it to restore them to slavery, he has as effectually left them in a state of freedom, as if he had executed a deed of manumission.

2. If such was the condition of Amy and her children, the result must, on every principle of justice and equity, fix their fate, whether for slavery or freedom. More especially, when it is remembered that, in Ohio, slavery is prohibited by her fundamental law.

A slave carried into a State where slavery is prohibited, with master's consent, and not for a temporary purpose, becomes free.

When a negro slave, with the permission of his owner, takes up his residence in a free State, and afterwards returns to this State, such owner cannot resume his property in him.

3. But the fact is not so. By the positive Statute of South Carolina, Amy and her children, whether slaves or free, would inevitably be expelled from the State, or be re-integrated into their former state of slavery, by way of forfeiture to the State, and not as the property of Willis.

4. Because bequest of property to slaves is substantial emancipation, and the slaves are manumitted by the will, and not by the executor's deeds of manumission.

5. Because the assent of the executor is always to be presumed, and when given, is proof of assets, and is irrevocable, and has relation to the time of testator's death.

Bauskett, Jolliffe, Cobb, Petigru, for appellant.

Aldrich, *contra*. (a)

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*The opinion of the Court was delivered by

O'NEALL, C. J. The elaborate decree of my brother Wardlaw (while a Chancellor) is in many of its parts entitled to the commendation of every well-informed mind. Yet there are parts which have not met with the concurrence of this Court. One, a very material part, on which the whole case depends, has not been satisfactory to a majority. Indeed, on it we have come to a conclusion entirely antagonistic to the decree.

In the first place, I turn to the Act of 1820, referred to and considered in *Frazier v. Frazier*, 2 Hill Eq., 311. By that Act the evil was stated "the great and rapid increase of free negroes and mulattoes in this State, by migration and emancipation," the remedy provided was, "that no slave shall hereafter be emancipated but by Act of the legislature."

It was argued that the statement of the evil was the increase of free negroes and of mulattoes but the true reading of the Act, is, the adjective free qualifies mulattoes, as well as negroes: and read in that way we have the evil as the legislature intended to state it, the great and rapid increase of free negroes and free mulattoes in this State.

What is the effect of the enactment that "no slave shall hereafter be emancipated but by Act of the legislature?" In *Frazier v. Frazier*, twenty-five years ago, with the concurrence of my distinguished brother and friend, Judge David Johnson, I stated that this Act could not "have effect upon emancipation beyond the limits of the State." It

is very true my brother Harper, the other member of the Court, did not sign the opinion, but he gave no dissent, and I happen to know that his objection was more to the competency of slaves to have such a decree pronounced in their favor than to the principles of the decree. He recognized the general principles of the decree in *Gordon v. Blackman*, [*Blackman v. Gordon*] 2 Rich. Eq. 45 [44 Am. Dec. 241], in which he said: "In *Frazier v. Frazier*, the Court decided that it would not interfere to prevent the execution of the trust when there was no law to forbid

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it." The case of *Frazier v. Frazier* was also recognized in *Finley v. Hunter*, 2 Strob. Eq. 214. The case of *Frazier v. Frazier* was the law until the Act of 1841; that Act provided that a devise for the removal of a slave from the State for emancipation should be void. That introduced a new rule of action, and it is our duty to enforce it when a proper case arises. If the objects of the testator's bounty, Amy and her children, had remained in the State until the testator's death, there can be no doubt that the devise directing them to be taken by his executors to Ohio, and there to be manumitted, would have been contrary to law, and the other devises in their favor must have failed. But Elijah Willis, in his lifetime, removed them to Ohio, with the avowed purpose to emancipate them. He died when he and they were on the northern bank of the Ohio, in the City of Cincinnati. If that act made Amy and her children free, then it follows that the devises in their favor are good.

The Constitution of Ohio, in the spirit of the Ordinance for the government of the territory north-west of the Ohio river, provides "there shall be no slavery in this State, nor involuntary servitude unless for the punishment of crime." It is vain to say that this is contrary to the Constitution of the United States. Each and every State as it emerges from a territorial government, is free to adopt their Constitution, allowing or rejecting slavery.

This provision cannot reach cases of persons passing through Ohio with slaves, or where a slave accompanies his master or mistress on a temporary sojourn for business or pleasure. For, in point of fact, the master, and the slave, as his property, are entitled by the comity of States, and also by the Constitution of the United States, to be protected. Cobb on Negro Slavery, chap. 7, sec. 152, 153.

But the case is very different when the master puts his slaves on the soil of Ohio with the purpose of making them free. It is then true, that they become free by his act. The eloquent counsel for the defendant, in

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(a) The Reporter deems it unnecessary to publish the arguments of counsel, the case having been fully and elaborately discussed by the Court, and especially by Chancellor Wardlaw, in his two able and masterly opinions.

his own work on *negro slavery, (Cobb on Negro Slavery, chap. 7, § 154, 1 paragraph) states the principle which applies to and governs such a case "where there is a change

of domicile from a slave holding to a non-slaveholding nation, the animus remanendi works of itself and instantan (simul ac imperii fines intrarunt) the emancipation of the slave." It is true Mr. Willis did not change his own domicile, although his last act in life was reaching the soil of Ohio. He intended to return, and therefore his own domicile was not changed, but his act and intention both concurred in placing his slaves, who before were mere chattels personal, in a country where they assumed the character of free persons. This was making Ohio their domicile, and they are there now in the full enjoyment of freedom which cannot be disturbed. It seems to me, looked at in this plain way, that they are and were free from the moment when, by the consent of their master, they were placed upon the soil of Ohio to be free. I have no idea that the soil of Ohio per se confers freedom. It is the act of the master which has that effect. In *Guillemette v. Harper*, 4 Rich., 190, I stated, in 1850, the principle which governs this case. "If the master carries a slave to Great Britain to set him free, or while there in any way assents to his freedom, there can be no objection to the validity of freedom thus acquired." I do not understand that the law of that case, which was the unanimous judgment of the Law Court of Appeals, has ever been questioned. In this case, if the facts be as I now assume them to be, that Elijah Willis carried Amy and her children to Ohio to set them free, there can be no doubt that the moment they reached that destination, they became ipso facto free.

To have effect it needed no deed. It is true Mr. Jolliffe, the executor, did, on the 25th of June, 1855, May term of the Court for Hamilton County, execute a deed of manumission. But clearly that was unnecessary. It might have been well enough to place a record of freedom within the constant reach of the parties. If it were necessary, I should

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be disposed to hold that such a deed would have relation back to the moment of arrival. The law of Ohio, 1841, chap. 76, p. 591-6, (b) was brought to our view; it requires blacks or mulattoes entering into the State, to give security and to register themselves. This does not affect the question of freedom. It is a mere police regulation for the internal government of such people. This great case turns upon the narrow question: what did Elijah Wilson intend and do, in going to Ohio, and carrying with him Amy and her children? His purpose was clear; he intended to free the negroes. This required, according to the testimony of experts in Ohio, no other act than merely placing the negroes within the territorial limits of Ohio. But if he in-

tended to do something more, such as buying land for them, schooling the children, &c., I do not see how that can alter the case. For those acts were not at all essential to the act of freedom. They are very important for the comfort of the negroes. When about setting out from home with the negroes, he said to Reason Woolley "he was going to carry them to Ohio, to Cincinnati; he said he wanted to go and carry them, and free them, so they could have the benefit of his property. She, Amy, wanted to come back with him; he said to her that when he got her out of South Carolina she should never come back again." To Mrs. Ary Woolley, a few weeks before leaving with the negroes, he stated his "object in taking them off was to carry them where they could be free, and provide for them."

To John H. Howard, in March or April, 1855, he stated, "he had determined to take them to Ohio, and free them there." To William Cullum on the boat, the Jacob Strader, he said, "he was going to Ohio, to set them (the negroes) free, and school the children." After this array of testimony, there can be no doubt what was his purpose. Indeed, from what is proved by other witnesses, he had

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long had the *purpose in his mind, in some way to accomplish their freedom. He reached the wharf at Cincinnati, disembarked himself and the negroes, and when about taking a hack to the hotel, with them in company, he fell and expired. Upon his person was found a duplicate of his will. I think these facts show that the intent and the act concurred. He intended to confer freedom on the slaves, he had travelled hundreds of miles to consummate that intention, and had reached a point where they could be free. What more was to be done? It seems nothing further was legally required to give freedom in Ohio. Shall we undertake to say otherwise? Can we reach a hand to Ohio and draw back those people to servitude? They are in the enjoyment of freedom, and we cannot and ought not to interfere.

To allow them to be free, and to permit the devise in their favor to operate, is, we are told, contrary to the policy of South Carolina. I know no policy, except that which her laws declare. To that I shall always (as I have done for thirty-two years, my judicial life) yield obedience. But I should feel myself degraded if, like some in Ohio and other abolition States, I trampled on law and Constitution, in obedience to popular will. There is no law in South Carolina which, notwithstanding the freedom of Amy and her children, declares that the trusts in their favor are void. As soon as they are acknowledged to be free one moment before the death of Elijah Willis, they are capable to become the cestui que trusts under his will.

Indeed, in one case (*Bowers v. Newman*, 2 McM., 472,) of which we have a very imperfect report, Harper, J., and myself held

(b) These laws have been entirely repealed by the Act of 1849, which has been placed in my hands since the delivery of this opinion. See Acts of a general nature, 47th General Assembly of Ohio, vol. 17, page 18, sec. 6.

that a slave could take freedom and property by the same devise.

It is supposed it is necessary to ascertain "what was Elijah Willis' intention after he reached Ohio, not before." We can only judge of that by what had occurred before. We know what he intended up to the moment when he reached Cincinnati. What did he intend when the boat reached the wharf?

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*He might possibly then have remained on the boat with his slaves and have returned to South Carolina. But he did not do that, he made the act of freedom absolute by landing within the territorial limits of Ohio. This showed he intended to confer freedom by making Ohio their home. He had told Amy, "when he got her out of South Carolina she should never return." The act made his words good. For he could not, if he had desired it, have again reduced her to slavery.

I have not undertaken to review many of the cases cited in the elaborate decree of the Chancellor, as in the able argument of the case here. For the case turned upon a very narrow point; in which the lights of authority could only help to the general principle, that if the act done was in consequence of the intention previously expressed, it was enough for the case.

This has been proved to be so on a review of the whole law and facts, and the result is, that the woman Amy, and her children, were free at the death of Elijah Willis, and were capable to become the *cestui que trusts* of the executor.

The Chancellor's decree is reversed, and the bill dismissed.

JOHNSTONE, J. I concur in the result.

WARDLAW, J., dissenting.

So far as the views of the Court were expressed orally in consultation, it is understood to be the opinion of the majority that testator's taking Amy and other slaves to Ohio, after expressing his intention to emancipate them, constituted emancipation of them. My brethren, I suppose, do not controvert that which was conceded in the argument of appellant's opening counsel, that testator contemplated further acts than he performed, in consummation of his purpose of manumission, and never at any time entertained the opinion or design that the emancipation of these slaves would, or should be complete by the act of landing them in Ohio. In his will, which is his only utterance after Amy

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and the other slaves *reached Ohio, albeit that utterance is by implication of law, he describes Amy and her children as his slaves, and directs his executors to bring them to Ohio, and to emancipate and set them free in said State. About the time the will was written, in a conversation with Andrew H. Ernst, one of his executors, Ernst testifies

that testator asked him to be one of his executors, and that testator had not then fully determined in his own mind what course to take to accomplish his end. In March or April, 1855, he said to John H. Howard, "that as he could not do so in this State, he had determined to take them to Ohio, and free them there; that he had been to Ohio, and had made arrangements to take them to Cincinnati." The reference is unequivocally to his visit to Ohio at the time of the execution of his will, and to the arrangements prescribed therein. Without this, it is manifest that when he speaks of taking them to Ohio, and freeing them there, he contemplates something ulterior to taking them there. The connecting particle "and" necessarily has this force. To the same effect is his declaration to William Cullum, while aboard the Strader, "he was going to Ohio to set them free and school the children; he was going to buy them a farm." Of like effect is his declaration to Reason Woolley, "he was going to carry them to Ohio, to Cincinnati; he wanted to go and carry them and free them, so they could have the benefit of his property; he would come back in three weeks, if he had good luck, and when he came back he would carry Gilbert, (brother of Amy,) and free him." Ary, wife of Reason Woolley, is more unqualified in her testimony than any other witness, and her statement is, that testator told her "his object for taking them off was to carry them where they would be free, and to provide for them." It may be reasonably concluded, as Mr. Jolliffe states in his argument, that she referred to the same conversations concerning which her husband testifies; but, however this may be, she means no more in fair construction of her words, than that testator said his object was to take the slaves to some sovereignty where they

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could be set free, be *suffered to reside, and enjoy the provision he intended to make for their maintenance, and it is only by torture of her phrases that she can be misunderstood to denote testator's intention to manumit them by the naked act of carrying them within the jurisdiction of Ohio. It may be deduced from the testimony of this witness, and from the evidence as a whole, that the purpose of testator, in taking these slaves to Ohio, was merely part of a system of measures, to sell his property here, to remove with the proceeds to a free-negro State, to emancipate these slaves there, to buy a farm for them, and educate the children. It is unquestionable that he had for years a vague wish and intent to emancipate Amy and her children: but when he went to Ohio this intent was provisional and tentative, to be or not to be executed, as experience there might demonstrate its policy or its folly. From the nature of intent, it is revocable and inoperative until actually executed; the retraction of it and the retention of the right to

retract, or locus penitentiae, have the same consequences. The subsistence of the intention at the time some act is done, apparently in consummation of it, may be sometimes inferred from previous statements of the intention to effect the object; but such previous declarations are always mere evidence of the character of the act, and in any case may be disbelieved, and are never sufficient and satisfactory proof, where the act is equivocal, if the purpose be unlawful and impolitic, and contrary to the social and political duty of the actor. The legislature of this State, for the citizens thereof, enacted, in 1820, that no slave should be emancipated but by Act of the legislature. The beginning of the emancipation supposed in this case was illicit in its origin, certainly so continued so long as the master and slaves had not passed beyond the limits of the State, and the presumption, at least in a forum of this State, is against the completeness of emancipation in any foreign jurisdiction, until the fact be demonstrated by evidence.

The case of *Fryer v. Fryer*, Rich. Eq. Ca.,

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92, illustrates *these views. Marriage, in this State, is a civil contract, needing no writing or other ceremony for its manifestation; indeed, needing nothing but the agreement of the parties, in good faith, to constitute the relation. A contract per verba de presenti, such as "we marry" or "we are man and wife," is marriage, and a reciprocal contract per verba de futuro, such as "I promise to marry you," copula sequente, is also marriage; *Ib.*, 110. In the case cited, the couple agreed to marry, and with that purpose went to a magistrate's house to have the ceremony performed, but he being from home, they returned saying, falsely, they had been married, were put to bed as man and wife the same night, and cohabited for three years or more, in the course of which they frequently declared they had been married; still, this was pronounced no marriage, principally for the reasons that, at the magistrate's house, the parties looked to a future celebration of nuptials, and did not themselves regard the copula as perfecting the agreement. Chancellor Johnston says, p. 97, "where there was no express stipulation that the copula should perfect the previous executory agreement, yet, if it be evident that the parties understood and intended that act to perfect it, I suppose it must have that effect. But it is of the essence of every contract that the parties shall have a present contracting intention, at the time of perfecting their contract; they must understand that they are making a contract; otherwise, no contract is made. I do not say that they must have a full understanding of the legal consequences of the contract they are forming. The contract once made, the consequences are matter of legal obligation, and they must abide them. But where such is the penalty, it is

but reasonable the parties shall not be held to have made a contract, unless where they had knowledge that they were contracting and intended to contract." Again, at p. 98, "where it is established that the parties came together unlawfully, their continuing together must be considered unlawful, until they show a subsequent marriage." It will

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not be disputed that *emancipation is a contract, for, in its most general sense, the word contract signifies any engagement, obligation or compact, and this may be unilateral or inter partes. *Broom Com. L.*, 257; 1 *Pow.*, 6. Now, applying the Chancellor's doctrine to this case, it is plain that Willis did not intend, by that act of going ashore at Cincinnati, to emancipate Amy, and did not know that he was thereby perfecting the emancipation. It was urged that this matter was settled by the maxim *utile per inutile non vitiatur*. The usual application of this maxim is to pleading, and it imports that mere surplusage, (where the redundant matter may be struck out without materially changing the general sense,) does not vitiate a count or plea. So, in the construction of deeds or other writings, by force of the maxim, immaterial expressions may be rejected. Granting, however, that the maxim is of general application, and that the converse of it is equally true, namely, that the omission of immaterial words, or acts, intended to be expressed or done, does not impair the efficacy of an act already complete; how are we helped to a conclusion by the announcement of a proposition having no operation, except on assumption of the point in dispute? It is the precise issue of the case whether the act of Willis was complete, to be determined by concession in a South Carolina Court, as to property here, by the law of the State. It may be conceded that, in ordinary contracts, not inhibited nor restricted by any law of the State, mere ignorance of the law as to the necessary formalities, even if it consist in the belief that something superfluous is demanded by law, will not invalidate a contract actually fulfilling all legal requirements. Thus, a will attested by three witnesses, would be valid, although testator supposed four witnesses were required, and intended to procure a fourth. An illustration of this principle, suggested by counsel, seems to have been very effective with a portion of the Court. Suppose, it was said, a slave should be sold by one citizen of the State to another, and the price was paid, and the slave

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was delivered, and the parties *should ignorantly believe that a bill of sale was indispensable, and agree to meet the next morning to give and receive such bill of sale, but the death of one of them, or some other impediment, prevented the execution of it, would such ignorance or mistake invalidate a sale already complete? Certainly not; for, in

such case, neither universal law nor local law required a bill of sale; but suppose, to make the case put analogous to that in hand, the local law did require a bill of sale, then payment of the price, and delivery of the chattel, would not make a sale, however cim-merian may have been the ignorance of the parties.

Much learned argument was employed to enforce the uncontested proposition, that by the law of nations, in the absence of local prohibition, a master may manumit his slave by any act or declaration which manifests his purpose to extinguish or throw off his dominion. But a State may regulate, to any extent, the relation of master and slave, as to its existence and dissolution; for example, might inhibit the removal of a slave from the district in which he was born, or his manumission in any place. In South Carolina we have such local prohibition. The Act of 1820 declares that no slave shall be hereafter emancipated but by Act of the legislature, and the Act of 1841 declares null and void any gift of a slave, by any mode of conveyance, with a view to emancipation, and any devise or bequest to a slave, wherever he may be, or more exactly according to book, without any limitation as to the existence of the slave within the State. There may be some misapprehension or confusion as to the extra territorial vigor of general laws of a State; but the fulness of occupation of my time does not permit me now to discuss this topic extensively. Briefly and generally, my opinion is, that a State, by its legislation, may control the contracts and acts of its citizens, wherever they may be, so long as they acknowledge their allegiance; although in just construction, general provisions, where there is no express extension,

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should not be held to include foreign *acts. According to the common law of England, and, as English text-writers say, according to universal law, no native subject or citizen of one sovereign, without the concurrence of such sovereign, can divest himself of his natural, primitive, and intrinsic allegiance, by any act of his own—even by swearing allegiance to another sovereign. Broom's Leg. Max., 33. Denial of the right of expatriation does not include denial of the right to change one's domicile; but no respectable publicist has ever maintained that a slave could have domicile, at least a separate domicile from his master's. It is enough for present purposes to adopt the opinion of Judge Story, no extravagant friend of the rights of the separate States of the Union, as expressed in *Van Reimsdyck v. Kane*, Gallison, 377: "Every State has, within its own sovereignty, an authority to bind its citizens everywhere, so long as they continue their allegiance. Unless, therefore, it be restrained by constitutional prohibitions, it may act upon the contracts made between its own citizens in ev-

ery country, and, consequently, may discharge them by general laws. But such is not the operation of jurisdiction on contracts made by a citizen with a foreigner, in a foreign country. If, in such case, the legislature, by positive laws, nullify such contracts, it is certain they cannot be enforced within its own tribunals, but elsewhere they remain with the original validity, which they had by the *lex loci contractus*. But if a statute be general, without a direct application to foreign contracts, the rule approved by Casaregis, seems proper to be adopted, that its construction shall not be extended to such contracts. *Ratio est quia statutum intelligit semper disponere de contractibus factis intra et non extra territorium suum.*" Now, certainly, Willis, at his death, was a citizen of South Carolina, and Amy no foreigner, and as the State, having nullified for its citizens the right of a master to emancipate a slave, her tribunals must enforce the inhibition as to property within her limits. It may be that, in our condition as a Confederate

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State, we can send no force *to Ohio to capture Amy, nor if Willis were living, and abided beyond the limits of the State, could we send any force to bring him within the jurisdiction; but when the person or the subject, a representative of Willis or his property, becomes amenable to our jurisdiction, we must enforce South Carolina law and policy. It would hardly be contended that a citizen of this State could give an estate to a slave in Georgia.

If the law of Ohio, a State so oblivious of the comity due to her confederates, could control this controversy, the result of this litigation would still be doubtful. It is true that her Constitution excludes involuntary servitude, except for crime, without any saving as to travellers, sojourners, or fugitive slaves. But in some of her statutes, as to slaves, conscientious professions are made. Thus it may be mentioned, as a matter more curious than relevant, in the preamble of a statute relating to fugitives from labor or service from other States, passed in 1839, the second section of the fourth article of the Federal Constitution is incorporated, and it is set forth: whereas, it is the duty of those who reap the largest measure of benefits conferred by the Constitution, to recognize to their full extent the obligations which that instrument imposes; and whereas, it is the deliberate conviction of this General Assembly that the Constitution can only be sustained, as it was framed, by a spirit of just compromise, therefore it is enacted, among other things, that all officers proceeding under the Act, shall recognize, without proof, the existence of slavery in the States of the Union in which it exists. Stat. of Ohio, 595, 599. By an act passed in 1804, it is enacted that after June 1, then next, no black or mulatto person shall be permitted to settle

or reside in Ohio, unless he or she shall first produce a fair certificate from some Court within the United States, of his or her actual freedom, and that such persons there residing shall register themselves, &c. Stat. Ohio, 592. And by an Act in 1807, Ib., 593, no negro or mulatto shall be permitted to emigrate into and settle within the State without giv-

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ing bond, &c. No special construction of these statutes will be attempted, but it may be pertinently asked, how could Amy, forbidden to emigrate to Ohio and settle there, acquire domicile and freedom by unlawfully going thither? We may understand from the provisions of these statutes, how Willis, under advice, supposed he must do something towards the emancipation of Amy after he reached Ohio, and why the executor executed the deeds of emancipation.

It is plain that some of the views thus presented hurriedly, are contrary to the opinions announced in *Frazier v. Frazier*. The proprieties of my position prevent me from the full expression of my aversion to the doctrines of that case; but I may say, respectfully, that it cannot be regarded as a case of high authority. It overruled the case of *Bynum v. Bostick*, 4 DeS., 266, which, for many years, had prevailed as the law of the State. It was decided by two Judges, very eminent men, entitled to the esteem and regard of all our people, and always receiving my own, against two Judges, one of whom is the father of Equity in South Carolina, and the other a Judge unequalled with us in genius, juridical learning, and extent of reputation as a jurist. It was followed in the same year by the disorganization of the Court which pronounced it, and, as many believe, served, to some extent, to produce this disorganization. Its prominent result was explicitly annulled, as a general consequence in similar cases, by the Act of 1841. It has never been directly approved in any subsequent judgment which is reported. We have been referred to the cases of *Finley v. Hunter*, 2 Strobb. Eq. 214, and *Gordon v. Blackman*, 2 [Rich. Eq.], 45 [44 Am. Dec. 241], [*Blackman v. Gordon*] 1 Rich. Eq., 64, as compurgators of its doctrines. In the former of these, Chancellor Johnston said, in the circuit decree: I am bound by *Frazier v. Frazier*, however much I doubt its correctness, and in the appeal decree, it is said that the object of the Act of 1841 was to defeat every effort to evade the Act of 1820. In the latter case, the Chancellor on circuit said: *Frazier v. Frazier* covers the whole ground.

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I am hedged in on all sides, and must submit here, that is, on circuit, and clearly implying dissatisfaction; and the Court of Appeals mentioned the doctrine of the case as a historical fact, and without approval, saying the Court decided in *Frazier v. Frazier*, it would not interfere to prevent the execution of such a trust, while there was no law to

forbid it; and then proceeded to give retrospective effect to the Act of 1841. In this very case, on the issue of probate, 10 Rich., 186, Judge Withers, organ of the Court, puts the matter adjudged in *Frazier v. Frazier*, conditionally, "if it be law," &c. On the whole, in reference to Willis, I must adopt the language of one of the characters of Shakespeare, and his legal acquirements have been elaborately vindicated by the Lord Chancellor of Great Britain, lately Chief Justice of the King's Bench:

"His act did not o'ertake his bad intent,
And must be buried but as an intent
That perished by the way; thoughts are no
subjects,
Intent but merely thoughts."

My brethren seem more inclined to adopt the extravagance of the Irish orator, which revolts most men of sober mind and correct taste, and to declare as the law of South Carolina: "The first moment a slave touches the sacred soil of Britain (or Ohio) the altar and the god sink together in the dust; his soul walks abroad in her own majesty; his body swells beyond the measure of his chains that burst from around him; and he stands redeemed, regenerated, and disenthralled by the irresistible genius of universal emancipation."

Decree reversed.

II Rich. Eq. *527

*THOMAS WILSON v. WILLIAM S. McJUNKIN, and OTHERS.

(Columbia. May Term, 1860.)

[Wills. ¶634.]

The testator devised real and personal estate to his executors in trust, for the sole and separate use of his daughter N., "for and during the term of her natural life, and at her death to be equally divided amongst her children in fee simple." N. had eight children living at the death of the testator, one of whom died in the lifetime of N., leaving a husband, but no issue, surviving her:—*Held*, that the eight children took vested interests, and that the representative of the one who died in the lifetime of N. was entitled to her share.

[Ed. Note.—Cited in *Farrow v. Farrow*, 12 S. C. 172; *Gourdin v. Deas*, 27 S. C. 488, 492, 4 S. E. 64; *Brown v. McCall*, 44 S. C. 519, 22 S. E. 823; *Tindal v. Neal*, 59 S. C. 11, 15, 36 S. E. 1004.

For other cases, see Wills, Cent. Dig. § 1495; Cent. Dig. ¶634.]

Before Dargan, Ch., at Union, June, 1858.

The circuit decree, which states the whole case, is as follows:

Dargan, Ch. William Sartor, by his last will and testament, devised and bequeathed certain real and personal estates, described in the plaintiff's bill, to his executors, in trust for the sole and separate use of his daughter, Nancy McJunkin, wife of Joseph McJunkin, for and during the term of her natural life, and, at her death, to be equally divided amongst her children in fee simple. The property thus given consisted of a tract of

land, whereon the said Joseph McJunkin lived at the date of the will, and two negroes, Joe and Dinah, and also sundry executions against the said Joseph McJunkin, and various choses in action, which the testator held against him, which he directed to be collected or to be appropriated in the purchase of negroes from McJunkin, to be held in the same trusts. The negroes were accordingly purchased with the fund thus designated; Nancy McJunkin was permitted by the trustees to possess and enjoy the real and personal estate during her life, according to the scheme of the trust. Nancy McJunkin died

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15th *of January, A. D. 1856, leaving surviving her, children as follows, viz.: Emeline Wilson, wife of William Wilson, Frances Davis, wife of P. A. Davis, Amanda Fant, wife of David A. Fant, Sarah J. Thomas, wife of ——— Thomas, William S. McJunkin, Robert D. McJunkin, and Harriet McJunkin, who has since intermarried with William Jeter.

At the death of the testator, Nancy McJunkin, the tenant for life, had another child, Mary McJunkin, who, A. D. 1840, intermarried with the plaintiff, Thomas Wilson, and who gave birth to a child who died in the life of the mother (almost immediately on its birth.) The said Mary McJunkin, afterwards Wilson, predeceased her mother the tenant for life, Nancy McJunkin. She died in 1845. Joseph McJunkin, the father, survived Mary —he died A. D. 1855.

At the death of the tenant for life, the estate to be divided among the remaindermen, her children, consisted of the tract of land aforesaid, and thirty-seven negroes, which negroes were valued at \$25,008.25.

On the 22d February, 1856, William S. McJunkin, Robert D. McJunkin, P. A. Davis and wife, Sarah J. Thomas, who has since intermarried with John Fant, David J. Fant and wife, Harriet McJunkin, who has since intermarried with William Jeter, and William Wilson, made a partition of the negroes among themselves.

On the 28th April, 1856, a bill was filed for the purpose of effecting a division among the same parties of the real estate, and also to confirm the informal division of the negroes, made on the 22d February, 1856. The land was ordered to be sold for division, and a decree was rendered confirming the said informal division of the negroes. A sale of the land was made in November, 1856, and confirmed at June term, 1857.

The plaintiff, Thomas Wilson, was not a party to the private partition among the parties, nor was he a party to the proceedings by which that partition was confirmed, and by which the land was sold for partition. He

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claims that his *wife, Mary, took a vested interest, by way of remainder, in the estate of which Nancy McJunkin was tenant for life, which was transmissible to her representatives, and that he, as her husband and dis-

tributee, was entitled to the one-half part of the share to which she would have been entitled if she had been living at the period of partition.

This claim of the plaintiff is resisted by the defendants on two grounds; the first of which is, that Mary, the wife of the plaintiff, took no vested estate or interest under the will of her grand-father, William Sartor. The question thus raised for the decision of the Court I had thought so well settled as not to admit of controversy or serious doubt; so plain is it, in fact, that it does not, so far as I am informed, seem to have been raised in any reported decision in South Carolina. But when we turn to the English authorities, we find the principle so well settled as to account for the question not having been raised in our Courts.

The defendants contend that the remainder to the children of Nancy McJunkin, after her decease, was contingent, because it was not certain that they would be living at that period, while, in the meantime, other children might have been born to participate with the ante nati, to the diminution of their respective shares. It will be remembered that Mary, the plaintiff's deceased wife, was born at the death of the testator, and there was no child of Nancy McJunkin born after the date of the will. The gift is to Nancy McJunkin during her life, and at her death to be equally divided among her children in fee simple. *Fearne*, 1 vol. p. 9, classifies contingent remainders into four kinds. His fourth class of contingent remainders he defines "where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made." In this instance Mary McJunkin was in being, and was ascertained at the time when the limitation was made. The facts satisfy the requisition of this rule to its fullest extent.

The fact that children subsequently born

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might come in *and participate, does not, cannot affect the right of children in esse at the creation of the limitation to take an estate, but merely disturbs the rights as to the quantity which they would be entitled to take. The quantity of their interest only, and not their estate, is contingent. In this case the question relates to a child who was in existence at the creation of the remainder. But it is equally well settled that where an estate is given to one for life, and after his death to his children; that children born after the creation of the limitation will come in equally with those born before, and that the estates of those born subsequently become vested interests eo instanti upon their birth. This, it must in candor be admitted, does not conform literally with Mr. *Fearne's* definition, that a remainder is contingent when limited to a person not ascertained or not in being at the time when such limitation is made. But it is not inconsistent with

the rationale of any rule upon the subject and it is productive of no evil consequences to hold, that in such a case the children in esse shall take vested estates for themselves, and for those who may afterwards be born and come within the description of those who may be entitled to take. As soon as the estate is created, it vests (the whole of it) in the then existing remaindermen, and as soon as another child is born his equal and undivided share vests in him as in the others previously born; so that there is never at any time any portion of the estate not vested or contingent as to an existing proprietor. The Courts are said to have "a leaning" in favor of construing estates to be vested, rather than contingent—the meaning of which is, that the policy of the law which is always supposed to be based upon the best interest of society, favors the vesting of estates. Though contingent estates must necessarily exist, and are essential to the wants of society and civilization, it is always better, so far as is practicable and consistent with these demands of society, that every estate should have an existing and as-

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certain *proprietor. Hence, the law favors that construction which holds estates to be vested.

In the particular class of cases which I am considering, there is another and a special reason why the estates of even the after-born children should vest upon their birth. In *Doe v. Perryn*, 3 T. R., 484, 495, Buller, J., holds the following language: The Courts of Law "have said that the estate shall vest on the birth of a child, and without waiting for the death of the parents; which rule is not attended with any inconvenience to the children, because where the estate is limited to a number of children, it shall vest in the first, and afterwards open for the benefit of those who shall be born at a subsequent period. But if this were held not to vest till the death of the parent, this inconvenience would follow: that it would not go to grand-children. For, if a child were born who died in the lifetime of their parents, leaving issue, such grand-children could not take; which could not be supposed to be the intention of the deviser." By the other Judges who sat in the case, Ashurst, J., and the Chief Justice (Lord Kenyon), this principle was assumed to be well settled at that time.

Since that time, (A. D. 1789,) the principle that the shares of the after-born remaindermen shall vest at their births, respectively, has been frequently recognized, and, so far as I know, has never been departed from or questioned. In 4 Kent Com., 197, it is laid down in the following language: "When a remainder is limited to the use of several persons who do not become capable at the same time, as a devise to A for life remainder to his children, the children living at the

death of the testator take vested remainders, subject to be disturbed by after-born children. The remainder vests in the persons first becoming capable, and the estate opens and becomes divested in quantity by the birth of subsequent children, who are let in to take vested proportions of the estate." This lucid abstract of the learned commentator is amply supported by his numerous authorities.

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*The defendants further contend that the plaintiff, if ever he was entitled to any part of the estate, has waived and released the same. They do not pretend that he has actually and formally done this, but that the circumstances and facts raise the implication.

I will mention the facts which they think amount to a waiver or a release on the part of the plaintiff. They say he was aware of the proceedings in this Court for a confirmation of the private division, and for a sale of the land and division of the proceeds. They offered no proof of notice of this fact, but infer it from the circumstances, that he at the time was a resident of Columbia or Lexington, and that the sale of the land was advertised in the Unionville Journal. These are all the facts on which they ground their presumption, that the plaintiff had notice of the judicial proceedings. If he had had express notice, I do not see how that could have affected his rights, except so far, perhaps, as to have estopped him from questioning the title of the purchaser of the land. If he had stood by and seen the land sold to another, without interposing an objection, the purchaser might have complained. But suffering the title of the purchaser to stand unimpeached, what should prevent him from setting up a claim to his proper share of the proceeds of the sale of the land?

The defendants also adduced in evidence a letter of the plaintiff to his brother, William Wilson, to show a surrender of his interest. The letter is a private and confidential communication to his brother. The strongest expressions in the letter, bearing on this point, are those in which he says he had heard of the division of the effects. "I do think," he says, "I should be entitled to the household effects which Mary (his wife) had when she died. As for the bed and furniture, she made them with her own hands; and as for the other furniture, her mother made it and gave it to her. I do not wish them to use myself, nor would I have it. I want your children to have it, &c." He fur-

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ther says: "I have *been advised to commence suit for an equal share as one of the legatees; I do not intend to do so. If I had everything, and could settle it on your children, without its coming into my hands, I would do so. I am hard run, and very far from being independent, though I do not and never did wish to live on my dear wife's property, though I believe it would have

been her wish for me to have what was hers; though in my present situation I do not desire it, only in the way I have stated. Please send me a copy of the will and keep this a secret, as you will be benefited if anything comes."

Farther on, he says: "As regards D. Fant, (who had married one of the parties entitled,) I do not want him to have one cent which should have been poor Mary's. He was the man who refused to help her at his own table, after being invited by her sister. He is unworthy to be called man. My blood boils whenever I think of it now; to think he, a brute, should exult on what should have been hers."

This letter the defendants rely on as a release from the plaintiff to the defendants, and D. Fant among them. It is evidently written in ignorance of the plaintiff's rights, in a spirit of discontent of what he believes would be the inevitable result, and manifests anything but a disposition to concede anything which he believed to be his, and which the law would give him. This is what the defendants call a release!

If he had said to the defendants in so many words, that he would release to them all his interest and share, it would not have bound him. It would have been without consideration, and wanting in an essential form.

The plaintiff was and is entitled to the one-half part of the share of his wife in the said estate held by Nancy McJunkin for life, with remainder to her children in fee. Nothing has happened which can have the effect of divesting him of his rights. The children of Mrs. McJunkin were as follows: 1, Emeline, wife of William Wilson; 2, Francis; 3, Amanda; 4, Sarah; 5, Harriet; 6, W. S. Mc-

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Junkin; 7, Robert D. *McJunkin; and 8, Mary Wilson, deceased, the plaintiff's wife. These were the remaindermen with vested estates in common, being eight in number. The share of the plaintiff's deceased wife was then one-eighth of the whole. The plaintiff, as her husband and distributee, is entitled to the one-half part of her estate. The other half is distributable between her father, now deceased, and her brothers and sisters. The plaintiff's share is a sixteenth of the whole estate. It is so ordered and decreed. I do not know whether the proceeds of the sale of the land have been collected and paid over. If they have not, it is ordered and decreed that the commissioner do pay to the plaintiff the one-sixteenth part of the net proceeds of the sale of the said land, and of the interest that has accrued thereon. If the proceeds of the sale of the land have been collected and paid over to the other remaindermen, it is ordered and decreed that the commissioner state an account, with each of the other remaindermen, for the purpose of ascertaining

how much each party must contribute to the plaintiff to make his share equal, and that each party pay to the plaintiff his or her proportionate share, and the interest thereon, from the time he received it, to make the plaintiff's share equal.

It is further ordered and decreed, that a writ of partition do issue for the purpose of re-dividing the personal estate, so held by Nancy McJunkin for life, with remainder to her children. In such division, it is ordered that the commissioners assign and allot to the plaintiff, Thomas Wilson, one-sixteenth part of the whole, and that as to the rest of the said personal estate, and the other remaindermen, they, the commissioners, conform as near as may be practicable with the former division.

It is further ordered and decreed, that the commissioner in equity state an account of profits of the negroes, &c., which have been in possession of the defendants, and that the plaintiff do receive the one-sixteenth part of the said profits from the time that the said

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defendants have been in possession of the said personal estate, or in the enjoyment of the profits thereof.

It is further ordered and decreed, that each party, plaintiff and defendant, pay an equal part of the costs of these proceedings.

The defendants appealed on the grounds:

1. Because his Honor erred, it is respectfully submitted, in holding that Mary Wilson, wife of Thomas Wilson, took a vested interest under the will of Thomas Sartor, transmissible to her representatives.

2. Because his Honor erred in holding that Thomas Wilson is entitled to any portion of the estate distributable among the children of Nancy McJunkin.

3. Because, if plaintiff was entitled to any portion of said estate, he has released the same, or, at least, his acts and declarations raise that implication.

4. Because the decree is in other respects erroneous.

Arthur, for appellants, cited: *Myers v. Myers*, 2 McC. Ch., 257; *Cole v. Crayon*, 2 Hill, Ch., 311; *Connor v. Johnson*, 2 Hill Ch., 41; *Campbell v. Wiggins*, Rice, Eq., 10; *Swinton v. Legare*, 2 McC. Ch., 440; *Stewart v. Sheffield*, 13 East, 527; *Lomax v. Glover*, 1 Rich. Eq., 141; 1 Strob. Eq., 383; *Matheson v. Hall*, 3 Swans., 339.

Gadberry, contra.

PER CURIAM. We concur in Chancellor Dargan's decree, and for the reasons contained in it, it is affirmed.

O'NEALL, C. J., and JOHNSTONE and WARDLAW, JJ., concurring.

Decree affirmed.

11 Rich. Eq. *536

*FRANKLIN A. MILES v. FINKLEA G. WISE, Adm'r. and Others.
(Columbia. May Term, 1860.)

[Injunction \hookrightarrow 26.]

Where one has acquired a good equitable title to slaves through the distributees—there being no creditors—of an intestate, the former owner of the slaves, upon whose estate no administration had then been granted, equity will restrain one who afterwards takes out letters of administration upon the estate of the intestate, from prosecuting an action of trover for the conversion of the slaves, against such equitable owner.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 37; Dec. Dig. \hookrightarrow 26.]

Before Dunkin, Ch., at Marion, February, 1860.

Franklin A. Miles filed his bill on the 13th day of February, 1860, stating, among other things, that on the 3d day of February, 1849, he purchased from Joseph Bird, Hugh G. Bird, John Blackman, Jr., and wife Ann, Mary Owens, Wilson Herrin and wife Maria, a negro woman named Hannah and her child Dick—that they represented themselves as the rightful owners of said slaves, under the will of their mother, Elizabeth Bird; that until some time in the year 1858, he retained the undisputed possession of said negroes; that in 1857 the defendant, Finklea G. Wise, obtained letters of administration upon the estate of Alafair Bird, who departed this life intestate, unmarried, without issue, and free from debt, about the year 1841 or '42; that said Wise, administrator, shortly after commenced an action of trover in the Court of Common Pleas for Marion district, against complainant, for the conversion of said slaves, and the other children of Hannah, born since the purchase by complainant, which action is pending and pressed for trial; that he has learned upon inquiry that the slave Hannah was the property of Alafair Bird, she having acquired it under the will of her father, Arthur Bird, who died in 1835;

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that Alafair Bird was *unhealthy and partially idiotic, and her brothers and sisters made an arrangement by which she was to be supported, living with her mother, Elizabeth Bird; that with this view, Joseph Bird, Hugh G. Bird, Anna Bird, and Mary Ann Bird conveyed all their interest in remainder in two other slaves bequeathed to the said Alafair Bird, by the will of her father, to Edmund Herrin and Wilson Herrin, who had married sisters of said Alafair, in consideration of their contributing a certain sum for the support of Alafair, which sum was to be paid to Elizabeth Bird, the mother; and to Elizabeth Bird, the mother, the same parties conveyed the slave Hannah and her increase, after the death of Alafair.

The bill then charged that Elizabeth Bird, the mother, Hugh G. Bird, a brother, and Mary Ann and Charlotte, sisters, were the

only heirs and distributees of Alafair Bird; that the other children of Arthur Bird and Elizabeth, to wit, Joseph, Maria, Peter, (the father of Ansy, wife of Finklea G. Wise, and Peter, her brother,) and another daughter, afterwards intermarried with Phillip Owens, were illegitimate, having been born previous to the marriage of their parents; that consequently, as assignee of all those rightly interested in the estate of Alafair Bird, the complainant has an indisputable title to the slaves, Hannah and her children, but that this title he cannot so well set up, under the strict rules of the common law, in his defence to the action of trover; that the administration granted to the defendant Wise is unnecessary, except for the purposes of partition; that a recovery by the said administrator, in the action of trover, would render it necessary for the complainant to file his bill for partition, and to be substituted for his assignors in said partition; and that the course pursued by the defendant Wise, tends unnecessarily to harass and disturb the possession of the complainant, and to multiply suits.

The bill prayed primarily for an injunction, restraining the action of trover.

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*The motion for an injunction was made at Marion, Monday, February 20, 1860.

On the same day the defendant, Wise, filed his answer, admitting the purchase, by the complainant, of the slaves Hannah and Dick, from the persons in that behalf in the bill named, but denying all knowledge of the consideration paid, or of any representations made by the vendors at the time; admitting, further, the apparent title acquired by said vendors, under the will of Elizabeth Bird, and the long continued adverse possession of the complainant; admitting, further the grant of administration to the defendant upon the estate of Alafair Bird, made on the 23d November, 1857; the death of said Alafair, about the time stated in the bill, unmarried and without issue, but not, so far as known to defendant, free from debt; and the commencement and pendency of the action of trover against the complainant. The answer further admitted the bequests to the intestate, by her father, Arthur Bird, of the absolute estate in the negroes Hannah and Dick; the partial idiocy of Alafair Bird, and the arrangement substantially stated in the bill, as made by the brothers and sisters of the intestate, disposing of certain property belonging to her, and including the negroes Hannah and Dick, but denies that this arrangement was made with her consent, and charges the motive inducing such arrangement to have been self-interest on the part of the parties thereto. The answer denied the unlawful cohabitation, before actual marriage, of Arthur Bird and Elizabeth his wife, or the illegitimacy of any of their children,

and claimed that Ansy Wise, (wife of the defendant,) and Peter Bird, her brother, (representing their father, Peter Bird, a brother of Alafair,) were lawful heirs and distributees of Alafair. Ansy Wise was stated to have been twenty-five years of age, and Peter Bird twenty-two, at the date of the grant of administration.

The answer submitted, that the title to the slaves in controversy being in the defendant, as administrator, the Court would, if it entertained jurisdiction, decree a specific delivery

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*to him of the said slaves, but submitted, further, that, as the matters and things stated and complained of were all determinable at law, the complainant was not entitled to relief in the Court of Equity.

His Honor made the following order, to wit:

Upon hearing the bill and affidavits, and the answer of Finklea G. Wise, the defendant, it is, on motion of Harlee & Graham, complainant's solicitors, ordered, that the defendant, Finklea G. Wise, administrator of Alafair Bird, be enjoined from further prosecuting his action of trover against the plaintiff, at law, for the recovery of the slaves Hannah and her children, mentioned in the pleadings, until the further order of this Court, and that a writ of injunction do issue accordingly.

The defendant, Finklea G. Wise, administrator, appealed on the ground:

That the Court of Equity has no jurisdiction in the premises.

Inglis, for appellant, cited *Brown v. Dickinson*, 10 Rich. Eq., 408.

Dargan, contra, cited *Riley Ch.*, 33; *Hughson v. Wallace*, 1 Rich., 1; *Marsh v. Nail*, Rich. Eq. Cas., 115.

The opinion of the Court was delivered by

O'NEALL, C. J. In this case I concur in the decree of the Chancellor.

The single question presented by the grounds of appeal is, "that the Court of Equity has no jurisdiction in the premises."

The Court of Equity has jurisdiction to prevent the assertion of a legal right, against a plain equitable right. This principle is as old as the Court, and has been asserted and carried out in innumerable cases.

Here the party complainant is in possession, under a purchase from the alleged distributees of the deceased, nine years before the administration of the defendant. This

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in*testate died seventeen years before the grant of administration. She was in her lifetime unhealthy and idiotic, and at her death was free from debt, as alleged in the bill. Taking this case, it is plain that the complainant has made out a case entitling him to the relief of the Court of Equity. The case

of *Marsh and wife v. Nail and others*, Rich. Eq. Cas., 115, is a conclusive authority in his favor.

But it is supposed that *Brown v. Dickinson*, 10 Rich. Eq., 408, stands in his way. I do not think so. In that case the complainant's right depended upon a deed which was supposed to constitute a separate estate in Mrs. Sessions, his grantor. The bill sought a discovery of that which he did not obtain. That closed the Court of Equity against him; and the case was properly left for the Law Court. There is no such difficulty in this case.

The defendant's answer sets up no debts; after a lapse of seventeen years, and from the condition of the intestate, the presumption is she owed none. The only contest set up is as to the legitimacy of two of the children of Arthur Bird and Elizabeth, his wife, (sister and brother of the intestate.) This question cannot be tried in the action at law; it must be tried in the Court of Equity, where the case is brought by the complainant. There can be no propriety, under these circumstances, of allowing the defendant to litigate at law, and disturb the complainant's possession. The circuit decree of Chancellor Dunkin is affirmed.

JOHNSTONE and WARDLAW, JJ., concurred.

Decree affirmed.

11 Rich. Eq. *541

*CHAS. B. FARMER, Adm'r, v. A. M. D. SPELL and Others.

(Columbia. May Term, 1860.)

[*Conversion* §15; *Executors and Administrators* §272.]

Testator directed "first, that all my just debts be paid and discharged; and, secondly, that the remainder of my property be disposed of as follows." He then devised all his "lands on the Round O, known as the Ash Hill plantation," to his son, "to be valued by three disinterested persons, and to be received by him at said valuation, as so much of his share of my estate"—directed that his daughter should "receive in negroes, the amount of the valuation of the land given to my son;" and, after providing for other children to be born, should there be any, bequeathed the remainder of his personal property to his wife:—*Held*, that there was no equitable conversion of the lands into personalty, and that as between the devisee and legatees the personal estate should be exhausted in payment of debts before resort could be had to the real estate devised.

[*Ed. Note*.—Cited in *Laurens v. Read*, 14 Rich. Eq. 268; *McFadden v. Hefley*, 28 S. C. 324, 5 S. E. 812, 13 Am. St. Rep. 675; *Clarke v. Clarke*, 46 S. C. 241, 24 S. E. 202, 57 Am. St. Rep. 675.

For other cases, see *Conversion*, Cent. Dig. § 28; Dec. Dig. §15; *Executors and Administrators*, Cent. Dig. §§ 1052, 1057, 1059, 1065, 1068; Dec. Dig. §272; *Wills*, Cent. Dig. § 2151.]

Before Dunkin, Ch., at Colleton, February, 1859.

Paul W. Spell, being seized and possessed

of a plantation known as his Ash Hill plantation, and of some slaves and other personal estate, died in March, 1857, leaving a last will and testament, as follows:

"In the name of God, Amen. I, Paul W. Spell, of the aforesaid State and district, being of sound mind and memory, and considering the uncertainty of this frail and transitory life, do therefore make, ordain, publish and declare this to be my last Will and Testament, viz.: First, that all my just debts be paid and discharged; and, secondly, that the remainder of my property be disposed of as follows, viz.: First—I will and bequeath to my son, Eldred Spell, all my lands on the Round O, known as the Ash Hill plantation, to be delivered to him whenever he shall become of age, to be valued by three disinterested persons, and to be received by him at said valuation, as so much of his share of

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my estate, *to have and to hold the same forever. Secondly—It is my will that my daughter, Sarah Harriet, shall receive in negroes the amount of the valuation of the land given to my son, Eldred, to be delivered to her when she arrives at the age of twenty-one, to have and to hold the same forever. Third—Should my wife, Amanda M. D. Spell, have another child or children by me, then the said child or children to receive in negroes, an amount equal, each, to my daughter, Sarah Harriet, to receive the same at the age of twenty-one, to have and to hold the same forever. Fourth—It is my will that my wife, Amanda M. D. Spell, should have the remainder of my personal property her natural life, and after her death to be equally divided among my children, share and share alike, the child or children of a deceased child to receive his or her portion so dying. Fifth—It is my will, in case either of my children die without issue of body, that the share of said child revert back to my surviving children. And lastly—I nominate and appoint my brother, Henry McF. Spell, executor to this, my last Will and Testament, and hereby revoking all others by me made, declare this to be my last Will and Testament, executed this, the 20th January, in the year of our Lord one thousand eight hundred and fifty-seven."

The executor named in the will refused to qualify, and the complainant became administrator with the will annexed.

The debts proved to be very considerable, and this bill was filed against the devisee and legatees and some of the creditors for a sale of the estate, and praying that the assets be administered in this Court. The principal question made was, whether as between the devisee and legatees the real and personal estate should contribute equally in payment of the debts or whether the personal estate should be exhausted before resort could be had to the realty.

Dunkin, Ch. The pleadings present the

facts upon which the judgment of the Court is sought.

By the will of the testator, it was clearly

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his intention to *place his son and daughter upon an equal footing, in the distribution of his estate. To carry this purpose into effect, his Round O plantation is directed to be valued by three disinterested persons, and to be received by his son at that valuation, as so much of his share of his (testator's) estate: And the daughter is directed to receive in negroes, the amount of the valuation of the land given to the son. The same principle is applicable, as was declared in *Perry v. Logan*, 5 Rich. Eq., 202. As between these legatees it was an equitable conversion by the will itself, of the land into personalty, as much so as if testator had directed the plantation to be sold, in order to ascertain the value, and fix the equality between them.

It is suggested in the pleadings, and seemed to be conceded at the hearing, that the entire personalty would be insufficient to pay the debts of the testator, in which event a sale of the real and personal estate would probably be necessary or expedient. But the Court cannot assume the insufficiency without a report from commissioner or special referee, to whom an enquiry was directed by the order, 23 February, 1859. It may be proper to enlarge that order by directing the commissioner to report the probable value of the personal estate of the testator, and of what the same consists; and it is accordingly so ordered and decreed; and that he have leave also to report upon the necessity or expediency of a sale of all or any part of the testator's estate. Upon the filing of said report, parties may be at liberty to apply at chambers for such order as may be necessary.

Finally, it is ordered and decreed, that the plaintiff, as administrator with the will annexed, account before the special referee for his actings in relation to said estate, and that the special referee report thereon at the next sitting of this Court.

Eldred Spell, defendant, appealed from so

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much of the *decree as decided that there was an equitable conversion of the lands devised to him, into personalty:

1. Because the devise to him of the "lands on the Round O, known as the Ash Hill plantation," was a devise of the land itself as such; and if so, there was no equitable conversion of it into personalty.

2. Because, if it was the intention of testator to place "his son and daughter upon an equal footing in the distribution of his estate," it is equally clear that it was his intention that the "Ash Hill plantation" itself was to go into the possession of, and be enjoyed by, this appellant.

Tracy, for appellant.

1. The constructive conversion of property, by the Court of Equity, is effected by apply-

ing the principle: that which ought to be done, will be considered as done. 1 Jarman on Wills, 523; Fletcher v. Ashburner, 1 Bro. Ch. Ca., 497. And realty can be converted into personalty, only, where a sale has been directed. 1 Rep. Leg., 503; 1 Sanders, U. & T., 300, marg.

It is evident, that only where the character of the estate is directed to be altered, and this has not been done, that occasion can arise for the application, in this connection, of the principle above mentioned. And, in every case that can be found, of the equitable conversion of realty into personalty, a sale had been ordered, and the proceeds were what was given.

In our own cases, Postell v. Postell, 1 De S., 173; Mathis v. Griffin, 8 Rich. Eq., 79; Wilkins v. Taylor, 8 Rich. Eq., 291; North v. Valk, Dudley Eq., 212; Perry v. Logan, 5 Rich. Eq., 202.

In the English cases, Mallabar v. Mallabar, Ca. Temp. Talb., 79; Ogle v. Cook (cited in North v. Valk); Spink v. Lewis, 3 Bro. Ch. Ca., 355; Digby v. Legard, in note to Cruise v. Barly, 3 P. Wms., 22; Wright v. Wright,

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16 Ves. *Jr., 188; Durow v. Motteaux, 1 Ves., Sr., 320; Chitty v. Parker, 2 Ves., Jr., 271; Fletcher v. Ashburner, 1 Bro. Ch. Ca., 497; Law Lib., vol. xl., 546; Ackroyd v. Smithson, 1 Bro. Ch. Ca., 503; Law Lib., vol. xl., 571; Embleyn v. Freeman (cited in Fletcher v. Ashburner); Flanagan v. Flanagan, Ib.; Collins v. Wakeman, 2 Ves., Jr., 683. So in the leading American cases, Craig v. Leslie, and the dozens of cases, English and American, cited in Law Lib., vol. xl., in discussing Fletcher v. Ashburner, and Ackroyd v. Smithson. So in Gott v. Cook, 7 Paige Rep., 521, and in all the other cases that can be found.

Thus Mr. Roper's position, that a direction to sell is essential to a conversion, is supported by the fact that no case can be found of the conversion of realty into personalty, in which a sale had not been ordered.

And no sale was ordered in this case.

2. But says the learned Chancellor: "The same principle is applicable as was declared in Perry v. Logan." Apply the rule laid down in this case, and it will not operate against appellant.

The Chancellor, in delivering the opinion of the Court of Appeals, says:

"Whenever it is apparent, from the words of the will, that the testator meant that his real estate, as such, should not pass into the possession of the objects of his testamentary bounty, but that his real estate should be converted into money, and as money, that it should come to those for whom he designs the benefaction, in equity, it will be regarded as a bequest of personal property. Under such circumstances, it will be treated in all respects as if the conversion had been made by the testator in his lifetime."

This, by no means, indicates that the con-

version is to be effected otherwise than by a sale. But applying the rule:

Did testator, in this case, mean "that his real estate, as such, should not pass into the possession of the object of his testamentary bounty?" It is the land he gives, not the

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proceeds of it. "I will and bequeath to my son, Eldred Spell, all my lands on the Round O, known, &c., to be delivered to him whenever he shall come of age, to be valued by three disinterested persons and to be received by him at said valuation, as so much of his share of my estate, &c." The land is given; the land is to be delivered; the land is to be received.

What indicates that it is not to be received as land? It is supposed its being directed to be valued, and to be received "as so much of his (the son's) share of my (testator's) estate." But the valuation was only for the purpose of ascertaining what value in negroes the daughter should receive. And though to be received as so much of testator's estate, it was not to be received as so much money of testator's estate, but as land worth so much money.

When land is valued by commissioners in partition, and allotted to an heir, it is not allotted to him as so much money of estate of him through whom he claims, but as land worth so much money. The valuation in partition and in this case are, in principle and effect, identical. Is the land received by the heir personal property?

3. Besides, "Courts of Equity, in general, will not interfere to change the quality of the property, as the testator has left it, unless there is some clear act, or intention, by which he has unequivocally fixed upon it throughout a definite character, either as money or as land," "and to establish a conversion, the will must direct it," out and out, "for all purposes, not merely those of the devisees." Jarman on Wills, vol. i., 523, note 1, and numerous authorities there cited; Spence Eq. Ju. Ct. Ch., vol. ii., 256. Even a direction that testator wished the land to be sold, does not necessarily effect a conversion. Cook v. Dangerfield, 2 Atk., 567.

4. Suppose there was a conversion. It was not "out and out," but, as circuit decree says, for a specific purpose only, "to ascertain the value and fix the equality between them."

Where a conversion is ordered for a spe-

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cific purpose, and *the purpose fails, there is no conversion. Ackroyd v. Smithson, in which Sir William Scott changed the mind of Lord Thurlow, and reviewed all the authorities. Fonb. Eq., vol. 2, 118, n. a. It appears from the facts, that there are no negroes left after paying debts, to give. The specific purpose for the valuation or conversion then has failed and so the conversion fails. Croft v. Slee, 4 Ves., 64. A conversion, for the sake of convenience, fails, if it should

happen that the conversion is not necessary. *Spence's Eq. Ju. Ct. Ch.*, 262, marg. Next of kin cannot call for a conversion, merely that they may take proceeds as personal estate. When the purpose fails, said Lord Eldon, the intention fails, and the Court regards testator as not having directed the conversion. *Ripley v. Waterworth*, 7 Ves., 435; *Hill v. Cock*, 1 Ves. and Beames; *Spence Eq. Ju. Ct. Ch.*, 234, marg.; *Chitty v. Parker*, 2 Ves., 271, marg.

5. The realty "cannot be appropriated towards the payment of the debts," "until all the personalty is exhausted." Because every devise of land, (when this will was made,) or of the value of land, is specific. *Forrester v. Leigh, Ambler*, 173; *Warley v. Warley*, Bail. Eq., 409; *Rop. Leg.*, vol. 1, 200, marg. The bequest to the daughter is not specific. *Wigfall v. Wigfall* 3 DeS., 47; 1 *Rop. Leg.*, 190; *Godard v. Wagner*, 2 Strob. Eq., 1; *Pell v. Ball, Spear Eq.*, 84; *Davis v. Cain*, 1 *Iredell Eq.*, 304.

Carn, contra.

The opinion of the Court was delivered by

WARDLAW, J. Courts of Equity, in promotion of right, sometimes consider as done that which should have been done.' On this principle, land directed by a testator to be sold and turned into money, is considered as personalty before an actual sale. *Fletcher v. Ashburner*, 1 Br. C. C., 497; *W. and T. L. C.*, 546; *North v. Valk, Dud. Eq.*, 212. Equitable conversion of realty into personalty is effected in strictness only where a sale of the land

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is ordered, and dis*position of the proceeds is made; but if the intention to dispose of the subject as personalty can be ascertained from the face of the will, it may not be indispensable that a sale should be explicitly directed as a means of conversion. Chancellor Dargan says, with sufficient precision, in *Perry v. Logan*, 5 Rich., 202, "whenever it is apparent, from the words of the will that the testator meant that his real estate, in that form, should not pass into the possession of the objects of his testamentary bounty, but should be converted into money, and as money, come to those for whom he designs the benefaction, this will be considered in equity as a bequest of personalty. Under such circumstances, it will be treated, in all respects, as if the conversion had been made by the testator in his lifetime." So, too, cases might be within the principle of conversion as to some incidents, where no alteration of the form of the estate was contemplated. Thus, if a testator should give his land to his son, and his slaves to his daughter, and express his intention that the land and slaves should contribute to the payment of his debts, ratably to their respective values, his will would be the law between his two children, and the devisee could claim no exoneration from liability for debts. The same end might

be effected by any form of words which would sufficiently exhibit testator's intention to put the legatees on terms of complete equality, but no equivocal expression of intention can supersede the rules of law in this matter, and much less can the rules be deflected in operation by the seeming hardship of their result as to a particular legatee.

The law of this State as to the relative liability for the debts of a testator of his real and personal estate, is nearly identical with that of England, where a testator there has charged his whole estate with his debts. The statute of Geo. II, c. 7, sec. 4, 2 Stat., 571, abolishes here the distinction between real and personal estates in the payment of debts, so far as the rights of creditors are concerned, but as between a devisee of realty and a

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legatee of personalty still leaves the *personalty as the primary fund for the payment of debts. It is settled by the elaborate judgment in *Hull v. Hull*, 3 Rich. Eq., 65, as to estate of which a testator was seized and possessed at the time of making his will, and as between the objects of his bounty, that a specific legacy of personalty must be exhausted in payment of debts before resort can be had to land devised, where no different rule is prescribed in the will. Every devise of land is specific, (*Broom v. Monck*, 10 Ves., 597, *Warley v. Warley*, Bail. Eq. 397,) and without the aid of this principle the devise in the present instance is unquestionably specific, for it is separated and distinguished from all other lands by the terms of description: "All my lands on the Round O., known as the Ash-hill plantation." On the other hand, the legacy to Sarah Harriet, is not specific, (although she would not be helped if it were otherwise,) being merely the amount of the value of the land, to be paid in negroes, without precise designation of the sum of money to which she should be entitled, or the number, names, ages or sex of the negroes to be used towards satisfaction of the legacy. Everything about the legacy is indefinite, and undistinguished from subjects of like kind.

The testator directs, "first, that all my (his) just debts be paid and discharged, and secondly, that the remainder of my (his) property be disposed of as follows;" and then proceeds to make his devise and bequests. And it is argued that this charge of his debts on his whole estate serves to manifest his purpose to put his real and personal property in the same category, as a common and equal fund for satisfaction of his liabilities. It is naked conjecture, not founded on any fair construction of the terms and provisions of the will, that the intention of testator would be defeated by enforcing the rule of law as to the prior liability for his debts of his slaves and money. There is no intimation in the will that the testator was ignorant or mistaken as to the legal effect of his dispositions, nor of his intent or wish that there should be

any departure from the usual course in the

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administration of his *assets. Every one is presumed to know the law; and this testator must be presumed to know that if he forbore to make a different direction, as he had a plain right to make or forbear to make, his personality must be applied to his debts before his lands could be used for this end. If, in fact, he knew the law, then he designed the consequences of his dispositions; and we are not authorized to conjecture, against the legal presumption of skill, and in the lack of any contrary manifestation from the context, that there has been disappointment of his purpose.

The direction of the testator that his debts be first paid, and that his devise and bequests shall operate on the rest of his estate not consumed in such payment, is merely the superfluous expression of the inevitable conclusion or implication of the law. It is mere surplusage, not modifying to any extent the injunction of law. It is simply announcing in words the desire of the testator to fulfill his lawful duty to be just before he undertakes to be generous. In our last case on this point, *Lloyd v. Lloyd*, 10 Rich. Eq. 469, the testator directed "that all his just and lawful debts, and all lawful charges against his estate be fully paid," and then devised and bequeathed "all the rest and residue of his property, real and personal"—the words in *Spell's* will are not quite so strong—and it was held that the charge of debts was superfluous, and inoperative to disturb the prior liability of personality bequeathed generally, even to real estate acquired after making the will, and left to descend. *Lloyd v. Lloyd* was decided on the authority of *Henry v. Graham*, 9 Rich. Eq., 100 where the words of the will, in this respect, were, "I direct all my just debts to be paid." The same view was taken in *Brown v. James*, 3 Sirob. Eq., 24, as to the direction that just debts be paid. In that case the doctrine on this point is well put interrogatively. Does there appear, from the whole testamentary disposition taken together, an intention on the part of testator, so expressed as to convince a judicial mind, that it was meant not merely to charge the estate

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secondarily *liable, but so to charge it as to exempt the estate primarily liable in whole or in part? No such intention to exonerate the personality can be detected in this will. The land specifically devised to the son, and to be delivered to him whenever he should become of age, is directed to be valued; but that valuation is ordered, without any expression of desire that the land should be changed in character, or that it should be taken subject to any abnormal liability for debts; and, indeed, valuation is directed merely to ascertain the amount of the bequest to the daughter, without changing its rank. It is very probable that the testator made the mistake, so common with men in debt, of over-estimat-

ing the net value of his estate, for we find him giving to possible children legacies equal in value to that of the daughter, and providing that his wife should enjoy for life "the remainder," that is, residue of his personal property; but we cannot be sure, from his words, that if he had been premeditated fully of the state of his affairs that would exist after his death, and instructed actually, as is always presumed in law, of the order of liability by law of the several portions of his estate for satisfaction of his debts, he would have changed his dispositions in any respect. We are not at liberty to conjecture, on any fanciful notions of equality and equity, that he did not intend to do that which the laws of many countries (thus exhibiting a very common sentiment of mankind) would have required him to do, namely, give superiority to his first-born of the male gender in relation to that kind of estate more immediately connected with duty to the State and the pride and aggrandizement of families. Suppose the land had been taken from the son by title paramount, it would hardly be pretended that the son could obtain contribution from his sister, on this notion of intended equality. No sentiment can be more general among men than the desire to provide for the comfortable sustenance of their surviving and bereaved consorts in life; yet we could not conclude, in deference to this sentiment, that because the testator gave an anticipated remainder of

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personalty to his *wife and left her without other provision, she has a valid claim on the other legatees for contribution from their legacies for her maintenance. Her dower is independent of the will, but in the event she takes nothing by gift of the testator. It would be utterly unsafe, nay, despotic, to determine judicially that a testator intended whatever the Judge may think he ought to intend. Then the fact that this testator, after a charge for debts, bestowed on his legatees the remainder or residue of his estate, is supposed to demonstrate his intention of equality among them as to burdens and benefits. Similar expressions were adjudged in *Lloyd v. Lloyd*, to have no such effect, and correctly so adjudged. The testator here chose to put the implication of law in the form of an express direction; yet it cannot be inferred logically that he intended anything more than the implication of law. He used the term remainder, because he knew that his testamentary gifts could have no operation on his estate, except as to the remainder left after the payment of his debts; but this does not manifest any further independent and disconnected intention on his part to derange the rank of the things given in paying debts. With all proper respect for the opinions of others, it seems to me leaping in the dark to a conclusion, to affirm that this testator meant his land devised to pay his debts before his personality was exhausted.

The decretal orders of the Chancellor are

not appealed from, and seem to be unobjectionable. We adjudge that the doctrine of the circuit decree that the land is liable for the debts of testator before the personalty be exhausted, whether this be founded on the principle of equitable conversion or any provision in the will, cannot be maintained, and must be reversed.

And it is ordered that the decree be reformed accordingly.

JOHNSTONE, J., concurred.

O'NEALL, C. J., dissenting. I concur in Chancellor Dunkin's decree.

It is plain to my mind that the testator intended perfect equality among his children.

His will plainly contemplates the payment of his debts out of the whole of his estate, real as well as personal. It directs the payment of all his debts, and provides that "the remainder of my property be disposed of as follows;" the devise and bequest follow this provision.

This, it seems to me, was equivalent to a devise, charging the whole of his estate with the payment of his debts, in the first instance, and then directing that the devise and bequest should have effect.

Saddling the debts upon the personal estate first, has the effect to leave the daughter nearly penniless, and to confer upon the son a valuable real estate.

Such injustice ought never to be allowed unless some rule of law forces it upon the Court. None such exists. I am, therefore, for affirming the Chancellor's decree.

Decree reformed.

11 Rich. Eq. *554

*B. F. PEGUES, Executor, v. C. M. PEGUES and Others.

(Columbia. May Term, 1860.)

[Wills \hookrightarrow 552.]

The Act of 1789, § 9, 5 Stat., 107, was intended to provide for the case of a lapse by the death of a child, after the execution of the will of the father or mother. The Act does not apply where the child was dead when the will was executed.

[Ed. Note.—Cited in *Key v. Weathersbee*, 43 S. C. 424, 21 S. E. 324, 49 Am. St. Rep. 846; *Logan v. Brunson*, 56 S. C. 12, 33 S. E. 737; *Suber v. Nash*, 84 S. C. 15, 65 S. E. 947.

For other cases, see *Wills*, Cent. Dig. § 1195; Dec. Dig. \hookrightarrow 552.]

Before Dunkin, Ch., at Marlborough, February, 1860.

William Pegues, Sr., died in 1857, leaving of force a last will and testament, made and executed on the 3d May, 1852.

By the second clause of his will, he bequeathed as follows, viz.: "I give and bequeath to my son, Malachi Pegues, the sum of \$1,500;" and the twelfth clause was in

these words, viz.: "All the rest and residue of my estate, not hereinbefore devised and bequeathed, I will and bequeath to all my children, (except my son, Claudius Pegues,) and my grand-son, Joseph Pegues, the son of said Claudius Pegues, to be equally divided amongst them, share and share alike. The share given to my grand-son, Joseph, is given to him, instead of his father, in compliance with his father's request."

Malachi Pegues, the son referred to by the testator, in the second clause of his will, was already dead at the time of the execution of the will; he having died in 1849.

The children of Malachi Pegues claimed the pecuniary legacy of \$1,500, under the second clause of their grandfather's will, and also the share of the residuum to which their father would have been entitled, had he survived the testator. This claim was resisted on behalf of infant children of the testator, and the executor filed this bill for instructions.

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*The single question made by the pleadings, and submitted to the Chancellor on circuit, was as to the proper construction of A. A. 1789, sec. 9, (5 Stat., 107,) which is in the following words, viz.:

"And be it further enacted, by the authority aforesaid, That if any child should die in the lifetime of the father or mother, leaving issue, any legacy given in the last will of such father or mother shall go to such issue, unless such deceased child was equally portioned with the other children by the father or mother when living."

Dunkin, Ch. By the ancient Act of distributions, A. A. 1712, (2 Stat., 523,) it was provided, among other things, that the surplus of the intestate's estate should be distributed one-third to the widow, and the residue, in equal portions, among the children, and such persons as legally represent such children, "in case any of the said children be then dead," unless the child has been advanced. In the same manner, it is provided by the A. A. 1791, (5 Stat., 162,) that if the intestate shall leave a widow, and one or more children, the widow shall take one-third, and the remainder be divided between the children, (if more than one,) the issue of a deceased child taking among them the share of their parent. A like beneficent spirit is manifested by the Act of 1789, in securing to the issue of the child of the testator, the bounty which was intended for the parent. Any legacy given in the last will of a father or mother to a child, shall go to the issue of such child, if the child should die in the lifetime of the parent; the Act is remedial. The object is to secure to the offspring what was given to the ancestors; but which gift could not take effect by reason of the death of the ancestor. All the legislative proceedings look to what is to be done on the death of the testator or

intestate; and all mean what is expressly declared by the Act of 1712, that "in case any of the children be then dead," the issue of such deceased child shall take, among them,

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the share of the estate *to which the parent would have been entitled, if he had survived the testator.

The Court is of opinion that the issue of Malachi Pegues, deceased, are entitled to represent their parent, and to take the legacies given to him under the second, and also under the residuary clause of the testator's will, and it is so declared.

It is ordered and decreed, that it be referred to the commissioner to take an account of the transactions of the plaintiff, and that he report thereon, costs to be paid out of the estate of the testator; and parties to be at liberty to apply, at the foot of this decree, for any further order, which may be necessary for carrying the same in effect.

The defendants, Catherine E. Pegues and Emma W. Pegues, appealed on the grounds:

1. That the death of Malachi Pegues occurring before the execution of the will, the legacy of \$1,500 in the second clause of the said will is not saved to his children by the Act of 1789.

2. The terms of the Act of 1789, sec. 9, do not include the case of a legacy void ab initio.

3. The children of Malachi Pegues have failed to bring themselves within the terms of the Act, by showing that their father was not "equally portioned with the other children," by his father, "when living."

4. Even if the pecuniary legacy of \$1,500 is saved to the children of Malachi Pegues by the operation of the Act of 1789, the benefits of that Act cannot be extended so as to entitle them to a share in the residuum, under the twelfth clause of their grand-father's will.

Inglis, for appellants.

Townsend, contra.

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*The opinion of the Court was delivered by

JOHNSTONE, Ch. I think the construction which has been generally put upon the statute, has been that it was intended to prevent the consequences of lapse arising from the death of the legatee after the execution of the will.

The language of the statute, although very loose, seems to bear evidence of such an intention. It contemplates the case of a legacy given:—that is, a provision made for the child of such a character as would be valid if the will should come forthwith into oper-

ation. Such a legacy being given, the statute goes on to provide, that if the child (thus provided for) should die, then the legacy given to him shall go to his issue—unless, &c. This language seems to be intended to describe a case (not uncommon), where a legatee should happen to die, after the execution of a will in his favor, by which casually his personal enjoyment of the intended bounty would be frustrated. I can hardly suppose the legislature contemplated the case of a man's giving a legacy to a dead child—or that it intended to remedy the effect of such an absurdity.

It may be very well conceived that it intended to make good a legacy which had become void, without going the length of supposing it intended to give effect to one which was void ab initio.

There is room for another remark upon the statute. It provides that the legacy to the child shall be made good to the child's issue, "unless such deceased child was equally portioned with the other children, by the father or mother" (who made the will) "when living." Advancements are, by law, to be taken into consideration only in cases of intestacy. A testator may make what provision he pleases among his children,—though it result from gifts, previously made by him aliunde the will, that he has dealt unequally by them. The legatee in this case would have taken the whole of his legacies, mentioned in the will, had he been alive when the will was made, and had he surviv-

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ed his father. When the statute gives his legacies to his children upon condition that he has not been fully advanced; does it not refer to advancements made after the will; and which may be considered as an equitable satisfaction of the legacies it contains? And if so, does it not follow, that it contemplated the case of the legatee being in esse at the date of the will?

It is ordered, that the decree, so far as it adjudges the legacies provided in the second and residuary clauses of the will for Malachi Pegues, to his children and issue, be set aside and reversed; and it is decreed, that said issue and children are not entitled to the same or any part thereof.

Ordered, that the cause be remanded to the Circuit Court.

WARDLAW, J., concurred.

O'NEALL, C. J., said—I dissent, and concur in Chancellor Dunkin's decree.

Decree reversed.

APPENDIX

11 Rich. Eq. *559

*JOHN FRETWELL and Others v. ALFRED M. NEAL and Others.^a

(Columbia. May Term, 1859.)

[*Executors and Administrators* ⇨291.]

Where the testator gives an estate for life in a slave, and directs that, after the death of the tenant for life, the slave be sold and equal distribution of the proceeds made among certain persons, an assent by the executor to the legacy to the tenant for life, does not divest him of the remainder—the estate in remainder, with power to sell and distribute, remains in the executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1153–1163; Dec. Dig. ⇨291.]

[*Executors and Administrators* ⇨291.]

Where the testator gave his plantation and two slaves to his wife for life, and the wife and children remained upon the plantation for several years, but it was under the control and management of the executor, who disposed of the crops and paid the debts with the proceeds, *held*, that there was not sufficient evidence of an assent to the legacy to the wife.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1153–1163; Dec. Dig. ⇨291.]

[*Judgment* ⇨819.]

A judgment in Georgia against an executor as executor, to be levied of the goods and chattels of the testator, founded on a debt contracted by the executor after the death of the testator, though irregular according to the course of procedure in this State, will, under the Constitution and Act of Congress, be respected by the Courts of this State, as a valid judgment; and a sale under it of the goods of the testator will be upheld.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1483; Dec. Dig. ⇨819.]

[*Evidence* ⇨177.]

A Sheriff's sale of a negro, made in Georgia, in 1830, proved by parol, without production of the execution or the return of sale by the Sheriff.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 570; Dec. Dig. ⇨177.]

[*Sales* ⇨240.]

Where there have been several successive sales of slaves subject to an equity, if any one of the purchases was made for valuable consideration and without notice, *held*, and all the subsequent purchases, will be good.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 678; Dec. Dig. ⇨240.]

[*Equity* ⇨84.]

Great lapse of time, *held*, strongly to support a defence, not only in supplying lost papers,

^aThis case was decided in the Court of Appeals, at May Term, 1859. It was mislaid when the cases of that Term were published or it would have appeared among them. It is too important to be omitted altogether, and is now inserted as an appendix.

but also in raising the presumption that no wrong was committed.

[Ed. Note.—Cited in *Sheriff v. Welborn*, 14 S. C. 487.

For other cases, see *Equity*, Dec. Dig. ⇨84.]

[This case is also cited in *Rogers v. Huggins*, 6 S. C. 363; *Mauldin v. Gossett*, 15 S. C. 580; *Fraser & Dill v. City Council of Charleston*, 19 S. C. 401, as to the necessity of making executor party to an action for determining payment of judgment.]

Before Wardlaw, Ch., at Anderson, June, 1858.

The facts of this case are stated in the circuit decree.

Wardlaw, Ch. John Fretwell filed the *560

original bill in *this case, January 23, 1856, in behalf of himself and his brother James, and his sisters (with their husbands) Nancy, wife of William H. Kelly, Julia, wife of Edward Cobb, Amanda, wife of John Burrow, Betsey or Elizabeth Mims, widow, and Sally, wife of Benjamin Scott, against the defendant Alfred M. Neal, claiming the specific delivery of the slaves Sarah and her issue, now numbering eight, for the purpose of partition among the legatees of William Fretwell, deceased. By amendment of the bill, James Fretwell, Cobb and wife, Burrow and wife, and Scott and wife, were made plaintiffs, and the heirs at law of Daniel Fretwell and William Fretwell, Jr., other legatees stated to be dead, as also Elizabeth Mims, were made defendants. Perhaps the representatives of Daniel and William are the proper parties, as these decedents may have left debts.

By another amendment John B. Watson was made a defendant, and charged as a confederate of Neal, but as the proof of confederacy failed, it is ordered and decreed that the bill be dismissed, as to the said John B. Watson.

The claim is made under the will of William Fretwell, lately of Green county, Georgia, bearing date August 22, 1822, and admitted to probate in said county on November 13, 1822: of this will Anna Fretwell, wife, and James Fretwell, son of said William, were appointed executors, and said James qualified as executor on said November 13, 1822. By this will, in 2 clause, testator gave to his wife for life, the plantation whereon he resided and the slave Sarah, with a negro man Green; and in 3 clause, directed that at the death of his wife, the plantation and said negroes should be sold, and equal distribution made among his children, James, Nancy, William, John, Julia,

Sally, Betsey, Amanda and Daniel; and testator, by 4 clause, gave to his son Cullen, four negroes; by 5 clause, gave a negro woman Rachel and her youngest child, Marcus, to his daughter, Nancy, whenever she should marry, provided that any increase of the negro woman before Nancy's marriage

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should go to the benefit of the family; by 6, 7, 8, and 9 clauses, he gave to his children William, John, Julia and Sally, each, two negroes; by 10 clause, directed that his children Betsey, Amanda and Daniel, should each have two negroes from the increase of the negroes if sufficient, and if not, that the deficiency should be supplied by the sale of any property not otherwise disposed of, namely; Bob, Mary and Fanny, and their increase at the time of the children marrying off, or becoming of age; by 11 clause, directed that his wife "should keep Bob, Mary and Fanny, and all the stock of every description, and all the farming utensils on the plantation for the support of her and the children so long as they remain minors;" and by 12 clause, he gave to his son James, a horse to be worth \$100, a good saddle and bridle, and also \$800, to be paid from the next crop. That chattels of testator were appraised February 8, 1823, at the valuation of \$7,214, including Sarah, at the price of \$450. No sale of the chattels was made by executor. On March 8, 1824, James Fretwell made a return to the Court of Ordinary for Green county, of his transactions on the estate, which, with some additions for subsequent years, was examined and approved at January term, 1830, and exhibited receipts to the sum of \$2,700.67, (of which \$1,974.02 was from the proceeds of the sale of cotton,) and payments to the sum of \$2,659.47, of which, many were for the renewals of notes in bank.

It appears by exhibit B, of defendant Neal's answer, which although not strictly proved, commits him at least as an admission, that James Fretwell, as executor, on February 27, 1824, executed a power of attorney to his brother Cullen, empowering him to transact and manage, in the absence of said James, all business pertaining to the estate of testator and particularly to sell and transfer any property of the estate which executor could sell and transfer, to pay and extinguish all debts of the estate, and for this purpose to borrow or advance money.

On August 16, 1828, Cullen Fretwell com-

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menced suit in the *Superior Court for Green county, against said James Fretwell, as executor, counting for money advanced and employed for the use of said estate, and for the legacy to said James, sold and assigned to said Cullen. James, as executor, accepted service, and at March term, 1829, confessed judgment for \$2,198.55 and costs; and on May 15, 1829, judgment was entered for said

Cullen against said James, as executor, for the sum so confessed, and \$10.25 cost, "to be levied of the goods and chattels, lands and tenements of William Fretwell, deceased, in the hands of his executor to be administered, if so much to be found, if not, then of the goods and chattels, lands and tenements of the defendant, James Fretwell."

On December 23, 1828, James Fretwell, styling himself "executor of William Fretwell, deceased," gave his promissory note to Cullen Fretwell, or order, for \$633, "loaned money;" on January 2, 1829, Cullen sued out process, and declared on said note against James as executor; on January 7, 1829, James, as executor, accepted service of process; at September term, 1829, a verdict was given for the sum mentioned in said note, with interest and costs, and on November 5, 1829, a judgment was entered for \$687.12, "to be levied of the goods and chattels, lands and tenements of William Fretwell, deceased, in the hands of the defendant as executor, if there be so much to be found, if not, then of the individual goods and chattels of the defendant." It does not appear by record that executions were issued on these judgments, or that anything was done towards their satisfaction; but there is prima facie proof of the existence and loss of the executions, and that under them, the sheriff sold Sarah and other property of testator's estate to Cullen Fretwell, in the year 1830. Before this time Sarah, with the other chattels, had remained on the plantation occupied by the widow and family, but it seems the executor controlled the crops of cotton. On May 3, 1831, Cullen Fretwell sold and transferred by bill of sale to Alfred M. Neal,

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the slave Sarah, described as about *thirty-five years old, with her two children, Mary, about two years old, and Rachel, four weeks old, for a sum paid of \$465, a fair but rather low price. At the time of this transfer, and for fifteen years afterwards, Neal was a resident in Elbert county, Georgia, and before the sale for two or three years he had frequently visited the family of testator. For the last twelve years he has resided in Anderson district; he has been in possession ever since the purchase of these slaves, and they are now worth \$3,000 or more. About the time the bill was filed, hearing of the claim set up, he secreted himself and the slaves for a few days, and actually sold the slaves to one Dooley, of Georgia, but, a few days afterwards, he bought the slaves again at an advance of \$200, on the price paid to him, and gave the bond to the sheriff, which had been ordered on a special injunction granted by the commissioner. After the death of testator, his widow remained for some years in Green, and then removed to Pike county, where (or in Carroll) she died in May, 1852.

Defendant Neal, in his answer, professes to be uninformed as to the material facts stat-

ed in the bill, and requires proof to be made of them; and pleads purchaser for value without notice of claim alleged, and also the statute of limitations.

I have stated the important facts in the cause as I understand the evidence, and for any omission or mistake, I refer for correction to the voluminous documents and testimony produced.

At the hearing, some doubt was suggested by me of the sufficiency of the proof of the will as an instrument of title, by mere exemplification of the foreign probate, without probate in this State; but this doubt has been removed by reflection. The case is within the Act of Congress of 1790, passed in pursuance of the 1 Sec., 4 Art. of the Constitution of the United States. Besides, a duly authenticated copy of an ancient record is good proof in itself. Moreover, the exemplification was probably admissible in evidence

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under *our Act of 1823, 6 Stat., 209, as the requisite notice had been given.

Some doubt, too, was entertained as to the jurisdiction of the Court, even on the indulgent views suggested in *Sims v. Shelton*, 2 Strob. Eq., 221, for from the number of claimants there could be no other delivery of the slaves than by distribution of the proceeds of sale, and the insolvency of the defendant is not alleged. But partition is an extensive field for equity, and as defendant may be considered as entitled to the share of James Fretwell, at least, relief may be afforded in that form, where specific delivery is sought. *Nix v. Harley*, 3 Rich. Eq., 379.

As to the plea of purchaser without notice, I think that defendant has established some of the elements of this plea. He has paid a fair price and received a conveyance from one in possession of the chattels, claiming them absolutely under a sale by the executor as legal owner. It may be that Cullen Fretwell, by merely giving credit on his execution, did not pay his money in that strict sense which is necessary to the integrity of the plea. *Williams v. Hollingsworth*, 1 Strob. Eq., 103 [47 Am. Dec. 527]; but that does not injuriously affect a purchaser from him who did pay money. Where plaintiffs claim by legal title, and seek no discovery from defendant impugning his title, this plea is inapplicable. *Donald v. McCord*, Rice Eq., 330; and here it is questionable whether such discovery is sought. But, in my opinion, the title of the plaintiffs is merely equitable, and although equitable owners may sue in equity, (*Bush v. Bush*, 3 Strob. Eq., 131 [51 Am. Dec. 675]) this plea is operative when proved to defeat their suits. The remainder in the slaves specifically after the life estate of the widow is not given to the children of testator, and nothing is given to them but shares in the proceeds of sales after the slaves shall be sold as directed. It has not been satisfactorily proved that the executor assented to the legacy of Sarah and delivered

her to the life tenant; but assuming that fact for the argument, the legal title of the

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executor would be suspended *only during the subsistence of the life estate, and not extinguished, and at the termination of the interest for life would be revived to enable him to perform the important trust of making sale and distribution. The will here does not expressly charge the executor to make the sale, but wherever a will directs a sale and fails to nominate the person to make it, the duty and power devolve on the executor. An executor's assent to a legacy so as to vest title and possession in a life tenant inherently operates for the benefit of the remaindermen. *Finley v. Hunter*, 2 Strob. Eq., 208; but it does not change the character of their estate from equitable to legal. Still, the defendant Neal must fail in this plea, because he had notice of plaintiffs' claim. I suppose that notice to the defendant is implied by law from the probate and record of the will in the ordinary's office of the State of his domicile and purchase. *Ellis v. Woods*, 9 Rich. Eq., 19; and the circumstances go far to show notice in fact. Defendant was intimate in the family of testator, and familiar with the affairs of the estate before his purchase, and he purchased from one of the sons. On his bill of sale he indorsed an assignment to one Creswell Neal, on January 29, 1832, which is unexplained, and probably was merely colorable. Contemporaneously with the institution of the suit, he conceals himself and elicits the slaves for a time. Possibly this course was taken from ignorance and timidity, but more naturally it exhibits distrust of his title from information long previously acquired. I suspect, yet I cannot safely conclude, that he had actual notice. This plea is overruled.

The effect of the lapse of time as a bar of the plaintiffs' remedy remains to be considered. Defendant has been in adverse possession of the slaves for nearly twenty-five years, without any counter claim, and his vendor had been in possession for a year or more previously. The tenant for life, whose immediate interest was disturbed, lived for twenty-two years after dispossession without making complaint, and those claiming, upon the expiration of her interest, forbore

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*clamor for nearly four years after her death. Under such circumstances, all reasonable presumptions should be made against a tardy claim.

It can hardly be contested that the executor of testator's will, sold the slave Sarah to Cullen Fretwell. The sale, in form, was made by his agent, the sheriff, under executions against him. It is said, however, that the sale was made for the private debt of executor, and after his assent to the legacy of Sarah. If these particulars be assumed as true, it may be safely declared, that before his assent to a legacy,

an executor has absolute power, at law, to alien the assets of a testator, in satisfaction of his private debt, and that creditors, much less legatees, cannot follow the assets unless there be positive fraud in the creditor, in accepting such disposal; and that in equity an executor cannot make a valid sale of the assets in payment of his own debt, where the purchaser knows the assets to belong to the estate of testator, for the purchaser is necessarily involved by the transaction itself in participation in a breach of trust; and that in both Courts, after the assent of the executor to a legacy, the title vests in the legatee and the control of the executor ceases. So that not even creditors can pursue the property bequeathed, by executions subsequently obtained against the executors. Wms. on Ex'ors, 673-4 and the cases there cited; *Alexander v. Williams*, 2 Hill, 522; *McMullin v. Brown*, 2 Hill Eq. 459.

There is no doubt that Cullen Fretwell knew that Sarah and the other assets sold to him, belonged to the estate of testator; but that the sale was made for the private debt of executor, and after his assent to the legacy, require to be proved, and, in my judgment, neither particular is proved. As to the former, if I were now called upon to adjudge the matter as an open question, I should probably determine that at least to the extent of Cullen's purchase from James of his legacy, and of the amount of James' note signed as executor, without proof further, that the judgments were obtained for the private debts of James;

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but the question is not open; it *has been solemnly considered and adjudged by a competent foreign Court of the domicile of the parties, that the debts were those of testator, to be levied from the assets of the estate. This Court is not now at liberty to controvert this judgment; on the contrary, by the requirement of the Federal Constitution, is bound to give to it due faith and credit. Besides, the judgments are not in conflict with any statute or declared policy of South Carolina; indeed, here, debts in form those of the executor individually, may be declared in the proper forum to be debts entitled to satisfaction from the assets of his testator, upon proper supplementary averments and proof: as the Superior Court in Georgia possesses and exercises general jurisdiction, both in law and equity, it must be presumed, especially when the presumption is corroborated by great lapse of time, that the necessary supplementary proof was offered. Then I am not satisfied of the executor's assent to the legacy of Sarah. There is no express proof of assent, and assent cannot be implied from the circumstances in evidence.

Sarah and all the chattels, none of them having been sold at any general sale by executor, remained after the death of testator

on the plantation where he resided in his lifetime in the possession of his surviving family for seven or eight years perhaps, but the executor retained title and control the whole time, and actually appropriated the crops up to the year 1829 in payment of the debts of testator and expenses of the administration. This is the common course of representatives of an estate (where the property is directed to be kept together) until time shall fully develop the exigencies of the decedent's affairs; it is rarely sufficient proof of an executor's assent to a legacy to a member of a common family that may be in the enjoyment of the property. It may be that this estate was much mismanaged, and some of the witnesses express strongly their belief that the exigencies of the estate did not require the alienation of its tangible assets, but they state no fact compelling like conviction on the part of others.

From the great lapse of time, we are

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bound to presume, *where the contrary is not proved, that Sarah was not delivered to the tenant for life for her own use and as trustee of the remaindermen; and if so delivered, that the tenant surrendered her interest for life and that with her assent and that of the remaindermen, the property was sold absolutely in satisfaction of the debts of the estate. *Riddlehoover v. Kinard*, 1 Hill Eq., 378. I conclude that defendant Neal is protected by the statute of limitations and the lapse of time. It is ordered and decreed, that the bill be dismissed.

The complainants appealed, and now moved this Court to reverse or modify the decree, on the grounds:

1. Because, it is respectfully submitted, that his Honor erred in decreeing that the title of the complainants to the negro slaves, Sarah and her issue, (the subject-matter of this suit,) under the will of William Fretwell, deceased, was an equitable instead of a legal title.

2. Because, it is respectfully submitted, that his Honor erred in decreeing that the proof was not sufficient to satisfy the Court, that the executor of William Fretwell, deceased, had assented to the legacy of the slave Sarah, to the life tenant, Mrs. Ann Fretwell, when it is submitted that the evidence on that point is full and conclusive.

3. Because, it is respectfully submitted, that his Honor erred in decreeing that the judgments obtained by Cullen A. Fretwell v. James Fretwell, executor of Wm. Fretwell, were conclusive of all matters purporting to have been decided thereby, against these complainants, when it is submitted that the complainants were neither parties nor privies to the record, nor in any way affected by the said judgments.

4. Because, it is respectfully submitted, that the evidence was sufficient to satisfy the Court that the said judgments were col-

lusive, fraudulent and void, founded altogether upon matters arising after the death of the testator, William Fretwell, and for the personal obligations of the executor.

5. Because, it is respectfully submitted,

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that there was not *sufficient proof that the said slave, Sarah, was ever sold by the sheriff, under and by virtue of executions against the executor of William Fretwell, and for the debts of the said testator.

6. Because, it is respectfully submitted, that his Honor erred in decreeing that lapse of time and the statute of limitations was a bar to the remedy sought by complainants, when the bill was filed within four years after the accrual of the rights of complainants, and when the defendant had constructive notice of their claim at the time, and before he came into possession of the said slaves.

7. Because, it is respectfully submitted, that the decree is, in other respects, contrary to equity and justice.

Harrison, for appellants.

Reed, contra.

The opinion of the Court was delivered by

JOINSTON, Ch. For my own part, I regard it as of little consequence whether the executor did or did not assent to the legacy for life in favor of the widow. If he did assent, his assent could divest him of his title and control beyond the life estate, only in the event that the slaves were bequeathed in remainder. Without such ulterior disposition, they reverted to the executor, on the death of the life tenant, for administration, according to the powers conferred on him by the will. In this case, the testator has not given the slaves in remainder, but merely directed that they be sold, and the proceeds divided among his children. This did not give the slaves to the children, but merely imparted to them an equitable interest in the amount for which the executor might sell them, and a right to compel him to make such sale. The title remained in the executor, subject to the life estate of the widow.

But the Chancellor has concluded, and, as we think, is warranted by the evidence in his

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judgment, that there was *no assent; and the consequence is that the slaves remained in the hands of the executor, with a legal title on his part, and were liable to be dealt with by creditors as in common cases.

Then as to the judgment obtained in Georgia by Cullen Fretwell. The Constitution of the United States, (article iv, sec. 1, 1 Stat., 178,) provides that "full faith and credit shall be given, in each State, to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." Under the power

thus conferred, the Congress, by Statute of 1790, (Brev. Dig., 317, 1 Laws of the United States, 115 [U. S. Comp. St. 1913, § 1519],) enacted, "that the Acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto. That the records and judicial proceedings of the Courts of any State shall be proved, or admitted, in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or presiding Magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every Court within the United States, as they have, by law or usage, in the Courts of the State from whence the said records are, or shall be taken."

It is unnecessary to quote the numerous cases in this State in which our Courts have given conclusive credit to the authenticated judicial records of other States. The irregularities of such proceedings are no ground for disregarding them. If they have effect as evidence in the State where they took place, though they can have no direct operation here, we are bound to regard them as good judgments; to accept them as evidence, and

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to make them the basis of such *further proceedings as the parties producing them may claim and be entitled to in our Courts.

We find before us a judgment, properly authenticated, rendered in Georgia against the executor of Wm. Fretwell, and expressly made leviable out of the goods and chattels of the testator. Slaves of the testator, of which the legal title was in the executor, were sold under it. But we are required to look into that judgment and declare that it had no effect in Georgia to render these slaves liable. We cannot do it. We have no evidence to shew that by the laws of Georgia the judgment was either void or voidable. It is not enough to say that the proceeding may contain irregularities or that upon the same premises, we should not have given such a judgment here. What a Court of Georgia has adjudged, we are to take as a good Georgia judgment, while that judgment remains unreversed. We suppose, in the absence of any proof to the contrary, that were the judgment under consideration produced in evidence in a Georgia Court, that Court would, also, regard it as a valid judgment; whatever it might do were it produced on an application, or proceeding, to reverse it, or set it aside. Were the bill before us a bill to reverse it, or set it aside, are we competent to do such an act? But were we competent, the bill seeks no such remedy; and we could not set aside one of our own judgments, much less a foreign judgment, collaterally.

But, it is objected that the parties seeking

remedy in this Court were not parties to the Georgia proceeding, and, therefore, are not bound by it. They were not parties; but if there was a necessary privity between them and the executor, who was a party, they are concluded by the judgment rendered, while that remains. It would be an alarming doctrine that a purchaser of estate property, under a subsisting judgment against the executor, which judgment expressly makes that property liable, has not obtained a good title, simply because the creditor did not make the distributees or legatees parties to his suit, but

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sued the executor, (not being *allowed by the forms of law to sue any other) for his debt. Every day furnishes us with instances in which the executor necessarily represents distributees and legatees in such suits; and if, under such proceedings, a devastavit is committed, the remedy must be against the executor, unless there has been some collusion with the creditor, the purchaser, or some other person;—in which case, though a bill will lie against all those implicated in the fraud, it must be (as this bill is not) framed for that purpose. The matter cannot be taken up collaterally.

But again, it is objected that the proof of the sale by the sheriff was not sufficient. The objection points to the nonproduction of the execution, and the return of sale. There was certainly no proof, from the record, of the sale. But there was ample proof by parol, that the sale was, in fact, made by the sheriff. Mr. Cone, one of the witnesses, says, that though by the law of Georgia there should be an execution and return of sale, there is, in fact, a general inattention by the officers to this requisition. Under these circumstances, and the fact of sale being made out, it would seem unreasonable that the interests of the purchaser should be sacrificed, by making him responsible for the non-production of the papers required; over which he never had any control, and which, though they may have been regularly filed, may have been lost in the lapse of years which has occurred since the sale was made.

The defendant having, according to the foregoing view, obtained the legal title, and without notice of any equity, must be protected in this Court. If Cullen Fretwell had notice, that does not affect this defendant; the well-recognized doctrine of equity being, that wherever, in a succession of purchasers, you reach one who is innocent, and purchases in ignorance, the title is thenceforth sanctified.

According to the view I have taken, the statute of limitations becomes an immaterial question. But it may be material to observe,

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that the great lapse of time which has *occurred, tends very much to support the defendant's case. This is true, not only in supplying lost papers, but in raising the presumption that there was no wrong committed. If

the widow saw injustice in the transactions now complained of, it is singular that she should have remained silent through the many years that elapsed between these transactions and her death.

We see no sufficient ground for the appeal, and it is ordered, that the decree be affirmed and the appeal dismissed.

DUNKIN and WARDLAW, CC., concurred.
Decree affirmed.

II Rich. Eq. *574

*JINSEY LEE v. CHARLES W. LEE and Others.

(Columbia. Nov. and Dec., 1858.)

[Trusts \S 17, 18.]

B, for the purpose of prosecuting certain trespassers in his own name, received from A an absolute conveyance of a tract of land, under a verbal promise to reconvey the land as soon as the purpose for which the deed was taken should be answered; and afterwards fraudulently refused to execute a reconveyance: *Held*, that B was not protected by the statute of frauds, and he was ordered to execute a reconveyance, according to the terms of his verbal promise.

[Ed. Note.—Cited in *Brownlee v. Martin*, 21 S. C. 400; *Jacobs v. Mutual Ins. Co.*, 56 S. C. 561, 35 S. E. 221; *Wilcox v. Priestner*, 68 S. C. 110, 46 S. E. 553; *Welborn v. Dixon*, 70 S. C. 115, 49 S. E. 232; *Leland v. Morrison*, 92 S. C. 513, 75 S. E. 889, Ann. Cas. 1914B, 349.

For other cases, see *Trusts*, Cent. Dig. \S 20; Dec. Dig. \S 17, 18.]

Before Dunkin, Ch., at Sumter, June, 1858.

This case will be sufficiently understood from the circuit decree which is as follows:

Dunkin, Ch. The plaintiff is a spinster, about fifty years of age. She is very illiterate, but has about as much sense as other persons in her position. For many years previous to 1849, and for some years subsequently, she and her brother, the defendant, Charles W. Lee, resided in the same house with their father and mother. Her father had, by deed, given to the plaintiff a tract of land containing about two hundred and two acres, and which was alleged to constitute her whole estate. She worked, and cooked, and washed, both in her father's lifetime, and while she lived with her brother, the defendant, after her father's death. The land given her by her father was detached, and one John A. Lee, another brother of hers, had trespassed upon it. It became necessary to bring suit against him. On 17th December, 1849, the plaintiff, for the alleged consideration of \$100, executed to her brother, the defendant, a conveyance of the premises in fee. Stephen C. Lee, one of the subscribing witnesses to the deed, and on whose oath it had been originally proved for record, testified, that "prior to the

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execution of *the deed, Charles W. Lee, the defendant, told him that he had been up to see Col. Moses, about John A. Lee's trespassing upon Jinsey's, the plaintiff's land; that

Col. Moses had told him that he, Charles, could not commence an action without a colorable claim or title to the land; Charles, or his father, asked witness to write a deed from Jinsey to him, which he declined. At this time, or soon after, Charles told him that Jinsey was to make the deed to him, and he was to bring the action." This witness further said that at the time of the execution of the deed (which was subsequently prepared by another person), "Jinsey (the plaintiff) was in the kitchen, and some one called her into the house, or piazza. She came, and asked what was wanted of her; Charles, or his father, or some one, said they wanted her to sign that deed; she said she could not write her name, but would have to make her mark; Wyatt Nettles wrote her name, she made her mark. She did not say a word, as he recollects, and then went back to the kitchen." Samuel Tunstall, a deputy surveyor residing in the neighborhood of the parties, testified: "That Charles W. Lee (the defendant) came to him to get him to write a deed for him; witness asked him if he was buying or selling land; he said no, he wanted a deed for the purpose of suing his brother, John, for trespassing on Jinsey's land; witness told him she might have made him a power of attorney, but he said his lawyer told him he must have a deed, and he insisted on witness's writing one; witness asked him what consideration he must state in it; defendant said he did not know of any; witness told him a deed was not of any account unless there was some amount stated in it; defendant seemed like he was at a loss; witness told him he would put in \$100; witness was then writing the deed; defendant said very well. He (defendant) carried the deed off."

It is not proposed to recapitulate the evidence, nearly all which is in writing, and very carefully reported by the commissioner. The agreement and understanding of the parties,

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*proved, as the Court thinks, most abundantly, by the testimony, was that the deed concocted for the purpose of maintaining the action against John A. Lee, was to be so used by the defendant in her behalf, and that at the termination of the suit, he would, at her request, reconvey the premises. The suit was accordingly instituted by the defendant, in his own name, against John A. Lee, for trespass, &c. How long the suit continued, or at what time it was ended, does not appear from the evidence, but it was finally compromised between the parties. So far as the Court can gather from the evidence, twenty acres of the land was given up to John A. Lee, and each party was to pay his own costs. But in 1854, the plaintiff agreed to sell the land, or a part of it, to Simon Lee, who had married her sister Ann, and he took possession of the premises, under his bargain with the plaintiff. In the latter part of that year (as proved by the

witness, David Lee,) the plaintiff "applied to the defendant for a reconveyance of her land, as he was to do. He told her he would do it—that Tunstall had written the other deed, and he would go and get him to write another deed back to her—that a few evenings after this, Charles came over to witness's house, and proposed to witness that they should buy the land from plaintiff. Next morning they went to her, and Charles asked her if she would sell the land. He said, if she would, he (Charles) would buy one half, and witness would buy the other. She (plaintiff) said she would not sell it to turn off her sister Ann, who lived on the place. Charles replied, that Connell Lee stated that Simon Lee, Ann's husband, had said that after he had cut off the tun timber, he was going to leave. Plaintiff said then, that if Simon was going to leave the place, that if Charles and witness would give her note and security for the price of the land, she would sell it to us. Simon, not being entirely willing to leave, Charles made another proposition to her, to wit: that he would give her a deed back for one-half of the land, and he would give her his note and security for the half adjoining him at \$2 per acre. She

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agreed; *and by mutual agreement, Tunstall came and ran out the land into two halves, and made a plat (plat exhibited of the half that was to be conveyed back to the plaintiff.) This (he afterwards said) was the half on which Simon Lee was then living, and that the plaintiff had put him upon it. Tunstall wrote the deed. Charles kept promising to sign the deed, but never did so, nor did he give the note and security." In June following, 1855, witness, at the request of his sister, went to the defendant to get him to make the deed back to her. He said he would do it. This was before Charles' marriage. (Defendant, Charles W. Lee, in July, 1855, married the daughter of his co-defendant, Wyatt J. Nettles.) In August, the defendant upbraided him (witness) for telling a pack of news about the transaction, between him and the plaintiff, and said, since I had told about it, he did not intend to make a deed back to her, &c., whereupon a quarrel and fight took place. Simon Lee fully confirmed this witness. He said that Charles Lee was aware that he (witness) had bargained with the plaintiff for the land; that in November, 1854, the survey was made, and the line run by Tunstall. After the line was run, he and Charles went to the plaintiff. Charles said he was to make title for half, and that he would pay the plaintiff for his half. The terms were agreed upon, but still witness got no deed. About twelve months afterwards, witness "went to Charles, and told him he wanted a deed, who replied, that he was to have no more to do with it; for he had not paid for it, and she (plaintiff) could keep the land and sell it, and go through with it." Samuel Tunstall corroborated

rates this, when he says that, in 1854, he ran a dividing line on this land. There were present with him on that evening, Charles W. Lee (defendant), David Lee and Simon Lee; Charles and Simon took part in the survey. Witness's object in that survey, by the direction of Charles and Simon Lee, was to divide the land in half; Charles told him one of the pieces was to be for Simon Lee, and that Simon was to pay for the survey. Witness made a plat of half for Simon Lee.

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*When he wrote the deed, he thought the land was worth \$300. Within the last two or three years, thinks it worth \$2.50 or \$3 per acre.

In April, 1856, one Jesse M. Hill obtained a judgment against the defendant, Charles W. Lee, for \$85 and costs. The land adjoined that of the defendant Wyatt J. Nettles. In July, 1856, the execution of Hill was levied on the land as the property of the defendant, Charles W. Lee. At the sale in October, 1856, full notice was given of plaintiff's title. It was bid off by defendant, Wyatt J. Nettles, as Sheriff Frierson testifies. But Wyatt J. Nettles, in his answer, says that it was not bid off by him, but by his son and co-defendant, S. J. Nettles, who is a minor, but who acted by his advice—that the land was bid off for \$15, and that he furnished his son with the money to comply with the terms of the sale; that notice was given of plaintiff's claim, and he has no doubt that this was the cause of the price at which it was bid off. On 25th March, 1857, this bill was filed. The answer of defendant, Charles W. Lee, insists that the transaction was an absolute sale, and that he paid to the plaintiff the consideration money of \$100. The answer is directly disproved, not only by the witnesses, Stephen C. Lee and Samuel Tunstall, testifying as to the circumstances of the preparation and execution of the deed, but by the uniform declarations of the defendant, from the time of receiving the deed until August, 1855. It is contradicted by the situation of the parties. He never was able to pay \$100, and the plaintiff was never known to have \$5 in her life. The whole current of the testimony satisfies the Court that the answer of the defendant is a bold attempt to sustain a palpable fraud by corrupt perjury. It is painful to arrive at this conclusion, particularly, where the perpetrator and the victim are brother and sister. It would be great injustice to the defendant, to suppose that he originally intended any fraud. He honestly undertook to protect the rights of his illiterate, poor and defenceless sister, against the aggressions of a tres-

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passer. He *was in no condition to traffic with her for the property which he had engaged to defend. Nor did he attempt any such malpractice. When he went to take advice of counsel as to the mode of vindicat-

ing his sister's rights against the annoyances of John A. Lee, he probably misapprehended his legal adviser. A power of attorney (as Tunstall told him) would have answered the purpose quite as well as a "face claim" (as he called it to one witness) or a "colorable claim" or "color of a claim" (as he said to the other witness). But still he acted in good faith. He always professed his readiness to reconvey to his principal. As late as November, 1854, he not only bargained with her for one-half the premises, but was actively engaged in assisting the surveyor to run the dividing line between the moiety, which he had agreed to purchase, and the moiety bargained by the plaintiff to Simon Lee, and who was then in possession, having been placed there by her several months previously. Down to June, 1855, he was always ready to reconvey. It was not until after his marriage with the daughter of his co-defendant in July, 1855, that he intimated any intention to claim the land. In September, 1855, he raised a conversation about the land with the witness, Alexander Kerby; told him how he came to get the deed from the plaintiff, and that he was to make her a deed back for the land, but said that "since she had done him as she had, that he would not make the deed back to her; he should not do it, for she had no note against him." And to David Lee he said in August, 1855, that "he knew that he had not paid a dollar for the land, but that he had a deed, and could hold it, and intended to do it." And soon afterwards, to the witness, Joseph Pate, he said that "he had never paid the plaintiff anything for the land, and he would be damned if he ever would, as she had done as she had done, and he could hold the land independent of her." In July afterwards, the land was levied on as the only visible property of defendant, under Hill's fi.

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fa.—sold as before stated, for \$*15, and nulla bona returned for the balance of the execution.

At the close of the defendant's answer, he desires that "if necessary to his defence, he may have the benefit of the statute of limitations." If there had been any truth in his answer, this hypothetical plea would have been wholly unnecessary. His answer covers the entire matter in controversy. Mr. Justice Story, as well as other writers on pleadings, states, that pleas of this character are pleas only why the defendant should not answer; and therefore, if he does answer to anything, to which he may plead, he overrules his plea, for the plea is only why he should not answer; and if he answers he waves the objection, and of course his plea; Story Pl., § 688 and note. But this is not a case for the statute of limitations. The defendant, as the agent of the plaintiff, had obtained the deed for the purpose of enabling him to conduct his agency, and prosecute her rights. The Court is not informed at what

time the possession of the deed ceased to be necessary for that purpose. But the defendant constantly and uniformly admitted the subsistence of the fiduciary relation until the summer or fall of 1855, some eighteen months before the institution of these proceedings. After the sale by the sheriff in October, 1856, the balance due on the execution against Charles W. Lee was paid to the sheriff by the defendant Wyatt J. Nettles, and the execution for that amount was left open against Lee for the benefit of W. J. Nettles. The character of the answer of the defendant Wyatt J. Nettles; the circumstances attending the sale, when, after the notice of the plaintiff's title, Charles W. Lee declared that he had a good deed for the land, which was then knocked off to defendant's son, a minor, and incompetent to contract, but who acted under his father's advice; and land worth from four to five hundred dollars bid on for fifteen dollars; all these satisfy the court that the defendant Wyatt J. Nettles co-operated with his son-in-law and co-defendant Charles W. Lee, to deprive the plaintiff wrongfully of her prop-

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erty, and *that if objection had been made, he ought not to have been examined as a witness in the case.

It is ordered and decreed, that the defendant, Charles W. Lee, execute to the plaintiff, by a deed prepared under the direction of the commissioner, a reconveyance of the premises described in the deed of 17th December, 1849, with the exception of the twenty acres heretofore conveyed by the said Charles W. Lee to John A. Lee. It is further ordered and decreed, that the defendant S. J. Nettles, and all claiming under him, be perpetually enjoined from in anywise using or setting up any title to the premises against the plaintiff, under the purchase at sheriff's sale in October, 1856.

It is finally ordered and decreed, that the defendants Charles W. Lee and Wyatt J. Nettles, pay the costs of these proceedings.

The defendants appealed, and moved this Court to reverse the decree on the ground:

Because, his Honor, having decided that there was no fraud on the part of Charles W. Lee in procuring the deed from the plaintiff, should have dismissed the bill—the parol trust which the bill enforces being void under the statute of frauds.

And failing the above motion, then the defendant Wyatt J. Nettles moved that the decree be modified and the bill dismissed as to him, on the ground:

That the evidence upon which his Honor held that he had co-operated with Charles W. Lee wrongfully to deprive the plaintiff of her land, by refusing to carry out the parol trust, was, it is respectfully submitted, insufficient to sustain his Honor's conclusion; and this defendant having fully and fairly answered the bill, as he was called upon by the plain-

tiff to do, and having also disclaimed all interest, and no corrupt, illegal or improper conduct being proved against him, the bill as to him should have been dismissed with costs.

Spain, Richardson, for appellants.

Moses, contra.

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*The opinion of the Court was delivered by

DUNKIN, Ch. If the oral testimony was at all admissible, the Court is satisfied with the decree. The only plausible objection would be that, as the conveyance was absolute in terms, parol evidence was inadmissible to contradict, vary, or add to its contents. But it appears well settled, on authority, that when a foundation is laid by an allegation of fraud, such evidence may be received. In *Russell v. Southard*, 12 How., 139 [13 L. Ed. 927], the precise question was presented. "We have no doubt (say the Court) that extraneous evidence is admissible to inform the Court of every material fact known to the parties when the deed and memorandum were executed. This is clear both upon principle and authority. To insist on what was really a mortgage, as a sale, is in equity, a fraud, which cannot be successfully practised, under the shelter of any written papers, however precise and complete they may appear to be." And they cite the language of the same Court in *Morris v. Nixon*, 1 Howard, 126 [11 L. Ed. 69]: "The charge against Nixon is substantially a fraudulent attempt to convert that into an absolute sale, which was originally meant to be a security for a loan. It is in this view of the case that the evidence is admitted to ascertain the truth of the transaction, though the deed be absolute on its face." Many other authorities are cited; and the Court conclude by saying that "the oral evidence is admissible upon the principles of general equity jurisprudence." In our own Courts the same question was presented in *Arnold v. Mattison*, 3 Rich. Eq. 153. The presiding Chancellor received the evidence, but declined to grant relief. If an instrument, (says he,) absolute on its face, can be converted by parol, into a defeasible instrument, except where the omission to reduce the defeasance to writing was occasioned by fraud or mistake, the evidence must be very clear and convincing. In that case the Chancellor held, upon the evidence, that the deed was intended by the parties to be absolute as its terms purported, and that if any fraud existed, it was in reference to third

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*persons. But if there be fraud, whether it consist in not executing a defeasance, or in misrepresenting the character of the instrument, or in any other way, it would be a reproach to the administration of justice if the perpetrator of the fraud could shield himself from detection and exposure by the abuse of rules instituted to prevent fraud. A bond, deposited as an indemnity, might be enforced

as an absolute debt; or, as in this case, a deed taken from an indigent, helpless and ignorant woman, for the avowed purpose of vindicating her rights to her freehold, might be perverted into an instrument of despoiling her of those rights. In the language of the Supreme Court, "the oral evidence is admissible in such cases upon the principles of general equity jurisprudence," and to prevent the successful practice of such frauds under the shelter of any written papers, however precise and formal.

The defendant's principal ground of appeal is because his agreement to reconvey the lands was a parol trust, and void under the statute of frauds. But *Massey v. McIlwain*, 2 Hill Eq., 421, (and *Kinard v. Heirs*, 3 Rich. Eq., 423 [55 Am. Dec. 643],) establish that the statute cannot be used as an instrument of fraud.

It is ordered and decreed, that the appeal be dismissed.

WARDLAW, Ch., concurred.

Appeal dismissed.

REPORTS
OF
CASES IN EQUITY

ARGUED AND DETERMINED IN THE
COURT OF APPEALS AND COURT OF ERRORS
OF SOUTH CAROLINA

VOLUME XII

FROM MAY, 1860, to MAY 1866
BOTH INCLUSIVE

BY J. S. G. RICHARDSON
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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUDGES OF THE COURT OF APPEALS

HON. JOHN B. O'NEALL, CHIEF JUSTICE. (*a*)
" BENJ. F. DUNKIN, CHIEF JUSTICE. (*b*)
" JOB JOHNSTONE, ASSOCIATE JUSTICE. (*c*)
" F. H. WARDLAW, ASSOCIATE JUSTICE. (*d*)
" THOMAS J. WITHERS, ASSOCIATE JUSTICE. (*e*)
" DAVID L. WARDLAW, ASSOCIATE JUSTICE. (*f*)
" JOHN A. INGLIS, ASSOCIATE JUSTICE. (*g*)

CIRCUIT JUDGES

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" THOMAS W. GLOVER.
" ROBERT MUNRO.

HON. F. G. MOSES, (*i*)
" T. N. DAWKINS, (*i*)
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Northern Circuit, C. D. MELTON, ESQ.
Southern " J. B. PERRY, ESQ. (*j*)

(*a*) Died in 1864.

(*b*) Transferred from Chancery Bench to Court of Appeals, and Elected Chief Justice, December, 1865.

(*c*) Died in 1863.

(*d*) Died in 1861.

(*e*) Died in 1865.

(*f*) Transferred from Law Bench to Court of Appeals, December, 1865.

(*g*) Transferred from Chancery Bench to Court of Appeals, December, 1865.

(*h*) Died in 1864.

(*i*) Elected December, 1865.

(*j*) Died in 1865.

NOTICE

THE Reporter, by the advice of the Chief Justice, has included in this volume, the Equity as well as the Law Cases. It was thought much better to publish them in one volume of respectable size, than in two small ones.^(a) The indexes and tables of cases have, however, been kept separate. This volume, it is believed, contains all the cases that were decided during the war and directed to be reported, except some two or three, of little or no value, in which the Reporter was unable to procure briefs, and which without them were unintelligible.

^(a)[Ed. Note.—The publishers of this Reprint have divided the original double volume (13 Richardson Law and 12 Richardson Equity), in order to print these two volumes in their proper numerical order.]

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER TERM, 1860.

JUSTICES PRESENT:

HON. JOHN B. O'NEALL, CHIEF JUSTICE.

HON. JOB JOHNSTONE, ASSOCIATE JUSTICE.

HON. F. H. WARDLAW, ASSOCIATE JUSTICE.

12 Rich. Eq. *104

*BENJAMIN A. ANDERSON and Wife v.
JOEL G. RHODUS and Others.

(Columbia, Nov. and Dec. Term, 1860.)

[*Fraudulent Conveyances* ⇨ 172.]

An absolute deed of conveyance, made for the double purpose of securing the payment of debts due by the grantor to the grantee and of defeating the other creditors of the grantor, cannot be set up by the heirs of the grantor as a mortgage.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 528; Dec. Dig. ⇨ 172.]

[*Life Estates* ⇨ 8.]

B made an unsealed instrument purporting to convey to A for life, with remainder over, certain lands and personalty, and in the instrument it was recited that the lands had been conveyed by A to B. A accepted the conveyance, had it recorded, and for twenty years treated the personalty as held under it. A had been the owner of the lands, had always had them in his possession, and continued in possession of them until his death:—*Held*, that A's title should be referred to the unsealed instrument under which he had acquired it by adverse possession, and that his heirs could not dispute the right of the remaindermen.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 26; Dec. Dig. ⇨ 8.]

[*Life Estates* ⇨ 8.]

Where, under an unsealed instrument purporting to convey lands to one for life with remainder over, he, the tenant for life, holds long enough to acquire title by adverse possession, he cannot question the title of the remaindermen, his possession enuring to their benefit as well as his own.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 24-28; Dec. Dig. ⇨ 8.]

Before Carroll, Ch., at Clarendon, June, 1859.

This case will be sufficiently understood from the circuit decree, which is as follows:

Carroll, Ch. The claims asserted by the bill have their origin in a written instrument executed by William Hilton, dated July 6, 1836. The consideration it recites is the grantor's "natural love, good will and affec-

tion" for the eight children of William Rhodus, enumerated by name. It purports to convey a tract of land, nine negro slaves,

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two horses and *a small stock of cattle, to William Rhodus and his wife Jane, to be had and held to and for the uses, trusts and purposes following, "that is to say, the said William, and Jane his wife, are to take, keep and continue in possession of the above-named property during the term of their natural lives, and to enjoy the profits arising therefrom, excepting so much as may be necessary to give to John, Joel, Gabriel and Rebecca Rhodus (four of their children) such an education as to place them upon an equality with the rest; and at their decease the property, with the increase of the negroes, to be equally divided between the aforesaid eight children, or such of them as shall then be living, and in case one or more of them shall die, leaving no lawful issue at their death, then their part or parts to be equally divided between the survivors, to vest in them and their heirs, executors or administrators, absolutely." There is no seal affixed to the signature of William Hilton, and the instrument contains no warranty of title. It was recorded in the Secretary's office at Charleston, 14th December, 1836. In the lifetime of William Rhodus, died his son John Rhodus, having never married, and his daughter Mary Ann Brunson, leaving surviving her two sons, David O. and Charles H. Brunson. Her brother Gabriel D. Rhodus has the grant of the administration of her estate. Jane, wife of William Rhodus, departed this life in December, 1856, and he in September, 1857, leaving of force a will, of which his son Joel G. Rhodus is executor, whereby he disposes of his estate in unequal portions among certain of his surviving children and grandchildren. In his lifetime William Rhodus sold Rachel, one of the slaves

referred to, and by deed dated July 23, 1857, transferred absolutely three others, Peter, Elsey, and Mary Ann, to his son Joel, who since his death has disposed of two of them, Elsey and Peter. The remaining slaves, with their issue born since 6th July, 1836, and the other chattels comprised in the unsealed instrument of that date, are in the possession

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of Joel G. Rhodus. The bill is exhibited by Benjamin A. Anderson and his wife Rebecca, against the surviving children of William Rhodus and his grandsons, David O. and Charles H. Brunson. It prays partition of the property included in the unsealed transfer by William Hilton, as also an account against Joel G. Rhodus, for the hire of the negroes since his father's death, and for the value of those appropriated by himself and his testator respectively. At the hearing, Joel G. Rhodus produced a formal bill of sale dated November 3, 1829, from William Rhodus to William Hilton, of the stock of negroes and the other chattels now in controversy. It purports to be an absolute transfer, with warranty of the title, for the consideration of \$1750. No conveyance of the land by William Rhodus to Hilton was produced. The written instrument executed by the latter to the former and his wife Jane, however, describes the property comprised in it as having been "conveyed to Hilton by William Rhodus, by deed dated the third November, 1829." In his answer, Joel G. Rhodus maintains that, whatever may have been the form of the conveyances or transfers from his father to Hilton, they were intended and should be regarded as mere mortgages; that the mortgage debt was subsequently paid to Hilton, whose interest in the property thereupon became extinct; and that the instrument whereby he assumed to dispose of the same in July, 1836, was therefore wholly inoperative. There was proof that shortly before its execution, Hilton had declared that William Rhodus was indebted to him, but had very nearly paid him, and as soon as he was paid he intended to make a deed of the property then in possession of Rhodus to his children, as Rhodus was in debt, and he (Hilton) wished to protect the property thereafter against any debts or contracts of Rhodus. It further appeared that William Rhodus had never been divested of the possession of the property; that between 4th November, 1829, and January, 1830, judgment debts against him,

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amounting in the aggregate to some six hundred dollars, had been assigned to Hilton, and that subsequently Hilton had held other demands against him, though of smaller amounts, and a formal receipt by Hilton was produced, bearing date March 24, 1843, whereby he acknowledged payment in full of all judgments in his favor against Rhodus, "in Sumterville or Kingstree, up to that date." On the other hand, it was in evi-

dence that in 1827, William Rhodus, being in debt, and with a view to protect his property from sale by the Sheriff, made a voluntary conveyance of the whole of it to Moses Benbow, and that this deed was shortly afterwards suppressed and destroyed; that with the same purpose, on the 28th August, 1827, he executed three voluntary deeds, purporting to be upon valuable consideration, of his entire visible estate, to Gabriel Dingle; that the written transfer executed by Hilton in July, 1836, was drawn under the instruction of Hilton alone; that after its execution, it was recorded by William Rhodus, in the Secretary's office, and that Rhodus spoke afterwards of the negroes as the property of his children, and always claimed them as belonging to his children, under the deed from Hilton. The tax collectors, to whom were paid the public taxes on the negroes since 1848, inclusive, deposed that the negroes were returned by William Rhodus as belonging to his children, and that William Rhodus, in his lifetime, usually made the returns, and when he did not, his son Joel G. Rhodus did, and in the same way. The declarations of William Hilton were objected to, as being in variance and contradiction of the absolute bill of sale by Rhodus to Hilton. It is not necessary to decide whether that objection be valid, as the declarations in question, if admitted, are not regarded as available for the defence. In *Arnold v. Mathison*, 3 Rich. Eq. 153, it is said that "if an instrument, absolute on its face, can be converted by parol into a defeasible instrument, except when the omission to reduce the defeasance to writing was occasioned by fraud or mistake, the evidence

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"must be very clear and convincing." The circumstances disclosed by the proof go far to explain why the transfer of the negro slaves and other chattels, from Rhodus to Hilton, was absolute in form. It may have been intended to answer the purpose of a mortgage as between the parties, but at the same time to operate as an absolute transfer as against the other creditors of Rhodus. That such was its real character, is fairly inferrible from the evidence. To protect his property against liability for his debts, he had previously executed the several voluntary deeds to Benbow and Dingle. That to Benbow had been destroyed. The deeds to Dingle appear to have been executed in his absence, and without his knowledge. There is no proof that they were ever in his possession, or that he had ever asserted any rights under them, or had ever recognized their existence. Dingle was probably found unwilling to perform the part of a confederate, and hence the subsequent conveyance to Hilton.

The declarations and acts of Hilton are utterly irreconcilable with the supposition that he was a mere mortgagee. On the contrary, they import the right of perfect and

absolute control over the property; and in the assertion and exercise of such right, there was on the part of William Rhodus complete and entire acquiescence. A conveyance in fraud of creditors is nevertheless good and effectual between the parties. Certainly the evidence is not very clear or convincing that the transfer was intended to operate only as a mere mortgage. As between William Rhodus and Hilton, it is considered that the latter was possessed of an actual and absolute title to the negro slaves and other chattels, the subject of controversy in this suit. On behalf of Joel G. Rhodus, it is objected, however, that there was no evidence of a conveyance of the land by Rhodus to Hilton. Such conveyance has not been shown by direct and primary evidence; but, in the judgment of the Court, it has been proved presumptively. The presumption is sustained by the concurrence of many

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and *significant circumstances: by the declarations of Hilton, without disguise, of his intention to execute a conveyance of the property (the land included) in favor of the children of Rhodus; by the fact that the instructions for the framing of the instrument proceeded solely from Hilton, and seemingly without reference to the wishes of William Rhodus, or even conference with him; by the actual execution of such conveyance; by its special recital of the very fact in controversy, a prior conveyance to Hilton of the identical property by the deed of William Rhodus, of a particular date; by the acceptance by Rhodus of the transfer, and of the life-interest it conferred; by his procuring it to be recorded, and by his explicit and uniform recognitions for twenty years of the instrument, as effectual to dispose of the slaves, much the most valuable portion of the property, without denial of its being operative also as to the other chattels and the realty conveyed. Such an array of circumstances is deemed sufficient to warrant the conclusion that a prior conveyance by Rhodus of the entire property had been executed, according to the recital in the transfer by Hilton. The will of William Rhodus, and the deed whereby he assumes to transfer to his son Joel three of the slaves in controversy, are acts which do not import acquiescence in the disposition of the instrument executed by Hilton. But it should be borne in mind that both will and deed were made after the lapse of more than twenty years from the execution of the transfer by Hilton. The sale of Rachel appears also to involve an assertion of right adverse to that instrument. At what date, or under what circumstances, this sale was made, does not appear by the evidence; and of itself it is insufficient to counterbalance the other significant acts and declarations of William Rhodus of opposite import. The lapse of time has been adverted to as one of the circumstances raising the presumption of a pri-

or conveyance by Rhodus to Hilton; but no technical or artificial efficacy is assigned to

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it, beyond its natural force and *significance. It is further objected, that the transfer by Hilton to Rhodus, having no seal, was ineffectual to convey the land. If so, then the title at the outset continued in Hilton, notwithstanding that instrument. But after twenty years of adverse possession, his title cannot be regarded as still subsisting. It was divested by the possession of Rhodus. The character of that possession must determine in whom the title became vested. A party's declaration, if contemporaneous with his acts, are explanatory of them, and are admissible in evidence as parcel of the *res gestæ*; *Martin v. Simpson*, 4 McC. 262. In point of fact, the possession of Rhodus was in nowise hostile to the rights of his children, the claimants in remainder; but, on the contrary, was in assertion and support of the common title. It must enure, therefore, to sustain that title, and the instrument creating it. In the contemplation of this Court, the life-tenant stands in such relation to the remainderman that, if he purchases an incumbrance, or outstanding title affecting the estate, it accrues to the benefit of both; 1 *White's Leading Cases in Eq.* (note) 57; *Randall v. Russell*, 3 *Meriv.* 196.

Still more clearly, it would seem, must this result follow, if the claim or interest were acquired by presumption or operation of law. Apart from these objections to the acquisition of a title by the life-tenant, in derogation of the interest in remainder, it might well be doubted whether William Rhodus would not have been precluded, upon another ground, from setting up such claim or title had it been acquired. The equity doctrine of election extends to other instruments than wills; *Moore v. Butler*, 2 Sch. and Lef. 266; *Dillon v. Parker*, 1 Swan, (note,) 401. If it be assumed that Hilton had the right to dispose of the slaves, it is by no means clear that William Rhodus, after having accepted a life-interest in them, under the transfer by Hilton, did not become bound to give full effect to that instrument in respect of the land; *Hall v. Hall*, 2 McC. Eq. 300.

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*It is conceded in the bill that the share of Mary Ann Brunson in the personalty, upon her death, vested in Gabriel D. Rhodus, her administrator, or was transmitted to her children, David O. and Charles H. Brunson. Their right to her portion of the property, either as donees under the transfer, or distributees of her estate, was not called in question at the hearing. Whatever interest they take in the property, it is apprehended, must accrue to them in the latter character. An estate in the sons, as purchasers, cannot be raised by implication; *McLure v. Young*, 3 Rich. Eq. 578; *Addison v. Addison*, 9 Rich. Eq. 61.

It is adjudged and decreed that the instrument of transfer executed by William Hilton, and exhibited with the bill, is a valid and effectual disposition of the property therein comprised.

It is further ordered that the defendant, Joel G. Rhodus, account before the Commissioner for the hire of such of the slaves disposed of by the said instrument as passed into his possession after the death of the life-tenant, William Rhodus, as also for the value of such of the said slaves as have been converted by him to his own use; and that his portion, in the residue of the property comprised in said instrument be appropriated to satisfy his indebtedness in that behalf.

It is also ordered that Joel G. Rhodus, as executor of William Rhodus, account for the value of the slave Rachel, sold by his testator in his lifetime.

And it is further ordered that one or more writs of partition issue, to divide the negro slaves and tract of land among the parties, according to their rights and interests as herein adjudged; and that the commissioner sell the other chattels comprised in said instrument, with a view to partition of the proceeds, at public auction, upon a credit of twelve months, after fifteen days' notice, at some suitable time and place to be fixed by the parties, if they agree, or by himself, if

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they do not: the purchase money to be secured by bonds with adequate sureties.

The defendant, Joel G. Rhodus, appealed, and now moved this Court to reverse the decree, on the grounds:

1. That the conveyance by William Rhodus to William Hilton of the property in question, though absolute on its face, was sufficiently established to have been made merely as a security for debt, and must be construed as a mortgage, which was extinguished by the payment of the mortgage debt.

2. That the conveyance in question, having been made for a particular purpose, and no transmutation of possession having been made, William Rhodus remained seized and possessed of his original estate in said property, and the same passed by his will.

3. That, at all events, there was no sufficient evidence of a conveyance of the real estate by Rhodus to Hilton, and if there had been, the deed from Hilton to Rhodus was not sufficient to re-convey the same.

Kershaw, for appellant. Acceptance of a deed poll is not an estoppel. The party may set up an independent title. *Giles v. Pratt*, 2 Hill, 441.

An absolute bill of sale given as a security for debt is construed a mortgage. *Haltier v. Etinaud*, 2 DeS. 571; *Berry v. Vineyard*, Harp. Eq. 153.

The conveyance being for a particular purpose, the grantor is in equity lawfully seized,

and may pass the estate by will. *Schmidt v. Schmidt*, 7 Rich. Eq. 216.

F. J. Moses, contra.

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*PER CURIAM. We concur in Chancellor Carroll's decree, and, for the reasons which he has assigned, it is affirmed and the appeal dismissed.

O'NEALL, C. J., JOHNSTONE, J., and WARDLAW, J., concurring.

Decree affirmed.

12 Rich. Eq. *114

*HENRY HAYNSWORTH v. JOHN F. HAYNSWORTH.

(Columbia. Nov. and Dec. Term, 1860.)

[*Deeds* ⇐133; *Trusts* ⇐140.]

The donor conveyed by deed real and personal property to a trustee for the sole and separate use of his, the donor's granddaughter M., wife of H., for life, and after her death to the use of H. for life, and after his death to the use of the children born and hereafter to be born of the said M. and their heirs; but should the said M. and the said H. both die without leaving children living at the time of their decease, born of the said M., then over to two other grandchildren of the donor. M. afterwards died, leaving H. and one child surviving her, and the child then died, leaving H. surviving him:—*Held*, that the child took a vested and transmissible interest which became indefeasible on the death of M. leaving him surviving her; and consequently that the ulterior and secondary limitation over to the two other grandchildren had not and never could take effect. (a)

[Ed. Note.—Cited in *Gourdin v. Deas*, 27 S. C. 489, 491, 4 S. E. 64; *Brown v. McCall*, 44 S. C. 525, 520, 524, 22 S. E. 823; *Tindal v. Neal*, 59 S. C. 11, 36 S. E. 1004; *Walker v. Alverson*, 87 S. C. 62, 68 S. E. 966, 969, 30 L. R. A. (N. S.) 115.

For other cases, see *Deeds*, Cent. Dig. § 369; *Dec. Dig.* ⇐133; *Trusts*, Cent. Dig. § 187; *Dec. Dig.* ⇐140.]

[*Deeds* ⇐133.]

Prior vested and therefore more favored interests will not be defeated in favor of ulterior and secondary interests upon a doubtful construction of the instrument creating them. It must clearly appear that the event has happened upon which such prior vested interests were intended to be defeated, or they will continue to exist.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 368-371; *Dec. Dig.* ⇐133.]

Before Carroll, Ch., at Sumter, June, 1860.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. By deed dated May 25, 1844, Charles Spann, Sen., transferred and conveyed

(a) Devise to W. and M., his wife, "and the survivor of them, during their natural lives, and then" "to M., their daughter, or if more children by M., the said wife, equal between them, and, in case they leave no children, to their heirs and assigns forever." M., the wife, died, leaving W., her husband, and M., their only child, surviving her. M., the daughter, married and then died, leaving her father and four children surviving her. W. then died, leaving the four children of

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to John F. Hayns*worth, as trustee, seventeen negro slaves, and one undivided third part of certain lands therein described. The deed provides, that the property comprised in it shall be had and held in trust "to and for the sole use of the grantor's granddaughter, Mary Elizabeth, wife of Henry Haynsworth, during her natural life, and after her death to and for the use of the said Henry Haynsworth, during his natural life, and after his death to and for the use of the children born or thereafter to be born of the said Mary Elizabeth and their heirs, share and share alike;" but should she and the said Henry Haynsworth both die without "leaving children living at the time of their decease born of the said Mary Elizabeth, then that the said John F. Haynsworth, or his representatives, shall convey the said premises to the grantor's grandchildren, Francis Geo. Spann and McConico Gulielma Spann, and their heirs, share and share alike, or, in case of the death of either or both, to their children;" and it is further provided that the trustee shall hold the property thereby conveyed, "for the uses above mentioned, so that the same shall not be subject in any manner to the present or future debts of the said Henry Haynsworth or any future husband of the said Mary Elizabeth."

By permission of this Court, the portion of lands included in the deed was sold, and the proceeds have been lent to Henry Haynsworth, whose obligation for repayment of

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the *same is in the hands of the trustee. After the execution of the deed referred to, the grantor's granddaughter, McConico Gulielma, intermarried with James L. Haynsworth; Mary Elizabeth, wife of Henry Haynsworth, departed this life June 1, 1846, having given birth to three children, two of whom, born respectively in the years 1844 and 1845, died in her lifetime. Her other child, a son—William Henry—born in 1841, survived her, but died in May, 1858; and the administration of his estate has been committed to his father, Henry Haynsworth.

The bill is exhibited by Henry Haynsworth against John F. Haynsworth, Francis G. Spann, James L. Haynsworth, and his wife,

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M., his daughter, surviving him. *The question in the case turned upon the proper construction of the words, "in case they leave no children." If the meaning was, if either should die leaving no children, then the enlarging limitation to the heirs and assigns of W. and M. had not taken effect, and consequently the plaintiff, who was the heir at law of the testator, was entitled to recover; but if, on the other hand, the meaning was, if the survivor of W. and M. should die leaving no children, then the limitation had taken effect, and the defendant, who claimed under W., was entitled to judgment. The Court without hesitation decided that the proper construction of the words was, if the survivor should die leaving no children, and gave judgment for the defendant. *Doe v. Knowls*, 1 B. & Ad. 324.—R.

McConico Gulielma. On behalf of the plaintiff, it is claimed that his son William Henry's interest under the deed was a vested remainder, defeasible only in the event of his dying in the lifetime of both his parents, and, as he survived his mother, that such defeasance can now never take effect; that the plaintiff, being life-tenant under the deed, and entitled by legal succession to the estate of his deceased son, thus unites in himself all the interests, present and expectant, which compose the right of absolute property; that the trusts created by the deed should be regarded as executed, and that the plaintiff's obligation in the hands of the trustee, with the original trust deed, should be ordered to be surrendered to him.

That the children of Mrs. Mary Elizabeth Haynsworth took vested interests in the property comprised in the deed scarcely admits of doubt. In the limitation to them words of contingency are not found, and do not appear until introduced into the succeeding and ulterior limitation. The law, it is said, favors the vesting of estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested; 4 Kent, 203. In *Rutledge v. Rutledge*, Dud. Eq. 201, the trusts of the marriage-settlement were for the use of the

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husband and wife, during their *joint lives, with the remainder to the survivor for life, and "after the decease of both" to the issue of the marriage as tenants in common; but in the event of there being no issue of the marriage, or of such issue dying during the lives of the husband and wife, or the life of the survivor, then to the use of such survivor.

There was issue of the marriage surviving both parents, and it was held that the issue, as successively born, took vested interests, as well those who did not survive their parents as those who did. An instance of similar construction is exhibited in *Smither v. Willoch*, 9 Ves. 234. In that case there was a bequest to testator's wife for life, and after her death the capital to be divided among his brothers and sisters in equal share; but should any of them die in the life of the wife, the share of him or her so dying to go to his or her children. One of the brothers died in the life of testator's widow without having ever had a child, and the Master of the Rolls adjudged the share of the deceased brother to be vested in interest, and subject to be divested only in the event of his dying in her lifetime and leaving children. The cases referred to are regarded as differing from the present case in unessential particulars only, and as decisive of the question under consideration. If the words employed be in other respects sufficient to pass a present interest, the mere circumstance of its being limited over on a contingency does not, in itself, prevent the interest from vesting. *Rut-*

ledge v. Rutledge, Dud. Eq. 205; Skey v. Barnes, 3 Meriv. 340. On the contrary there is high authority for the proposition that it has precisely the opposite effect; 2 Jarm. (note u) 738. It is held that the children of Mrs. Mary Elizabeth Haynsworth took vested estates under the deed.

The case, however, is not determined by the decision of that question. It remains to be considered whether, in the events that have occurred, the limitation over to Francis G. Spann and his sister McConico can take

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effect. The deed *manifests that the grantor's chief purpose in framing its provisions was to secure the property comprised in it to his grandchildren, the grantees, and their issue. The whole is given to them successively, except an estate for life, contingent in enjoyment, which is carved out for the plaintiff, in the event of his surviving his wife; and even that interest is apparently sought to be restricted by the provision that it should not be liable for his debts. The estate, given to the children of Mrs. Mary Elizabeth Haynsworth, is limited in terms which literally import an origin coeval only with the date of its coming into possession. Such form of description cannot postpone the period for its vesting in interest, but it is not without significance in giving construction to the limitation over. If there should be no children of Mrs. Mary Elizabeth Haynsworth to take the estate given them at the date assigned for its beneficial enjoyment, then Francis G. Spann and his sister are appointed to take that estate and at that time. The limitation to the children of Mrs. Mary Elizabeth Haynsworth is to take effect at the date of their father's death; undoubtedly not in derogation of her life-estate, however, but at his decease, assuming that he survives her. If there be no children of hers to take at that time, then the grantor's other grandchildren named in the deed become entitled. The date at which the former were to take in enjoyment, and that at which the latter were to take in default of the former objects, are identical. The point of time which marks the decease of the survivor of two persons is one and the same with that which marks the decease of both. Two points of time were assuredly not within the contemplation of the grantor when he fixed the date expressed by the words, "at the time of their decease." Had it been so intended, and the same form of expression been employed, he would have said, "at the times of their decease." It would be absurd to suppose that the grantor anticipated that both would die at the same

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instant. The *phrase in question may be considered as equivalent to what would be expressed by the words, "at the time of the decease of both." The construction contended for by the plaintiff would interpret them as signifying "at the time of the decease of either," a conclusion which cannot be admit-

ter until "two" can be shown to be synonymous with "one." If the deed had ended with the limitation in favor of the children of Mrs. Mary Elizabeth Haynsworth, and if Henry Haynsworth had survived both her and them, the whole estate would have vested absolutely in one no longer connected by ties of blood or affinity with the family of the grantor. It was to prevent this very result that the limitation over was incorporated into the deed. If so, it is not perceived how the purpose of the grantor could have been changed or modified by the circumstance (had he foreseen it) of his granddaughter, Mary Elizabeth, leaving issue surviving her, if such issue died afterwards in the life of the father. The death of the mother and the death of the children in the lifetime of the father, and not the order in which these events might occur, constituted the contingency provided for in the limitation over. In the judgment of the Court, the construction suggested by the plaintiff finds no warrant in the words descriptive of the event upon which the ultimate limitation is to take effect, nor in the context of the deed, nor in any rational motive that can be ascribed to the grantor. It is ordered and decreed that the bill be dismissed.

Copy Deed.

"State of South Carolina, Sumter District:

"Know all men by these presents, that I, Charles Spann, of Sumter District, in the State aforesaid, in consideration of the love and affection which I have and bear towards my granddaughter, Mary Elizabeth Britton Haynsworth, wife of Henry Haynsworth, of Sumterville, in said district and State, and in consideration of the sum of one dollar to

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me in hand *paid by John F. Haynsworth, have given, granted, and delivered, and by these presents do give, grant, and deliver, unto the said John F. Haynsworth, his heirs and assigns, forever, in trust, as hereinafter mentioned, the following negro slaves, namely, Gilbert, Caleb, Mack, Ephraim, Hagar, Mima, Penny, Caty, Molly, Will, Hager, (the younger,) Nelly, Caty, (the younger,) Dorcus, Sam, Jupiter, and Jane; and also, one-third undivided of one thousand acres of land embracing the settlement and houses in which my late deceased son, William Spann, resided, as tenant in common; and also, one-third undivided of the land laid off eastwardly from my other land by a line running sixty-five west, surveyed by Mr. Hasting Jennings, the fourteenth day of October, in the year of our Lord one thousand eight hundred and thirty-seven; together with all and singular the said slaves and their increase, and all and singular the one-third of the said land as above described, with the appurtenances unto the same belonging or in any wise incident or appertaining: to have and to hold the said premises unto the said John F.

Haynsworth, his heirs and assigns, in trust, to and for the sole use of my said granddaughter, wife of the said Henry Haynsworth, during her natural life, and after her death to and for the use of the said Henry Haynsworth for and during his natural life, and after his death to and for the use of the children born or hereafter to be born of my said granddaughter, and their heirs, share and share alike; but should my said granddaughter and the said Henry Haynsworth both die without leaving children living at the time of their decease, born of the said Mary Elizabeth Britton Haynsworth, my granddaughter, then the said John F. Haynsworth, or his representatives, shall convey the said premises to my other grandchildren, namely, the children of my deceased son, William Spann—that is to say, to Francis George Spann and McConico Gulielma Spann—and their heirs, share and share alike equally between them; and in case of the death of

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either or both, to their children—the *children of a deceased parent taking the part to which their parent would have been entitled if living; and the said John F. Haynsworth shall hold the said property herein conveyed for the uses above mentioned, so that the same shall not be subjected in any manner to the present or future debts of the said Henry Haynsworth or any future husband of my said granddaughter, Mary Elizabeth Britton Haynsworth. In witness whereof, I have hereunto set my hand and seal, this twenty-fifth day of May, in the year of our Lord one thousand eight hundred and forty-four. Signed, sealed and delivered in presence of ('and their heirs, share and share alike,' in one place, and the words, 'and their heirs,' in another place, being first interlined.)

"Chs. Spann, Senr. [L. S.]

"C. W. Miller.

"Sarah S. Spann."

The plaintiff appealed, and now moved this Court to reverse the decree of his Honor, the presiding Chancellor, on the ground:

Because, by a proper construction of the deed, the plaintiff's intestate, William Henry Haynsworth, took a vested interest under it, defeasible only in the event of his dying in the lifetime of both of his parents; and as that contingency did not arise, he took an absolute estate, subject to the life-interest of the plaintiff in the property conveyed.

F. J. Moses, Haynsworth, for appellant.

J. S. G. Richardson, Fraser, contra.

The opinion of the Court was delivered by

JOHNSTONE, J. We agree with the Chancellor, that Wm. Henry Haynsworth took a vested interest in the property conveyed in the deed. But we do not concur in his conclusion that that interest has been defeated by his failure to survive both his parents.

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*A vested interest has the quality of transmissibility, and is not defeated by the death of the tenant. It is not to be taken away, except upon the occurrence of some event, which, by the terms of the grant, or a just construction of the instrument, was intended to terminate that interest. This principle is very just and reasonable, and has the merit of effectuating the intention of the grantor more completely than any other that has been suggested. Where the grant vests an interest generally and indefinitely in one person or class of persons, and this is followed by ulterior limitations to other persons, it is a plain case of preference of the former in the affections of the grantor. If the ulterior limitations are suspended upon conditions or contingencies, these must occur before the secondary grant can take effect. A contrary judgment would have the effect of supplanting the primary intention by the secondary, while yet the primary intention might be carried out.

In *Kersh v. Yongue*, 7 Rich. Eq. 100, it was held that, the condition of an ulterior disposition not having occurred, prior dispositions creating vested and transmissible interests remained in full force. I might mention other cases of our own, and cases decided abroad, but this may suffice, I think fully sustaining the principles I have announced. These principles show that, in the present case, the real question is, whether these ulterior limitations are entitled to be enforced. Have the conditions upon which they are suspended been fulfilled? Have the contingencies attached to them, by the deed, occurred?

It is true that the construction must be upon the whole instrument; and if, by a fair construction, the contingencies annexed to the limitations over can be carried back, and applied also to the preceding interests, it should be so held. But the preceding interests here are given generally, and by words implying no restriction. After all that has been said in the decree, and in the argument

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here, or that, as I *conceive, can be said, the matter, to say the most, if left doubtful whether the grantor intended the words of contingencies to apply to the interests he had given before he made use of those words. Where doubts exist, they should not be allowed to disparage prior interests in favor of secondary. The more favored objects of bounty should prevail over the less favored. The effect of these observations is, that the ulterior limitations must be tried by their own strength, and upon the terms annexed to them.

And what are they? "Should my said granddaughter" (Mrs. Haynsworth) "and the said Henry Haynsworth" (her husband) "both die without leaving children living at the time of their decease, born of the said Mary E. Haynsworth, my said granddaughter," then

over to the ulterior grantees. Should they both die without children at their death: what can this mean but that the limitation is made to depend upon a double contingency? And is not fulfilled by the death of one of them without surviving children of the marriage. It is true Mr. Haynsworth (let his death occur when it may) must die without such children, the possibility of such issue being now extinct. But Mrs. Haynsworth left one living child of the marriage surviving her. Both have not died, and cannot die, (as things have occurred,) without such issue. The result is, that the limitations over have not taken and cannot now take effect.

We are therefore of the opinion that the decree dismissing the bill should be reversed and set aside, and it is so ordered.

But we have not the record before us, and cannot proceed for want of it to make the decree for the plaintiff to which he is entitled. It is therefore further ordered that the case be remanded to the Circuit Court, which will proceed to decree according to the record.

O'NEALL, C. J., and WARDLAW, J., concurred.

Decree reversed.

12 Rich. Eq. *124

*THE COLUMBIA BUILDING AND LOAN ASSOCIATION v. WILLIAM BOL-LINGER.

(Columbia. Nov. and Dec. Term, 1860.)

[*Building and Loan Associations* ⚡31.]

An incorporated building and loan association advanced, in conformity to the provisions of its constitution, to one of its members, who owned ten shares of its capital stock, two thousand dollars, at a premium of thirty-five per cent., equal to seven hundred dollars, paid him thirteen hundred dollars, being the amount advanced less the premium, and took his bond, secured by a mortgage of real estate and an assignment of his shares of the stock, for the amount advanced, two thousand dollars, payable, with interest at the rate of six per cent. per annum, in monthly instalments of twenty dollars each:—*Held*, that the contract was usurious.

[*Ed. Note.*—Cited in *Ex parte Monteith*, 1 S. C. 232; *Mechanics' & Farmers' Bldg. & Loan Ass'n v. Dorsey*, 15 S. C. 462, 469; *Thompson & Co. v. Gillison*, 28 S. C. 538, 544, 6 S. E. 333; *Buist v. Bryan*, 44 S. C. 125, 127, 21 S. E. 537, 29 L. R. A. 127, 51 Am. St. Rep. 787.

For other cases, see *Building and Loan Associations*, Cent. Dig. § 47; Dec. Dig. ⚡31.]

[*Partnership* ⚡20.]

[Cited in *Pollock v. Carolina Interstate B. & L. Ass'n*, 51 S. C. 424, 29 S. E. 77, 64 Am. St. Rep. 683, to the point that the arrangement constituted a loan, not a partnership transaction.]

[*Ed. Note.*—For other cases, see *Partnership*, Cent. Dig. §§ 6, 7; Dec. Dig. ⚡20.]

Before Carroll, Ch., at Richland, June, 1860.

The decree of his Honor, the Circuit Chancellor, which states every thing necessary to

a full understanding of the case, is as follows:

Carroll, Ch. The Columbia Building and Loan Association was organized in May, 1852, and on 16th of December following obtained a charter of incorporation. In its constitution it is declared that the association "shall have for its object the accumulation of a fund, by the monthly subscriptions or savings of the members, to assist them in procuring for themselves such real estate as they may deem desirable, or to be employed in their business or trade." By its charter, the association is created "a body politic or corporate, for the purpose of making loans of money, secured by mortgage of real estate or personal property, to its members and stockholders, with power to make such rules and by-laws for its government as are not repug-

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nant to the constitution and laws *of the land, and with a capital stock to consist of twelve hundred shares, to be paid in by successive monthly instalments of one dollar on each share so long as the corporation shall continue." The Act of incorporation further provides, that the funds of the association "shall be loaned and advanced to the stockholders in such mode, and subject to such terms, conditions, and regulations as may, from time to time, be prescribed by its rules and by-laws, and that whenever its funds shall have accumulated to such an amount that, upon a just division, each stockholder will be entitled to receive two hundred dollars, or property of that value, for each and every share of stock by him or her held, and such division of the funds shall have been made, the corporation shall cease and determine." In the constitution of the association, among other regulations, are the following:

"Each stockholder, for each share of stock he may hold, shall be entitled to purchase an advance of stock of two hundred dollars, and no more. Whenever the funds in the treasury shall warrant it, one or more advances shall be disposed of to the highest bidder. Any stockholder taking an advance shall allow to be deducted the premium offered by him for the same, and shall secure the association for such advance by bond and mortgage. For each advance of two hundred dollars made to a stockholder, at least one share of stock shall be assigned as collateral security. Any stockholder taking an advance shall pay to the treasurer, in addition to his or her monthly dues for shares, one dollar per month on each share for which such advance is made, or at the rate of six per cent. per annum on the whole amount including the premium. Should any stockholder, having received any portion of his stock in advance, neglect or refuse to pay any or all of his dues to the association for three successive months, then the directors may compel payment of principal and interest by instituting

proceedings on the bond and mortgage according to law."

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*On the 2d Monday of December, 1854, two thousand dollars of the funds of the association were "purchased" in parcels of one thousand dollars by William Bollinger, then a member and holder of ten shares of the capital stock, at the premium of thirty-five per cent. From the sum so purchased, the premium bid, seven hundred dollars, was deducted, and the residue, one thousand three hundred dollars, was delivered to Bollinger, who, at the same time, executed his bond to the association in the penalty of four thousand dollars, conditioned for the payment of two thousand dollars in manner following, that is to say: the "sum of twenty dollars to be paid on or before the second Monday of each and every month succeeding the 14th December, 1854, the date of the bond, until the whole sum of two thousand dollars (the principal) and the interest thereon, at the rate of six per centum per annum, payable monthly, as above, shall have been fully paid and satisfied." To secure payment of his bond, Bollinger, on the same day, executed to the association a mortgage of a lot or parcel of land in the town of Columbia, and as collateral security he also assigned to the association his ten shares of the capital stock, as required by its constitution.

Before the 2d Monday of December, 1854, Bollinger had made thirty-two monthly payments upon his stock, amounting in the aggregate to three hundred and twenty dollars.

After the execution of his bond, the monthly payments required by its condition were duly made until November, 1856; but since that date nothing has been paid upon the bond.

The bill is for foreclosure of the mortgage, sale of the premises comprised in it, and payment of the mortgage debt out of the proceeds. By consent of parties, the usual order of reference was made, requiring the Commissioner to ascertain the amount due upon the bond. The report was filed 18th June, 1860, and states the balance due upon

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the *bond at that date to be two thousand seven hundred and seventy-nine dollars and fifty cents, and the defendant Bollinger excepts to that report. His fourth exception is, that the report does not show how the supposed balance of two thousand seven hundred and seventy-nine dollars and fifty cents is made up.

In the statement of the account between Bollinger and the association, annexed to the report, there is a debit against him of eight hundred and sixty dollars for arrears of monthly dues, and this is followed by another charge, which is thus expressed: "To amount of fines for non-payment of the above dues, one thousand eight hundred and ninety-two dollars." It is shown by the testimony before the Commissioner that Bollinger

"had incurred fines and forfeitures;" that he "owed fines and penalties" which amounted on 2d Monday of August, 1858, to four hundred and sixty-two dollars, and that the fines he subsequently incurred were in the aggregate five hundred and six dollars; and it is stated in general terms by the witness examined at the reference, that the sum of two thousand seven hundred and seventy-nine dollars and fifty cents was due upon the bond on 2d June, 1860. This comprises the whole of the evidence reported, which relates to the item of the account under consideration, except what may be collected by inference from the constitution of the association. The report should specify so much of the evidence as will enable the Court to perceive with certainty upon what proof the Commissioner has acted. When the Commissioner reports upon accounts, he generally states the results of the accounts in the body of his report, and refers to schedules annexed, as to the particular items. *Johnson v. Davis*, 2 Strob. Eq. 157; 2 Dan. Ch. Pr. 1481. It is considered that the report does not conform to the rule referred to, and the fourth exception is therefore sustained.

The remaining exceptions present the sin-

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gle question, *whether the contract, upon which the defendant's bond is founded, was usurious or not.

Societies similar to the Columbia Building and Loan Association are common in England as well as in this country. A question similar to that now to be considered, if not identical with it, arose in the case of *Silver v. Barnes*, 6 Bing. N. C. 180. There, the defendant, a member of the "Woollridge Mutual Benefit Society," had bid off eighty pounds of the society's funds, at the premium of £15. 17s. 6d., to be paid in addition to five per cent. on the eighty pounds. The defendant received the eighty pounds, and executed his note for that sum to the treasurer of the society, and the action was brought upon the note. It was held by the Court, that "the transaction was a dealing with a partnership fund, in which the defendant had an interest in common with the other members of the society, and was not a loan." The authority of this doctrine has been repeatedly recognized. *Burbidge v. Colton*, 8 Eng. L. and E. R. 62; *Cuthill v. Kingdom*, 1 Excheq. R. by Welsb. H. & G. 494; *Bibb County Loan Association v. Richards*, 21 Geo. R. 608. The point decided in *Silver v. Barnes*, that the money advanced to the defendant was not a loan, appears to have been rightly determined.

But it is conceived that there were other and more satisfactory grounds for that judgment than those upon which it seems to have been placed. In this cause the most embarrassing inquiry, perhaps, is to ascertain what was the real contract as to the money advanced to Bollinger by the association. That sum

comprised the entire portion of the common fund that could ever be advanced to him as a stockholder, according to the constitution of the association. Neither Bollinger, nor any one of his associates in that society, had the right to be paid two hundred dollars in December, 1854, upon each share of their stock. They could only claim such payment when, from the monthly dues upon their stock, the

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*premiums to be received, and other sources of supply, the funds of the association should so accumulate as to be sufficient to pay to all the stockholders that sum upon each share of the stock held by them respectively.

If, however, the wants or necessities of any stockholder rendered it desirable that he should receive a sum equivalent, presently, to the amount to which he would be entitled upon his shares at the termination of the association, its constitution provided for such advances upon the stock. Indeed this was the primary and leading purpose of the association. As two hundred dollars, not payable until a day indefinitely future and uncertain, are not worth that sum, if paid immediately, the stockholder who received, in anticipation, the moneys that would be payable on his shares at the termination of the association, might well be content to receive a sum of less nominal amount, if presently paid. The constitution of the association accordingly provides that its funds shall, from time to time, be offered to its members as advances upon their stock, and in parcels corresponding with the assumed ultimate value of one or more shares, the preference of taking such advances to be decided by competition among the stockholders, and to be assigned to him who shall consent to the largest abatement from such ultimate value, and agree to take the residue of the same, to be immediately paid as an equivalent for the present value of his stock. It was under this provision of the constitution of the association that Bollinger, in December, 1854, obtained an advance upon his ten shares of the capital stock. By his contract with the association Bollinger agreed, in lieu of the two hundred dollars for each of his shares to which he would be entitled when the funds of the association would suffice to pay that sum to each share of its whole capital stock, to accept the sum of two thousand dollars in cash, to be reduced, however, by seven hundred dollars, payable presently, and by the further sum of ten dollars, payable monthly

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thereafter, during *the existence of the association. If this be a just conception of the contract between Bollinger and the association, then the transaction was not a loan. It was an advance by anticipation to Bollinger of the present value of what he would be entitled to receive upon the shares he held at the termination of the association. If the contract be regarded as a sale by Bollinger

and a purchase by the association of his interest as a stockholder, the inhibition against usury would have no application to such a transaction. If his interest in his shares be considered as in the nature of a debt against the association, the agreement, being executed, would be sustained as amounting to a lawful satisfaction of such debt. When a creditor accepts as full satisfaction a sum less than his debt, if such payment be made before the debt is due it is a good discharge. Pinnell's case, 5 Rep. 117. The acceptor of a bill took a premium of sixpence in the pound from the indorsee for payment of the bill before it became due, and this was held not to be usurious. Chit. on Con. 772. If the association stood towards Bollinger as an agent in regard to particular funds of uncertain amount not yet received, and were to advance to him the estimated amount of the same, retaining as compensation a sum exceeding the legal rate of interest upon such advance, the transaction could not be impeached upon the ground of usury.

In *Harvey v. Archbold*, 3 Barn. & C. 631, an agent, to whom goods had been consigned for sale, remitted to his principal, by anticipation, the probable amount of the proceeds of such goods, and it was held that such remittance did not amount to a loan, so as to render a charge of six per cent. thereon usurious. A contract, if not usurious when executed, would not be usurious if executory only. If, in the case cited, the agent, instead of having all the goods actually consigned to him, had received but a portion of them, and had taken security from his principal for the consignment of the residue, the result would have been the same. The relations

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between *the parties in the case supposed are considered as analogous to those between the parties here.

The additional sum of one dollar to be paid monthly by Bollinger on each of his shares of stock, after receiving the advance upon them, was as much parcel of the premium for such advance as were the seven hundred dollars. If, by agreement founded upon an estimate of the probable duration of the association, a gross sum had been fixed and paid presently, in lieu of such additional monthly payments, and such ascertained sum had been deducted from the one thousand three hundred dollars received by Bollinger, the residue would have exhibited the net sum paid to him as an advance upon his stock. From the very nature of his contract with the association, such net sum was not then capable of being ascertained. But that sum, whatever its amount, Bollinger never engaged to return. The bond that he executed is not and was never intended to be a security for its repayment. Twenty dollars are required by the condition of the bond to be paid monthly.

Of this sum, it is in proof that the one moiety is for the primary monthly dues upon

the defendant's shares, and the other moiety for the additional monthly dues that arose upon the same shares after the advance thereon. The former moiety cannot be regarded as interest upon the sum advanced to Bollinger, for the obligation to pay it existed prior to such advance, and was assumed by his original subscription for his shares. As to the latter moiety, it was, in truth, but parcel of the abatement agreed to be made from the assumed ultimate value of his shares when Bollinger received the advance of their value by anticipation, and is no more interest than were the seven hundred dollars deducted at the outset. It is provided by the constitution of the association that "each stockholder taking an advance shall secure the association for such advance by bond and mortgage." The security referred to surely

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does not mean security for the return of the money to be so advanced. This would be wholly inconsistent with the idea of an advance to the stockholder in anticipation of what will hereafter be due to him upon his shares. The security contemplated is security that the stockholder will make all such payments as are necessary to preserve and perfect the right to the sums payable at the termination of the association, upon the shares whose value has been advanced to him. His title to receive those sums, the ultimate profits and proceeds of his shares, is transferred to the association by the effect of his contract for such advance, and the assignment of his shares executed in pursuance of it. The very object of the bond is to secure and render effectual such transfer. The view which has been taken of the contract between the parties is sustained by the case of *Moseby v. Baker*, 6 Hare, 98. What is said by the Vice-Chancellor of the plaintiff in that case may almost literally be applied to the defendant in this. "He was in the position of a member who had received, by anticipation, the one hundred and twenty pounds, which the non-purchasing members were not to receive until the termination of the association. Each of the members (as well those who had purchased advances as those who had not) had to pay the price of his shares, so far as the future monthly payments were concerned. That the plaintiff had discounted his share and received its full value in advance, would not alter his liability in that respect. He is a purchaser of shares, who has received the value of his shares, but whose purchase-money is unpaid."

It is true that the terms loan and advance are employed in the charter as if synonymous; that the constitution of the association designates the bond to be executed by the member receiving an advance upon his shares as "security for such advance," and refers to the payment of the bond as a "payment of principal and interest;" and that an

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officer of the association, examined as a

witness in the cause, speaks of the advance to the defendant as a "borrowing" and a "loan."

But, it is the duty of the Court "to look, not at the form and words, but at the substance of the transaction." *Tete v. Bedgood*, 7 B. & C. 453.

Thus considering the matter in controversy, the Court is of opinion that the contract in question was not usurious, and the first, second, third, and fifth exceptions are therefore overruled.

Whether any other defence in this Court would have availed to resist the enforcement of the contract between Bollinger and the association, it is unnecessary to determine. It was assailed by the defendant as being within the inhibition of the statute against usury. But neither in his answer, nor in the argument at the hearing, was it impugned upon any other ground. It is ordered that the report be recommitted and amended as herein above directed.

The defendant appealed, and now moved this Court to reverse or modify the decree, on the grounds:

1. Because the contract, on which the bond and mortgage sought to be foreclosed were given, is usurious, and therefore null and void, and certainly for the excess beyond the money actually lent.

2. That the constitution and by-laws of the plaintiffs, under which the loan to the defendant was made, are repugnant to the laws of the land prohibiting usury, and are not authorized by their charter.

3. That the whole scheme of the plaintiffs, in forming their association and obtaining a charter of incorporation, was, in effect, to evade the laws of the State against usury, and to lend their money at exorbitant rates of interest by color of authority under their

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charter and by-laws, which, without such disguise, would be prohibited by law as glaringly usurious. But the charter grants no such authority.

Bauskett, for appellant.

Arthur, Tally, contra.

The opinion of the Court was delivered by

O'NEALL, C. J. The single question presented by this case is, whether the contract is or is not usurious.

I had it not been for the Chancellor's decree, and the cases to which he has referred, I should not have entertained a doubt as to the usurious character of the contract.

The contract, in the beginning, allowed a discount of seven hundred dollars, on an advance of one thousand three hundred dollars, which was called a purchase of two thousand dollars of the funds of the corporators, at the premium of thirty-five per cent. This sum of two thousand dollars and interest at six per cent. was to be repaid, in sums of twenty dollars, at the end of each month suc-

ceeding the 14th of December, 1854, the date of the bond. These were the provisions of the bond. Before the second Monday of December, 1854, the defendant had made thirty-two monthly payments, amounting to three hundred and twenty dollars. After the execution of the bond, the monthly payments required by its condition were duly made until November, 1856. This constituted a further sum paid of four hundred and sixty dollars. The actual payments on the loan, or advance, amounted to one thousand four hundred and eighty dollars, one hundred and eighty dollars more than the sum loaned, or advanced.

How the contract, which has thus earned more than the principal in a period of little more than four years, can be any thing else than usurious, "the taking, directly or indirectly, above the value of seven pounds for

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the forbearance *of one hundred pounds for one year," is difficult to conceive. Indeed it must task and has tasked human ingenuity in every tribunal where the question has been presented, to find the reasons whereby such a contract could be sustained.

The case of *Silver v. Barnes*, 37 Eng. C. L. Rep. 335, seems to have been the beginning where the doctrine was sustained that such a contract was not usurious. That case was put by the Circuit Judge upon the ground that it was a mere advance of partnership funds. How that could have sanctified such a contract, I cannot perceive. For it was as much usury to receive more than seven per cent. on such an advance as upon individual funds. The Court of Common Pleas, on an appeal, placed their judgment on the ground whether it was an advance of partnership funds, or an usurious loan, was a question for the jury, and their verdict, that it was an advance of partnership funds, was sustained, as conclusive. I think it was a decision against law, even put in that point of view. For it still was contaminated by usury, if it was even a partnership fund. It was the taking more than legal interest for the forbearance of money. That case has been the foundation of all the subsequent cases in England, Connecticut, and Georgia. Here it is to be decided for the first time, and I rejoice that we are not bound by any previous adjudication. The case of the *Bibb County Loan Association v. Richards*, 21 Geo. Rep. 592, was placed upon the ground that the charter had adopted the constitution and by-laws of the association as part of the law by which it was regulated, and the charge being according to it, could not be illegal. This was the view of Lumpkin, J., followed by Benning, J., who hold that the association had followed the charter, and therefore they were entitled to recover. McDonald, J., dissented, and took, it seems to me, the true view, that more than legal interest being charged and received for the

forbearance of money, the contract was usurious.

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*In the case before us, the constitution and by-laws were not adopted as part of the charter. By the third section of the charter, the corporation is authorized to make "any such rules and by-laws for their government as are not repugnant to the constitution and laws of the land."

The by-laws which authorized the contract before us cannot of themselves sustain its validity. If the contract be contaminated by usury, it must fall, and with it the by-laws, as contrary to the law of the land.

By the second section of the by-laws, it is provided, "whenever the funds in the treasury shall warrant it, one or more advances shall be disposed of to the highest bidder, provided the same be not sold under par, and be secured by real estate fully equal in value to the sum advanced." Under this section, two thousand dollars were bid in by the defendant, at a premium of thirty-five per cent., and under the third section, "any stockholder taking an advance shall allow to be deducted the premium offered by him or her;" the premium, seven hundred dollars, was deducted. For what was such a premium deducted? Beyond all doubt, it was not for the privilege of buying. But it was for its consequence, the use of the money, which was to be repaid by instalments of twenty dollars per month. That, beyond all doubt, was for the forbearance of money, and is necessarily, under our law, usurious. The contract made under the third and fourth sections provides ample security for the payment of the money, in the mortgage of real estate of equal value, and the assignment of stock in the said corporation. There is therefore no risk to increase the premium. By the fifth section, the defendant is bound to pay interest at six per cent. on the amount bid in, and by the seventh section, for the failure to pay his dues to the association for three months, the directors may compel the payment of principal and interest, by instituting proceedings at law, or in equity, on the bond and mortgage. I am therefore

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clear that the contract in this *case is a plain attempt to evade the usury law. By the Act of 1831, which altered the law in relation to interest and usury, and repealed the penalties of the Act of 1777, it is in the second section provided, "that every person lending or advancing money, or other commodity, upon interest, shall be allowed to recover, in all cases whatsoever, the amounts or value actually lent and advanced; and that the principal sum, amount, or value so lent or advanced without any interest, shall be deemed and taken by the Court to be the true legal debt, or measure of damages, to all intents and purposes whatever, to be recovered without costs." Under this provision, the corporation will be entitled to re-

cover the sum actually loaned, deducting the payments made. The result will be, that thirteen hundred dollars will be the principal, on which payments to the amount of one thousand four hundred and eighty dollars have been made; so the corporation has been over-paid one hundred and eighty dollars. The consequence is, that the complainant's bill must be dismissed.

It is, therefore, ordered and decreed, that the Chancellor's decree be reversed, and that the bill be dismissed with costs.

JOHNSTONE, J., concurred.

WARDLAW, J., was absent, and gave no opinion.

Decree reversed.

12 Rich. Eq. *138

*ALEXANDER VERDIER v. CATHARINE B. VERDIER, Executrix. (a)
CREDITORS OF JOHN A. FRAYSSE v. SAME.

FRANCIS G. GREZELLE v. SAME.
(Columbia. May Term, 1860.)

[*Appeal and Error* ⇨77.]

A decree, on bill for partition and settlement of the estate of a decedent, adjudging that one of the parties was one of the next of kin of decedent, and entitled, with other parties, to a share of his real estate descended, is final, and if not then appealed from cannot be objected to and made the subject of appeal at any subsequent stage of the proceedings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 447; Dec. Dig. ⇨77.]

[*Appeal and Error* ⇨364.]

So, also, where the Court decrees that real estate descended is liable for payment of debts in exoneration of personal estate bequeathed and not charged with debts, such decree cannot be appealed from at a subsequent stage of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1971; Dec. Dig. ⇨364.]

The cases on the subject of appeals taken at some subsequent stage of the case, reviewed.

[*Executors and Administrators* ⇨272.]

Semble, that real estate descended must be applied in payment of debts in exoneration of personal estate bequeathed and not charged with debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1052-1057, 1059, 1065, 1068; Dec. Dig. ⇨272.]

This case will be sufficiently understood from the opinion delivered in the Court of Appeals, which is as follows:

WARDLAW, J. Simon Verdier, late of Colleton District, died June 21, 1853, leaving a widow, Catharine B., and no descendant, and a will, dated September 5, 1825, whereby he nominated his widow and James Bowman executors, and, without any mention

of his debts, gave to his widow the whole of his estate, real and personal, except a bequest of \$3,000 and an alternative legacy

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of a family of negroes or \$1,000 to Bowman, who predeceased testator, in lieu of commissions. After making his will, testator acquired valuable real estates in this State and elsewhere, which were suffered to pass by descent.

The three suits named in the caption, respectively presented for judgment, the claims, to a share of the descended realty of the decedent, of Alexander Verdier, brother of testator, John A. Fraysse, son of testator's sister, and Francis G. Grezelle, son of testator's aunt; all the bills recognizing the title of the defendant to the real estate devised, and to a moiety certainly, and to two-thirds, if the brother and nephews were aliens, under our Statutes of Distribution, of the descended real estate. The answers of defendant submitted that the real estate of her late husband, not devised, was liable for the payment of his debts, before resort for this purpose could be had to the personalty bequeathed to her, without charge for debts. To the second of these bills, by the creditors of John A. Fraysse, and to that alone, the children of John A. Fraysse, they being natives of this country, were made parties defendant, probably by amendment of the bill; and they filed an answer. The cases were heard in connection at the same sitting, February, 1858, by Chancellor Wardlaw, and February 18, with consent of all the counsel, he ordered the Commissioner to inquire and report as to the real estate acquired by Simon Verdier, after the execution of his will; and on the 19th February, 1858, filed his decree adjudging that the claims on the part of Alexander Verdier and John A. Fraysse should be dismissed, as these persons were aliens, being natives of France, not naturalized in this country, nor entitled to inherit by force of any treaty between France and the United States; that Grezelle, having been naturalized before the death of testator, was entitled to take by descent, and that he and the children of Fraysse, as standing in the same degree of kindred to the deceased, were entitled to distribute among them per capita one-third

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of the descended real estate; *and that the descended lands were liable for the debts of the estate before the personalty bequeathed uncharged, and the Chancellor ordered a reference to the Commissioner to ascertain the amount of the debts paid by the executrix. On reports made by the Commissioner, orders were obtained by consent in August and November, 1858, for sales of the descended lands, and these orders have been executed. At February sitting, 1860, the Commissioner made a report of his sales, and also as to the amount of debts paid by the executrix, and no exceptions being

(a) This is the only Equity case of this Term (May, 1860) that is not contained in 11 Rich. Eq., so far as the Reporter knows.

filed, this report was confirmed by Chancellor Carroll. A motion was submitted to the Chancellor to distribute the proceeds of the sales of the lands descended among the children of Fraysse, in exclusion of Grezelle, and exonerated from the payment of debts, the personal assets being ample for this purpose; and this motion was refused as manifestly in conflict with the decree of February, 1858. From this refusal and from the former decree, the children of Fraysse, and their mother, interested as distributee of some of this class who have died, appeal, and affirm that Grezelle is not so near in kindred to intestate as the children of Fraysse, and that the personality, under the circumstances, is the primary fund for payment of debts.

It is too clear for argument that the whole fault in decision is in the decree of February, 1858, and that Chancellor Carroll erred in no respect in refusing to entertain an appeal from the judgment of his predecessor, co-ordinate in authority. The leading question in the case, therefore, is as to the right of the appellants to appeal now from the decree of February, 1858.

The fifth section of the Act of 1808, 7 Stat. 305, prescribes that appeals shall be taken from decrees in equity, making no distinction between interlocutory and final decrees, to the next sitting of the Court of Appeals after the filing of the decrees; and the 6th and 9th rules of the Court of Appeals, Mil. Comp. 30, prescribe, besides other particulars, that ev-

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ery *appealing party shall give notice of his intention to appeal within fifteen days after notice of decree filed, and docket his cause at the first term of the Court of Appeals after it has been decided. The recent course of the Court of Appeals in Equity (and their decisions are authoritative) has been to exact in general the promptitude of appeal demanded by the Act and the Rules, and still as to decrees not final and depending as to the result on the further action of the Court, to allow a party to retain his right of appeal until he ascertain that he is really damnified by the decree. Thus a widow ordered to elect between her dower and a provision for her in her husband's will, may postpone her appeal until she has the means from the Master's report to determine that she is injured by being put to election. So in account, a decree adjudging the liability of a party to account is not final in its nature, nor by necessary consequence injurious to the accounting party on the terms prescribed for taking the account; and in such case, while he may appeal at once from the decree, he may wait for the final judgment fixing the extent of his liability, and then bring under consideration all interlocutory orders, leading to the judgment. Appellate tribunals disclaim being merely professional advisers to any portion of the community, and are properly reluctant to decide questions which may have no practical effect on the interests of the parties be-

fore them; but they should discourage all that delay of justice which is as disastrous as its denial, and especially should prevent the success of that sordid tardiness induced by speculations of profit from changes of opinion, or of persons, in the forum.

The case of *Price v. Nesbit*, 1 Hill Eq. 453-457, especially by its reference to a previous decision, has been supposed to decide that the right of appeal, from all the judgments in a case remains so long as there is an undecided fragment in the cause. Chancellor Harper endeavored to correct this error in *Britton v. Johnson*, Dud. Eq. 28, by explaining that

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**Price v. Nesbit* belonged to the procedure of the Court as to rehearing and review, and not as to appeal. According to the English practice, the Court, on proper showing, may review and reverse its decree while the cause is under its control, and even may correct a plain error, especially if clerical, on its own motion, without any petition; Dan. Ch. Pr. 1724, n; and our own practice is quite as liberal. See *Lemacks v. Glover*, 1 Rich. Eq. 141; *Donnelly v. Ewart*, 3 Rich. Eq. 18. The Chancellor proceeds to remark that the English practice should be pursued throughout, and that there should be a suggestion of specific errors, certificate of counsel as to errors, and decision thereupon without argument. And then embracing both rehearings and appeals, says: "It is a great mistake to suppose that parties are at liberty, as of course and of right, again, to stir a matter which has been once adjudged, without the permission of the Court. This would be a source of endless confusion, embarrassment and uncertainty." In the case of *Britton v. Johnson*, there had been an appeal from one part of the decree, which was decided, and the attempt was made to appeal again from another part of the same decree, (with plausible suggestion of error,) but the Court would not entertain the second appeal.

In *Brown v. Postell*, 4 Rich. Eq. 71, 77, where a decree pronounced by one Chancellor, affirming the right of plaintiff, had been in effect superseded, by the decretal order of a second Chancellor, in the directions for making new parties and as to the terms of reference to the Commissioner, and a third Chancellor, on the facts found by the Commissioner, decided against the right of the plaintiff, it was held, on appeal from the last decree, that the principles of the first decree were open to investigation. In pronouncing the judgment, Chancellor Dargan says of *Price v. Nesbit*: "The extent to which the right of appeal was allowed in that case has given rise to much discontent. It is suppos-

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ed by many *to sanction a rule mischievous and cumbersome in operation." And he borrowed no force from it.

In *Boyce v. Boyce*, 6 Rich. Eq. 321, it is said by the organ of the Court: "It is lamentable that the decision of *Price v. Nesbit*, so

often quoted, was ever made. It has been a source of annoyance ever since it was pronounced. It seems that no amount of explanation or repudiation can prevent its being cited as authority. Seventeen years ago enough was said in *Britton v. Johnson* to prevent any further recurrence to it. All other means failing, I am prepared to expressly overrule it."

In *Simpson v. Downs*, 5 Rich. Eq. 424, Chancellor Dargan announced as the result of the deliberations of the Court: "Where there is a final decree as to any one of the parties, or any distinct branch of the litigation, so that nothing remains to be adjudged as to that party or that branch of litigation, the appeal must be taken within the time and in the manner prescribed by the rules of Court, or the right of appeal will be lost." The course of practice thus announced was pursued in *Rawls v. Walls*, 5 Rich. Eq. 143, and *McRae v. David*, 7 Rich. Eq. 377; and see *Seaman v. Mure*, 7 Rich. Eq. 284; *Hurt v. Hurt*, 6 Rich. Eq. 114; and *Dyson v. Leek* [5 Strob. 141], there cited.

Now, to apply this doctrine to the present case, it is altogether plain that the decree of February, 1858, explicitly adjudged in favor of Grezelle as one of the distributees, displacing others to the extent of his share, and that the descended realty was liable for debts before personalty. Nothing as to either point remained to be adjudged, in the former as to the party, and in the latter as to the branch of litigation, although matters of detail in execution of the decree were left to be adjusted by the ministerial officer of the Court. All affecting the merits—the rights and principles involved—was absolutely determined.

As a judge I am satisfied that policy and the law require the reasonable diligence here-

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in enforced; I feel some personal regret that my own miscarriage works prejudice to a party, in any particular, but in this case perhaps the blunder may be retrieved by a different remedy from appeal.

Whatever may have produced my mistake in 1858, it seems to me palpable now that, according to the rule for computing kindred, by beginning at the intestate, going up to the common ancestor, and thence down to the person claiming kindred inclusively, reckoning each step as one degree, Grezelle is in the fifth degree of kindred, and postponed a step to the children of Fraysse. If the correct view had been adopted in 1858, all the bills would have been dismissed, and the children of Fraysse left to their own plaint; but we cannot now undo and set aside the intermediate acts in execution of the decree, upon appeal too tardily presented.

As to the rank of liability for debts of the lands and personalty in this case, of course we adjudge nothing; but some of us are not satisfied that the case of *Warley v. Warley*,

Bail Eq. 398, on the authority of which this point was decided, is overruled in this respect by the case of *Henry v. Graham*, 9 Rich. Eq. 100, unpublished in February, 1858, and the case of *Lloyd v. Lloyd*, 10 Rich. Eq. 469, wherever there is no direction in the will concerning the debts.

It is ordered that the appeal be dismissed.

JOHNSTONE, J., concurred.

O'NEALL, C. J., dissenting: The right of appeal from Chancellor Wardlaw's decree, so far as the rights of Grezelle are concerned, is the point upon which I differ. The case of *Price v. Nesbit*, 1 Hill Eq. 445, presents my views on the vexed question as to the right of appeal from an interlocutory decree. The decree there was prepared after a full examination and review of the au-

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thorities, and in obedience to the *appeal decree in *Harrison v. Jenkins*. I never have had occasion to regret its conclusion.

Still, I may be allowed to say that if the Court of Appeals in Equity, in their rule from 1837 to 1859, had settled a different practice I would cheerfully yield to it. But I think they have not. It is true *Price v. Nesbit*, in the language of one of my brethren, has been very much "blackballed," but its principle is affirmed in *Simpson v. Downs*, 5 Rich. Eq. 424, (in 1853.) In that case Chancellor Dargan, in undertaking to settle the right of appeals, says, "The opinion of the Court is, that where there is a final decree as to any one of the parties, or any distinct branch of litigation, so that nothing remains to be adjudged as to that party or that branch of the litigation, the appeal must be taken within the time and in the manner prescribed by the rules of Court, or the right of appeal will be lost."

"It is different where there has been a decree adjudging the liability of a party with a reference to the Commissioner to ascertain the amount due, or where something remains to be done requiring the further judicial action of the Court."

I accept this as the rule now to govern in the Court of Equity.

In this case, Grezelle was held to be in common right as next of kin in the fourth degree with the children of Fraysse; and a writ of partition to divide the real estate of Simon Verdier, in this State, acquired after the making of his will, among his widow, the children of Fraysse, and Grezelle, was ordered. A reference was also ordered as to the rents and profits.

Upon the coming in of the Commissioner's report, the question was made whether Grezelle was entitled at all. It seems he is in the fifth degree of relationship to Simon Verdier, and not in the fourth, as the Chancellor's decree supposed. He is therefore not of the next of kin to the deceased. I think

the parties have the right, on the coming in
of the *Commissioner's report, to have this
plain mistake corrected by way of appeal.

I agree with Chancellor Wardlaw that the
debts of Simon Verdier are properly charge-

able on the real estate acquired subsequent-
ly to the execution of his will. The case of
Warley v. Warley decides, and I think right-
ly, that very question.

Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—MAY TERM, 1861.

JUSTICES PRESENT.

HON. JOHN B. O'NEALL, CHIEF JUSTICE.

HON. JOB JOHNSTONE, ASSOCIATE JUSTICE.

HON. F. H. WARDLAW, ASSOCIATE JUSTICE.

12 Rich. Eq. *196

*WILLIAM M. MYERS v. JOHN O'HANLON.

(Columbia. May Term, 1861.)

[Wills ⌘231.]

Testator died in 1835, and six days after his death his will, dated in 1833, was admitted to probate in common form. Bill filed in 1857 to set up a later will executed but a few days before the testator's death, and alleged to have been fraudulently destroyed by a son and son-in-law of testator. The plaintiff claimed as devisee and legatee under the last will, and averred want of notice until within four years before the filing of the bill:—Bill dismissed because the matter was not within the jurisdiction of the Court, and, if it were, because the bill was barred by the Statute of Limitations and the lapse of time.(a)

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 560; Dec. Dig. ⌘231.]

[Wills ⌘231.]

Equity has no jurisdiction in case of the fraudulent destruction of a will, whether of real or personal estate; the parties interested under it must seek relief in a Court of Probates.

[Ed. Note.—Cited in *Prater v. Whittle*, 16 S. C. 45; *Thames v. Rouse*, 82 S. C. 42, 62 S. E. 254.

For other cases, see Wills, Cent. Dig. § 560; Dec. Dig. ⌘231.]

(a) In *Gains v. Chew*, 2 How. 619, 15 Cur. 236 [11 L. Ed. 402], it was thought by the Supreme Court of the United States that relief to a certain extent could be given in equity, under very similar circumstances, and after a lapse of more than twenty years. In *Hudson v. Weatherill*, 13 Eng. L. & E. R. 132, 18 Jur. 233, decided in 1853, probate had been granted establishing the validity of a certain testamentary instrument, two of the provisions of which, one a devise of real estate to the defendant and the other a bequest to him of a note for £1000, were impeached by the bill on the ground that those provisions were void because of fraud and undue influence, and Stuart, V. C., gave relief, declaring defendant a trustee for the heir at law of the real estate, and for the next of kin of

[Equity ⌘75.]

A bill to be relieved against a fraud will not lie, it seems, after twenty years, though want of notice be stated.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 239; Dec. Dig. ⌘75.]

[This case is also cited in *Mordecai v. Canty*, 86 S. C. 478, 68 S. E. 1052, as to the jurisdiction of the court of common pleas in contracts involving the validity of wills, and in *Du Pont v. Du Bos*, 52 S. C. Append. 605, as to the doctrine of limitation of actions, and in *Re Solomons' Estate*, 74 S. C. 192, 54 S. E. 207, as to the question of jurisdiction.]

Before Carroll, Ch., at Richland, June, 1860.

David Myers, late of Richland District, died suddenly on the 3d day of March, 1835, and six days afterwards his last will and testament, dated June 26th, 1833, and a codicil

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thereto, dated July 3d, 1834, were proved in common form before the Ordinary of said district. The testator left a widow and eight

the personality. The Vice-Chancellor seemed to

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think, upon the authority of Lord Cot*tenham, that if the whole will were impeached for fraud, equity, notwithstanding the probate, had jurisdiction; but he decided the case on the authority of *Gingell v. Horne*, 9 Sim. 539, the doctrine of which case, he said, "I understand to be this, that although probate has been granted establishing the validity of a testamentary instrument as a will, yet the validity of a part of that instrument, containing a gift to an individual, is challengeable in this Court upon the ground of fraud or other equitable circumstances. In such a case this Court has jurisdiction to interfere, and to declare that the legacy inserted by fraud or undue influence is invalid, and fastens upon the gift the character of a trust for the next of kin, or for those who are entitled to challenge the gift." He further cited *Seagrave v. Kirwan*, 1 Beat. 157; *Wilford v. Bulkley*, 2 Cl. & Fin. 102; 2 Bligh, N. S. 141; and *Mif. Pl.* 300.—R.

children surviving him, who were all provided for by his will, except two sons, the complainant, William M. Myers, and John J. Myers, from whom he had been estranged for many years, and who were, by the terms of the will, expressly and utterly excluded from all share and participation in his estate. The testator was the owner of a very large estate, and the complainant and his brother John J. Myers also owned large estates which they had derived directly from their grandfather.

In 1857, twenty-two years after the will and codicil had been proved before the Ordinary, the complainant filed this bill against James O'Hanlon, a son-in-law of the testator, David F. Myers, a son of the testator, and others, his devisees and legatees, and the heirs and representatives of such of them as had died, in which he stated, that the testator a few months before his death and after the date of his codicil had purchased a valuable plantation in Mississippi; that in January, 1835, he had become completely and entirely reconciled to the complainant, and that on or about the 20th day of February, 1835, but a few days before his death, he had made and executed a will by which he revoked the will and codicil which had

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been admitted to probate, and devised *and bequeathed to the complainant the valuable plantation on which he, the testator, resided, and a large number of slaves and other personalty; and that the defendants, James O'Hanlon and David F. Myers, a few hours after the death of the testator, found the said last-mentioned will among the papers of the testator, and immediately burnt and destroyed the same, and afterwards fraudulently set up the will of 1833, and the codicil of 1834, and caused them to be proved as the last will and testament of the testator, they well knowing, at the time, that they had been revoked and were null and void, and also well knowing the contents of the will of February, 1835. The bill stated the facts with much particularity and minuteness of detail, except as to the contents of the destroyed will, of which the complainant could only state that it contained the devise to him of the home-place and of about forty or fifty field hands, and other valuable bequests. Various statements and conversations of the testator and the defendants and other members of the testator's family were minutely set forth, and the complainant averred that he had come to a knowledge of the facts which go to prove the spoliation and destruction of the will of February, 1835, within four years before the filing of his bill. The object of the bill was to set up the will of February, 1835, so far as it contained devises and bequests to the complainant, and the prayer was, that the same be set up and established and that the will and codicil which had been proved be set aside, or that the devise of land and

bequests to him be established; or that the defendants be decreed to reopen the probate, and proceed again before the Ordinary as if no such will had been proved, and as to the real estate that an issue devisavit vel non be ordered; and that the defendants be restrained from setting up lapse of time as a bar to the proceedings; and that the defendants and especially the defendants, James O'Hanlon and David F. Myers, be decreed to make good to the complainant all

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that he had lost by the spoliation and *suppression of the will of February, 1835, and the fraudulent probate of the will of 1833, and the codicil of 1834; and for further relief.

The defendant, James O'Hanlon, filed several pleas, by which he relied upon the probate of 1835, the lapse of time, and the want of jurisdiction in the Court, as a bar to complainant's bill. He afterwards filed a full answer, in which he denied the statements of the bill as to the existence and destruction of the supposed will of February, 1835, and relied on the same grounds of defence he had taken in his pleas. David F. Myers and other defendants answered to the same effect.

The case was heard on bill, answers, and evidence, and his Honor afterwards filed his decree, as follows:

Carroll, Ch. The judgment of the Court proceeds upon its decision of certain legal questions, presented by the answers. These may be readily apprehended, without reference to a multitude of facts which appear in the pleadings and proofs; and a formal history of the case may therefore be dispensed with. By the English law, exclusive cognizance of the probate of testaments and their revocation belongs to the Spiritual Court. This jurisdiction is, with us, vested in the Court of Ordinary; and by the Act of 1858 (12 Stat. 701) it is extended to wills disposing of real estate. A will obtained by fraud cannot be impeached in equity, "because," says Lord Hardwicke, "a will or personal estate may be set aside in the Ecclesiastical Court for fraud, and of the real estate, at law; and the reason is, the animus testandi, which is essential to the making of a will, is wanting in such case." *Bennet v. Vode*, 2 Atk. 324. Nor is the jurisdiction changed, though the fraud affects not the whole, but only some particular clause or portion of the will. Where one of the legacies was introduced by forgery, it was held, that the will should have been proved in the Spiritual Court, with a par-

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*ticular reservation as to that legacy. *Plume v. Beal*, 1 P. Wms. 388. Upon the question of probate, the inquiry is, whether there be propounded a valid will. If valid in part, though void in part, it is still a will, and must be admitted to probate according-

ly. *Jolliffe v. Fanning*, 10 Rich. 194. In respect to the jurisdiction of this Court, a distinction is drawn between fraud upon the testator, affecting his will, and fraud upon the legatee, affecting his interest under it. In the former class of cases, no redress can be had here, but, in the latter, relief is sometimes granted in this forum. 1 Story Eq. 184, note 1, and authorities there cited. The plaintiff contends that his case comes within the jurisdiction of this Court, because, by the fraud of the acting executor under the will of 1833, in the suppression and spoliation of the will of 1835, he was kept in ignorance of his rights, and therefore omitted to resist the probate of the former will, or to appeal from the sentence of the Ordinary thereon, or to take any proceeding in assertion of his interest under the latter will, within the period prescribed by law; that the destruction of the will of 1835, moreover, subjected him to grievous disadvantage, in respect of the evidence necessary to prove it before the Ordinary; and that this Court ought, therefore, to interpose, by granting relief directly, or else by constraining the executor to consent that the probate of the will of 1833 be revoked. On behalf of the plaintiff, the leading authorities relied upon in this branch of the argument were the cases of *Barnsly v. Powell*, 1 Ves., Sen., 287, and *Tucker v. Phipps*, 3 Atk. 359. In the former case, the executor named in a forged will had procured it to be admitted to probate in the Prerogative Court, by fraudulently obtaining from the testator's son and heir, a weak man, and afterwards found to be a lunatic, a special proxy, under hand and seal, confessing the allegations. The bill exhibited by the son sought, among other things, to be relieved against the supposed will and the sentence of probate. Lord

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Hardwicke held that the Ecclesiastical Court had no power to set aside the proxy; for, he remarks, it could only be done "by inquiring whether the deed was obtained by fraud or imposition." He places the jurisdiction of the Court distinctly upon the grounds that fraud was practised upon the son in obtaining the proxy, and by that means the probate—a fraud for which there was no relief in the Spiritual Court; and he decreed, therefore, that the executor should consent to the revocation of the probate. If probate was obtained by the suppression of the will of 1835 in this case, still more directly was it obtained by the production of the forged will in the case referred to. Yet it is conceded by Lord Hardwicke, that upon that ground this Court could not have interposed. It was not on account of the forgery of the will that he took cognizance of the cause. For that, the remedy was exclusively in the Spiritual Court. But he interposed because of the direct and immediate fraud upon the son—

not relievable in that Court—in obtaining the proxy, and the probate founded upon it. The case referred to has not been understood as standing upon any other principle. "If fraud," says Lord Hardwicke, citing the case of *Barnsly v. Powell*, "has been practised to obtain the consent of the next of kin to the probate, the Courts of Equity have laid hold of this circumstance to declare the executor a trustee for the next of kin." Mitf. Pl. 257. In *Gingell v. Horne*, 9 Sim. 548, the testator's next of kin, in their bill against the executors, alleged that the codicil had been procured to be executed when the testator was not of sound mind; that the testator's incompetency was unknown to them until the time for appealing from the sentence of the Ecclesiastical Court had elapsed; and consequently they were wholly without remedy in that Court. The prayer was, that the codicil might be declared to have been fraudulently obtained, and the executors decreed trustees of the residuary estate for the plaintiffs. Upon demurrer by the defendants, for want of

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jurisdiction, *it was urged that the Court should entertain the bill, because the demurrer admits, not only that the codicil was obtained by fraud, but also that the fraud was not discovered until the time for making that defence available in the Ecclesiastical Court had expired. The Vice-Chancellor remarks: "I know no case in which the lateness of discovery has been made a ground for the interference of this Court. There is no method of escaping from the effect of probate when granted, unless in a case like *Barnsly v. Powell*, in which Lord Hardwicke set aside the ground on which probate was obtained." No such fraud or imposition appears to have been practised in obtaining probate of the will of 1833. In *Tucker v. Phipps*, the plaintiff's wife was entitled, under her father's will, to a pecuniary legacy, charged upon both the real and personal estate. The will had not been admitted to probate, but had been destroyed or concealed by the defendant, the executor, and the bill prayed that he be decreed to make payment of the legacy. The execution of the will was admitted, which dispensed with the necessity of an issue devisavit vel non. It was held that there was no occasion to prove the will in the Spiritual Court, to enable the legatee to recover the legacy out of the real estate, and that the defendant was entitled to have the legacy paid out of the personal estate, in exoneration of the real; yet, being the executor, he should be left to reimburse himself out of the personalty. This is the ground upon which the judgment of Lord Hardwicke is placed. It is true, he there remarks, that in cases of fraudulent or malicious spoliation, the Court will not put the plaintiff under the difficulty of going into the Ecclesiastical Court. The

ground upon which this Court interposes in such cases, he thus expresses: "In the Spiritual Court the plaintiff must prove it a will in writing, and must likewise prove the contents in the very words, which will be a difficulty almost insuperable, and which Courts of law do not put a person upon doing, and

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must also prove the whole will *though the remainder does not at all regard his legacy." To subject the plaintiff to such difficulty, he adds, "would be giving the defendant a great advantage from his own acts in destroying or suppressing the will." The point adjudged in the case referred to cannot avail the plaintiff here. That decision only shows that by recognizing the interest of the legatee in respect of the charge upon the realty of the testator prior to the will being admitted to probate, there was no invasion of the province of the Ecclesiastical Court. The reason is, because wills of real estate do not come within their cognizance. It is otherwise in this State. The Act of 1858 provides that no devise of real estate shall be admitted as evidence in any cause until after probate before the Ordinary. Wills of real estate, in respect of the jurisdiction of the Ordinary, under our law, must be now regarded as standing upon the same footing, substantially, with testaments under the English law. The judgment of Lord Hardwicke cannot, therefore, benefit the plaintiff, even in respect of the lands, which he claims as having been devised to him. Nor is he assisted in anywise by the observations of that distinguished magistrate as to the jurisdiction of equity, upon the head of the suppression and spoliation of wills. It is apprehended in this State there is no variance between the rule of evidence at law and in the Court of Ordinary, as to the execution, validity or proof of last wills and testaments. By the 13th section of the Act of 1839, 11 Stat. 31, appeals from the sentence or decree of the Ordinary relative to any will or testament are directed to be made to the Court of Common Pleas, and it is expressly enacted that all issues arising out of them "shall be tried according to the usage and practice of that Court." Upon the trial of such issues the same rules of evidence, mode of examination, and forms of procedure, are observed as on the trial of original causes in that Court. In truth, the validity of contested wills is tried and determined practically in the Court of Common Pleas. The

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*primary decree of the Ordinary in such controversies is regarded by the parties as comparatively immaterial. It is upon the appeal to the Law Courts that the actual contest, the substantial trial, really occurs. In legal construction, the Court of Common Pleas has but appellate jurisdiction in such cases. But by the express provision of the Act of 1839, if an issue of fact is involved,

the cause is to be tried anew, as though it were an original cause in that Court, and the parties are at liberty to raise new questions, never considered by the Ordinary, or even made before him. *Peeples v. Smith*, 8 Rich. 90. The reasons which operate with the English Chancery in assuming jurisdiction in cases of wills suppressed or destroyed have, therefore, no application here. A party claiming under a contested will, prior to its being admitted to probate, may in this Court procure a discovery from his adversary, with a view to the proof of such will before the Ordinary, or may obtain such provisional orders as are necessary for the preservation of the estate or fund in controversy. *Atkinson v. Henshaw*, 2 V. B. 85; *Phipps v. Steward*, 1 Atk. 285. The application in such case is made to the auxiliary jurisdiction of the Court. But this Court, it is apprehended, cannot, by final decree, set up or establish any title under a will, until it has been duly admitted to probate. To obtain such decree, original evidence of a will of personalty assuredly cannot be received here. For such purpose, says Lord Cottenham, "this Court knows nothing of any will of personalty, except such as the Ecclesiastical Court has, by the probate, adjudged to be the last will." *Price v. Dewhurst*, 4 Myl. & Cr. 81. Neither is it competent for the Court, with a view to its final decree, in respect of a devisee, to receive primarily evidence of the will under which he claims. It would be contrary to the express inhibition of the Act of 1839. It results that the Court cannot interpose in this case, either by direct relief, or by decreeing

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that the *executors consent that the probate of the will of 1833 be revoked.

Apart from the objection to the jurisdiction of the Court, the plaintiff encounters another difficulty not less formidable. Between the admission to probate of the will of 1833 and the filing of the bill there was an interval of twenty-two years, and the defendants rely upon the Statute of Limitations, the lapse of time, and the presumptions thence arising, as a bar to this proceeding. The reply upon the part of the plaintiff is, that by the suppression and spoliation of the will of 1835, the executors perpetrated a fraud, which first came to his knowledge within four years next preceding the filing of his bill. While one is in ignorance of a fraudulent transaction to his prejudice, the Statute of Limitations in this Court does not operate against his right to impeach it, because, says Lord Redesdale, "until discovery, the title to avoid it does not completely arise." *Hovenden v. Annesley*, 2 Sch. & Lef. 634; *Godbold v. Lambert*, 8 Rich. Eq. 155 [70 Am. Dec. 192]. The plaintiff's claim is derived from the will alleged to have been made in 1835. In his letter to his brother David, he says: "Old Bill Myers, who went to and

returned from Charleston, with our father, in 1835, told me, after his death, that in returning from Charleston, only three or four days before his death, our father told him that he had in his pocket a new will, just executed in Charleston, and that he had made me the richest man of his family." This information assuming it to have been received was of an impressive character, and must have reached the plaintiff as early as the spring of 1836, his informant having died not later than that date. The recent and entire reconciliation between the plaintiff and his father, and the demonstrations on the part of the latter of his former affection and attachment for the plaintiff, as alleged in his bill, must have strongly inclined him to give credence to the information referred to. The father came to his death by violence within forty-eight hours after his return

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from *Charleston. Though the new will had not been found among the papers of the testator, or elsewhere, after his death, the presumption of its revocation, under such circumstances, could scarcely have arisen. *Durant v. Ashmore*, 2 Rich. 192. The plaintiff must be held, therefore, to have had notice of the will of 1835, if there was such will. According to his information, that will provided for him most liberally, and materially modified, if it did not entirely revoke, the will of 1833. "It is believed," says Chancellor Harper, that "no case can be put in which a man knows that another claims and is in the enjoyment of what belongs to him, and neglects to pursue his claims at law, where there is nothing to prevent his doing so, that he will not be barred by the statute." *Drayton v. Marshall, Rice*, Eq. 385 [33 Am. Dec. 84]. That the plaintiff's remedy was in the Court of Ordinary cannot affect the application of the principle here announced. In point of fact, until the statute of 1858, the plaintiff's title to the lands devised to him under the will of 1835 (if there was such a will) must have been asserted exclusively by action at law. If, by the suppression or destruction of the will of 1835, the fact of such will having ever existed had been kept concealed from the plaintiff, his case would have been far stronger than it is. But, notwithstanding its spoliation, information that there was such a will subsisting at his father's death came, as we have seen, to the plaintiff's knowledge, at least as early as the spring of 1836. He was aware at that time that he was entitled to a valuable portion of his father's estate, and it was withheld from him. Where a party is aware of his right, and of the injury it has sustained, his claim to be relieved exists, undoubtedly, subject to the operation of the Statute of Limitations. In such case it is entirely immaterial whether the wrong was effected by open force or secret fraud. If the claimant is aware of his right and of its invasion, he is bound to as-

sert his claim for redress within the statutory term, though the immediate agencies

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employed in effecting *the wrong may include a fraud of which he is wholly ignorant. Immunity against the operation of the statute, it is conceived, extends only to such frauds as involve in them ignorance, by the party injured, of his right, or of its violation. For the reason indicated, the Statute of Limitations must be regarded as operative against the claims of the plaintiff, though he were in profoundest ignorance, until within four years before the filing of his bill, of the spoliation of the will of 1835, assuming such spoliation to have occurred. The injury that he sustained resulted from the will of 1835 not being produced and admitted to probate. Whether that will had been casually lost or fraudulently suppressed, the consequence to the plaintiff was precisely the same. If he was in ignorance of the spoliation, he nevertheless knew of its injurious effect upon his rights, and such knowledge was sufficient to subject his claim for relief to the operation of the statute.

Although, in the apprehension of the Court, the point is not material, it is, perhaps due to the defence to inquire whether the plaintiff did not have notice more than four years before he exhibited his bill of the fact of the spoliation, assuming it to have occurred. Evidence is not wanting that early intimations had reached him of such spoliation having been perpetrated. In his letter to David F. Myers, already referred to, the plaintiff says: "You will remember that at the time of the death of our father, it was whispered about that a will had been burned at his residence on or about the day of his death, which, it was said at the time, was not signed or executed. I heard all this about the time of his death, but was entirely unable at the time to learn any additional facts." Whether such intimations, of themselves, would amount to notice, it is not necessary to determine. Coupled, however, with other information received by the plaintiff, importing that there was a will later than that of 1833, subsisting at his father's death.

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whereby a large prop*erty was given to him, the whisperings referred to were most significant and impressive. The information which reached him as early as the spring of 1836 is regarded as imparting notice of the spoliation sufficiently to put the plaintiff upon the assertion of his rights. It may be conceded that the plaintiff was unprovided with the necessary proof to sustain his claims until within four years prior to the filing of his bill. But this cannot avail him. In such case the inquiry is, whether the plaintiff had notice of the fraud, and not whether he could prove it. *Parham v. McCravy*, 6 Rich. Eq. 146; *Prescott v. Hubbell*, 1 Hill Eq. 217.

If the plaintiff's bill be saved from the operation of the Statute of Limitations, upon the ground that it seeks to avoid a fraud but recently discovered, the question then arises, whether such fraud is relievable after twenty-two years have elapsed. Presumptions from such lapse of time are not "absolutely irrebutable," but are strong presumptions "of fact" which "shift the burden of proof," and are well nigh invincible. *Stover v. Duren*, 3 Strob. 448; *Foster v. Hunter*, 4 Rich. Eq. 20. They are not founded merely upon the ground of acquiescence or laches on the part of the claimant, but also upon consideration of policy and convenience, which operates to the preservation of the public peace, and the quieting of men's possessions. *Eldridge v. Knott*, Coop. 215. "It has been," says Lord Redesdale, "a fundamental law of state policy in all countries, and at all times, that there should be some limitations of time beyond which the question of title should not be agitated." *Houvenden v. Annesley*, 2 Sch. & Lef. 630. "The lapse of twenty years," says Chan. Harper, in *Kinard v. Riddlehoover*, 1 Hill Eq. 378, "is sufficient to raise the presumption of the grant of a franchise, the payment of a legacy, or almost any thing else that is necessary to quiet the title to property. This is the general equitable law." There exists a moral necessity for such a rule. The case of a fraud, recently discovered,

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should not be held *exempt from its operation. When the plaintiff alleges in his bill that the fraud which he seeks to impeach was not discovered until within the four years next preceding, the burden of proof is thrown upon the defendant, and he must show that the plaintiff had earlier notice. *Shannon v. White*, 6 Rich. Eq. 96 [60 Am. Dec. 115]. It would not be gravely argued that, notwithstanding the lapse of sixty years or more, a party laboring under no personal disability was still entitled in this Court to avoid a transaction, upon the ground that it was tainted by fraud, which he had but recently discovered. Yet if the boundary of twenty years be passed, there is no recognized limit beyond at which to stop. It could not be endured after such a period that by the mere allegation of the bill that the fraud had been first discovered within four years, the defendant should be subject to the grievous burden of proving notice had by the plaintiff prior to that time. Under such circumstances, the earlier and more perfect the plaintiff's knowledge of the transaction in all its particulars and the more thorough his acquiescence in it, the more difficult would be the required proof. "Can I," says Lord Redesdale, "pronounce a transaction fraudulent, which happened eighty years ago, now, when everybody who knew any thing of the original transaction is dead?" 2 Sch. & Lef. 640. In *Bossard and White*, 9 Rich. Eq. 483, it is said: "Why may not the

lapse of twenty-four years raise a presumption of notice, that lapse of time raising a presumption of almost any fact necessary to quiet title?" In *Pulteney v. Warren*, 6 Ves. 92, Lord Eldon remarks: "If there be a principle upon which Courts of justice ought to act, without scruple, it is this, to relieve parties against the injustice occasioned by its own acts or oversights, at the instance of the party against whom the relief is sought." Yet, after twenty years, a bill of review will not lie for error of law apparent on the record. *Smith v. Clay*, Amb. 647; Mitf. Pl. 88. Nor after that period will leave be granted to file such bill, upon the ground

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of newly-discovered evidence. **Story Eq. Pl.*, sec. 419. The present bill is, in substance, for a review of the proceedings had in the Court of Ordinary. If, after twenty years, this Court will not review its own proceedings, much less will it interfere after that period for the review of the proceedings before the Ordinary. It would be a reflection upon the Court, if it were less willing to correct its own errors than those of another tribunal.

The grounds of defence that have been considered were first presented by formal pleas, and were also relied upon in the answers subsequently put in. The attention of the Court has been directed to the rule, that where the plea covers the whole bill, and the defendant also answers, the answer overrules the plea. Assuredly, the defendants are in no worse condition than if they had simply answered, and had omitted to put in their formal pleas. The meaning of the rule referred to is, that if the defendant submits to answer, he must answer fully: "He is not to shield himself from making a full answer, on the ground of the excuse which he offers in the answer itself." But if there be any matter which might be the subject of a plea in bar of the bill, the defendant may state and rely upon it in his answer. *Weatherford v. Tate*, 2 Strob. Eq. 29; *Miller v. Furse*, Bail. Eq. 188; *Yarborough v. Bank of Georgia*, 4 Rich. Eq. 470; Mitf. Pl. 308. Such is the familiar practice of the Court. There is no conflict between the cases referred to and the case of *Joyce v. Gunnels*, 2 Rich. Eq. 267, because the defence there relied upon was in the nature of a mere dilatory plea. Other questions and topics were discussed at the hearing, but it is not deemed necessary to consider them here.

The matters complained of by the bill, in the opinion of the Court, are not within its jurisdiction, and, if they were, are regarded as barred by the Statute of Limitations and the lapse of time. It is so adjudged, and it is ordered and decreed that the bill be dismissed.

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*The complainant appealed, and now moved this Court to reverse the decree of his

Honor, the Chancellor, and that the cause be remanded for another trial, or a decree be made by the Court of Appeals granting the relief prayed by the bill, upon the grounds:

1. Because the Court has jurisdiction to grant relief in some one of the forms prayed by the bill, and it is a fit case for its exercise.

2. Neither the Statute of Limitations nor lapse of time can, under the law and course of this Court, be interposed as an obstacle to the relief claimed by the bill.

3. Complainant had no knowledge of the spoliation of the will till within four years before bill filed.

4. Complainant had no sufficient knowledge of the spoliation of his father's will until within four years before bill filed, and certainly not of the facts constituting the fraud. If there was proof enough to put him on the inquiry, yet it was impossible to develop the fraud and spoliation, the evidence thereof being derived mainly from the confessions of the parties implicated, and these were not made till within four years before the filing of the bill.

5. His Honor announced to the counsel arguing the cause that he was satisfied a prima facie case had been made out, and that relief must be granted in some one of the forms prayed by the bill, and declined to hear the argument.

6. The cause was not fully heard upon the main grounds of the bill, to wit, the right and duty of the Chancellor, upon the case made, either to order an issue devisavit vel non, or to remand the cause to the Ordinary for trial, opening the probate, and enjoining the defendants from setting up in defence the plea of the Statute of Limitations or lapse of time since the original probate; the argument having been arrested by the Chancellor.

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*DeSaussure, Arthur, for appellant.
McMaster, contra.

PER CURIAM. We have attentively considered this case, and listened to the elaborate argument on the part of the complainant, and are led to the conclusion that the Chancellor's decree is right.

It is therefore ordered and decreed that the Chancellor's decree be affirmed.

O'NEALL, C. J., JOHNSTONE, J., and
WARDLAW, J., concurring.

Decree affirmed.

12 Rich. Eq. *213

*JOHN B. REID and Others v. SAMUEL
REID and Others.

(Columbia. May Term, 1861.)

[Trusts ⌘44.]

Trust in land declared upon the deposition in writing of a witness who was the original

trustee under an absolute conveyance to him, the statements in the bill and answer, and parol evidence.

[Ed. Note.—Cited in Price v. Brown, 4 S. C. 152.]

For other cases, see Trusts, Cent. Dig. § 67; Dec. Dig. ⌘44.]

[Trusts ⌘20.]

The provision of the Statute of Frauds that a trust must be "manifested and proved by some writing" is satisfied by any writing made long after the trust was created, and in such case the trust will be held to have existed from the time it was created.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 25; Dec. Dig. ⌘20.]

[Trusts ⌘119.]

Where the existence of a trust is shown by writing, parol evidence may, it seems, be let in to show its terms.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 166; Dec. Dig. ⌘119.]

Before Inglis, Ch., at York, June, 1860.

This case will be sufficiently understood from the decree of his Honor, the Circuit Chancellor, which is as follows:

Inglis, Ch. The plaintiffs, as the heirs at law of George Reid, are seeking partition between themselves and Samuel Reid, one of the defendants, of a tract of land described in the pleadings. Their right to seek partition is denied, on the ground that George Reid and Samuel Reid held the legal title to the land, not for themselves alone, but in trust for the use of the heirs generally of Thomas Reid, their father.

Thomas Reid was certainly, for many years, the owner of this land, holding the larger part under a lease for ninety-nine years from the Catawba Indians, and the residue under a grant from the State. By an indorsement on the lease, dated October 11, 1830, he assigned his interest therein to Thomas Walker, and on the same day conveyed to him the small parcel of twenty acres held under the grant. Thomas Walker by a similar indorsement transferred the lease, on the 11th of August, 1837, to Sam-

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uel Reid and George Reid, *and subsequently conveyed to Samuel Reid the twenty acre parcel. In each of these transfers the conveyance is, professedly, upon a money consideration, and is in its terms absolute. On the 13th of June, 1850, George Reid and Samuel Reid took out a new grant to themselves for the whole of this land.

If the transfer by Thomas Reid had been expressed to be in trust to pay out of the land itself or out of the rents and profits thereof a specified debt, a trust, for the use of the grantor and his heirs, &c., in all the surplus, after the purpose so expressed had been satisfied, would have resulted by implication of law. He who, having full knowledge of the facts, had taken from Thomas Walker a transfer of his estate, unless under a sale made in fulfilment and execution of the trust, must have held subject to the

trust. Though no such trust is expressed in the present instance, it is quite certain that such an one in fact existed, and that the transaction is precisely of the character just described. Thomas Reid was indebted to Thomas Walker, and conveyed his estate in the land to him as a security for the payment of the debt. In August, 1837, when a small balance only of the debt remained unpaid, Samuel Reid and George Reid, two of the heirs of Thomas Reid, who had died in the mean time, paid this balance, and took a transfer from Walker of his title for the benefit of the family.

It is objected that the existence of a trust for the payment of a debt is proved only by parol evidence; and to give effect to such proof would be in violation of the seventh section of the Statute of Frauds. Such, however, is not the fact. It is to be observed that the statute does not require that the trust shall be created or declared originally in writing; only that it shall be "manifested and proved by some writing." The "writing" which manifests or proves the trust need not be contemporaneous with its creation. A written acknowledgment of the party enabled by law to declare the trust, though

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*made long after its original creation, will be sufficient; and will have relation back to the time of the creation thereof, so as to defeat the rights which parties claiming under the trustee by immediate conveyances might otherwise have acquired. Of course bona fide purchasers, for valuable consideration, without notice, will be protected. A deposition signed and sworn to, or a statement in a bill or answer, may constitute such written proof of the trust as will satisfy the statute. *Rutledge v. Smith*, 1 McC. Eq. 129; *Browne on St. Frauds*, sec. 97; *Hill on Trustees*, (56); *Hill on Trustees*, (57); *Browne on St. Frauds*, sec. 100; *Hill on Trustees*, (61).

The fact that the conveyance by Thomas Reid, though in terms absolute, was, by the agreement of the parties, upon trust for the payment of a specific debt, is here proved by the written deposition of Thomas Walker, the original trustee, taken in the present cause, sworn to and signed by him; by the written statements of the plaintiffs themselves, who are the heirs of one of the subsequent joint holders of the legal title, made in their present bill; and by the written declaration of Samuel Reid, the other joint holder of the legal title, contained in his answer. This written proof explains clearly enough the nature of the trust, but, whether so or not, it at least suffices to show that the persons apparently entitled to hold absolutely are not really so; and, therefore, to let in parol proof to establish the trust, notwithstanding the statute. The admissions of George Reid, abundantly testified to by the witnesses, and on this ground listened to by the Court, fully supplies whatever the written proof may seem to

lack. It is equally established by this evidence, written and unwritten, that Samuel Reid and George Reid, when they took from Thomas Walker a transfer of his estate in the land, well knew the terms upon which he had held, and agreed with him and with each other to hold upon the same terms. If the first trust be established by competent proof, the ulterior trust need not be manifested by writ-

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ing, for it results *from the existence of the former by implication of law. The demand of the statute is, in the opinion of the Court, satisfied. *Browne on St. Frauds*, sec. 3; *Hill on Trustees*, (62.)

But, further, the trust upon which Samuel Reid and George Reid thus held the legal title to this land has been, in fact, executed. It appears from the testimony of Thomas Walker that the balance of the debt due to him, being about forty dollars, was paid by Samuel Reid. J. D. Crawford, who administered upon the estate of Thomas Reid, testified that he paid all demands against the estate, except a claim of Samuel Reid for forty dollars. The heirs of Thomas Reid being all of age, made an agreement among themselves in reference to the manner in which the estate which remained for distribution should be divided, and a full and final settlement had. In the year 1850, in pursuance and part execution of this agreement, this tract of land, as constituting part of said estate, was by actual survey, in the presence and with the consent, approbation, and concurrence of George Reid, divided into three parts of unequal extent and value, and the parcels were assigned to three of the children, to be taken by them severally, at a valuation thereafter to be made, in whole or in part satisfaction of their respective distributive shares in said estate. Those to whom these parcels were so assigned thereupon at once took several possession of their respective parcels, and have held the same thence hitherto, making improvements upon the faith of their title, and each one exercising all ordinary acts of ownership over his or her own parcel. It is true that the division of Thomas Reid's estate thus agreed upon was at the time only partially effected, and has not yet been wholly completed. This was owing, however, not to any thing concerning this land, but to causes which, in the regard of the parties, only delayed the final consummation, and did not annul or revoke what had been done. It cannot escape observation that, in the division of this tract of land, a portion

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considerably larger and more valuable *than either of the other two was allotted to Samuel Reid, a fact which finds a ready and reasonable explanation in the supposition, that his advance to pay the balance due to Walker was intended to be first satisfied out of the valuation of the part so allotted to him, before he was charged on account of his distributive share. If, therefore, the trust upon

which this land was originally transferred by Thomas Reid could not be proved by any written evidence thereof, yet, having been executed by George Reid, he and of course his heirs are bound by its execution, and cannot now recall that, in order to set up again their apparently absolute title. *Elliott v. Morris*, Harp. Eq. 281.

It is the judgment of the Court that the plaintiffs are not, in their capacity of heirs of George Reid, entitled to a partition of this land between themselves and Samuel Reid, by virtue of the joint seizure of George Reid and Samuel Reid, in the lifetime of the former.

Anticipating the result thus attained, the plaintiffs have further asked that, in the event of such a judgment, the land shall be divided as the estate of Thomas Reid among his heirs, and that the portion thereof to which they, as representing George Reid, one of these heirs, may be entitled, shall be set apart to and partitioned among them, to be enjoyed in severalty. This Court always aims to do complete justice, and that can scarcely be accomplished in the partition of an estate by piece-meal. Thomas Reid at his death was seized of another tract of land, called by some of the witnesses the Chambers tract. This tract was, by the consent and joint action of all the heirs, sold about the year 1837, and after the application of so much of the proceeds, as the deficiency of the personal estate rendered necessary, to the payment of the intestate's debts, the residue was, by consent, distributed among certain of the heirs, to be accounted for in their portions of the estate. In January, 1828, Thomas Reid had conveyed

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to George Reid an undivided moiety of a tract of land known as the Turkey Creek tract. The consideration upon which it is declared in the deed that this conveyance was made is five hundred dollars. The declarations and conduct of George Reid very satisfactorily evince, however, that no part of this money consideration was ever paid by him, but that he was to account with the other children for its value, or the proceeds of such sale as he should be able to make of it, as part of the estate, and in the nature of an advancement. The assumption by the other heirs and the admission by George that this was the case, caused it to enter as an element into the basis of the agreement already mentioned as made among the members of this family for the division and settlement of their father's estate. The distribution of the proceeds of the Chambers tract was made in pursuance and part execution of this agreement. The division and allotment of the Walker tract was also in pursuance and in further execution of it. A litigation which arose with third parties about the title to the Turkey Creek tract, or part of it, and consequent delay in effecting a sale, or in collecting the purchase-money, alone suspended the full execution of that agreement and comple-

tion of the partition. To these admissions of George Reid, by word and act, effect must be so far given as not to disturb the arrangement made by the members of this family among themselves for the division of their common patrimony, and in such large part executed. The plaintiffs cannot have a partition of the Walker tract, as the estate of Thomas Reid, without bringing into this partition the Turkey Creek tract, and in some manner accounting for it as part of the estate.

It is ordered, that it be referred to the Commissioner of this Court to inquire at what price the Chambers tract was sold, and what disposition was made of the proceeds of the sale, and, particularly, whether any of the children of Thomas Reid received any part of such proceeds; if so, what sums were so received, by whom, and at what date; into what

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*parts the Walker tract was divided in 1850. and the value at that time of the several parts; to which of the children these parts were severally assigned; what amount was then due to Samuel Reid for his advance of the balance due to Walker, with the interest from the date of such advance; whether the said tract, or any part of it, was in the possession of any of the children between the years 1837 and 1850; if so, which of them had such possession, of how much of the tract, and what rent ought to be charged against them in favor of the estate; what off-sets or discounts, if any, for payment of the rent reserved on the Indian lease or otherwise, are proper to be allowed against such charge of rent; the value of the undivided moiety of the Turkey Creek tract conveyed by Thomas Reid to George Reid at the death of the former, regard being had to the condition of the land when conveyed in January, 1828, and the amount of any costs and expenses incurred and paid by George Reid, as stated in the pleadings, in conducting any litigation necessary for the vindication of the title derived from Thomas Reid, or otherwise, for the preservation of said Turkey Creek land to the estate.

It is further ordered, that the plaintiffs have leave to account for the sums received by George Reid for the undivided moiety of the Turkey Creek land conveyed to him by his father upon his sale thereof, with interest from the date of such receipt, subject to the deduction of expenses of litigation, instead of the value of the land at the death of Thomas Reid, with interest therefrom, if they so prefer; but in that case they must also account for the proper rent, so long as he used the land between the date of his father's death and the date of his sale, and the Commissioner will regulate his inquiry accordingly.

It is further ordered, that the several sums which, upon inquiry, shall appear to have been received by any of the children of Thomas Reid, as part of the proceeds of the Chambers tract, with interest from the date of

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such receipt, *the valuation of the several parts into which the Walker tract was divided in 1850, with interest from the date of such division, (first deducting from the valuation of the part allotted to Samuel Reid the sum which shall be found to have been due to him for the advance of the balance due to Walker, with interest from the date of such advance,) the valuation of the undivided moiety of the Turkey Creek tract, with interest from the date of Thomas Reid's death, (deducting from this amount the expenses of litigation paid by George Reid,) or, if the plaintiffs so choose, the sums received by George Reid upon the sale of the Turkey Creek tract, with interest from date of receipt, and rent prior to the sale as hereinabove is ordered, deducting expenses of litigation as before, and the amounts which shall be found due by any of the children for the rent of the Walker tract before the division of 1850, be regarded as constituting together the estate of Thomas Reid now for distribution; and that the Commissioner ascertain the shares to which the several heirs are entitled therein, and what sums have been received by each one heretofore in money, land, or other property, or in the use and occupation of the property estimated in rent; which, if any, have been overpaid, and which have not received their shares in whole or in part, and devise a scheme for equalizing the shares, by requiring those who have been overpaid to pay to such as have not been paid; and for securing such payments by liens, as far as possible, upon the property so received from the estate, or otherwise; and that he report the result of the inquiries, calculations, distributions, recommendations, &c., herein ordered, together with any special matter, to the Court, at the next term.

It is further ordered, that the Commissioner devise and report some scheme for the payment of the costs of the cause, out of the estate of Thomas Reid, by requiring such of the parties as shall be found to have been

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overpaid to pay into *Court a sum sufficient to satisfy the costs, the parties so paying to have credit in the accounts to be stated between the estate and themselves for the sums paid.

The complainants appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because his Honor permitted parol evidence to be offered, for the purpose of raising a trust in the lands of George Reid, deceased, contrary to the seventh and ninth sections of the Statute of Frauds.

2. Because the admission of the parol testimony of Thomas Walker, to add to, vary and contradict his own deed, executed by him to George and Samuel Reid, twenty-three years after its execution, is contrary to all precedent and well-established principles of law.

3. Because, it is respectfully submitted that, after Thomas Walker made an absolute and unconditional sale of the lands to George and Samuel Reid, and had divested himself of all interest therein, it is wholly incompetent for him, either by parol or written testimony, to convert them into trustees for others.

4. Because, if Thomas Walker be held as competent to declare a trust in land twenty-three years after he had parted with all interest therein, it is submitted that his deposition, taken by commission, is not such a voluntary written declaration thereof as will support the trust in said land.

5. Because the defendants were parties to the fraud perpetrated by Thomas Walker upon the creditors of Thomas Reid, in conveying the Walker tract to George and Samuel Reid, for the purpose of screening it from liability for the debts of the said Thomas Reid; and, therefore, they cannot ask this Court to relieve them from the consequences of their own fraudulent designs and acts.

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*6. Because there was neither written nor unwritten testimony sufficient to warrant the Court in decreeing a trust in the Turkey Creek land.

7. Because the testimony of the Clintons and McElwee is so confused, conflicting, and uncertain, that no trust in the Turkey Creek land could be based upon it. It points with certainty to neither a subject-matter of a trust nor to the persons who are to take a beneficial interest.

8. Because, according to the testimony of said witnesses, the declarations of George Reid can be fairly interpreted to amount to nothing more than an admission that he had received the Turkey Creek land from his father, by way of advancement, though it is submitted that it does not amount to even so much.

9. Because his Honor erred in supposing that the survey of the Walker tract in 1850, and the allotment of portions thereof to some of the defendants, was in part execution of a trust in said lands by George Reid, when it is submitted that the testimony does not justify nor suggest such an inference; and by no possible deduction from the evidence could said survey and allotment be held as amounting to a part execution of a trust in the Turkey Creek land.

10. Because the decree of Chancellor Inglis overrides the decree of Chancellor Dargan, ordering a sale of the Walker tract, and is totally inconsistent with an order passed by his Honor himself during the term at which this case was heard, in which he confirmed the report of the sale of said land made by the Commissioner under the decree of Chancellor Dargan.

11. Because the Statute of Limitations, or lapse of time, is a bar to the claims of the de-

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fendants to any beneficial interest *in either

tract of land, more especially to their claims as cestui que trusts in the Turkey Creek tract.

Moore, for appellant.
Melton, contra.

PER CURIAM. This case depends upon a very remote transaction. The parol proof makes a very clear case for the complainants.

The only question is upon its admissibility. The Chancellor has examined that question, and has admitted the proof upon satisfactory grounds.

It is therefore ordered and decreed that his decree be affirmed.

O'NEALL, C. J., JOHNSTONE, J., and WARDLAW, J., concurring.

Decree affirmed.

12 Rich. Eq. *224

*SIMPSON BOBO, Admr., v. W. D. D. POOLE and Others.

(Columbia. May Term, 1861.)

[*Executors and Administrators* ⇨495.]

An executor is not entitled to ten per cent. commission for paying annually to a legatee, as directed by the will, the interest on a certain part of the estate. Such commissions are only allowed when the executor receives interest annually, and lets it out again as principal.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2104; Dec. Dig. ⇨495.]

Before Inglis, Ch., at Spartanburg, June, 1860.

David Dantzler, the testator in the cause, directed by his will that his property should all be sold, and the money invested at interest. The interest due to each of the children to be paid annually to the parents, until the grandchildren arrived at the age of twenty-one years, when their respective fortunes were to be paid over.

The appellant, administrator with the will annexed, took charge of the estate, and John Poole, who married one of the daughters, and to whom the annual interest was due, received from him sums of money exceeding the annual interest, and gave his notes for the same.

On a settlement with the administrator before the Ordinary, the question was made, whether under the will he was entitled to 10 per cent. on the annual interest made.

The Ordinary decided that he was not, and the administrator appealed, on the ground that under the statute he is entitled to 10 per cent. on annual interest made by investment of funds, and five per cent. on the corpus of the estate.

The decree of his Honor, the Chancellor, is as follows:

Inglis, Ch. David Dantzler by his will directed one-fifth part of his estate to be in-

vested, and the interest to be paid over to his son, Lewis M. Dantzler, for the support of

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himself *and family and the education of his children, and the principal divided in equal shares among his children, to be delivered to them as they successively should come of age or marry. Another fifth part he directed to be "appropriated to his daughter, ——— Poole, and her family, on the same terms and considerations as the bequest to his son Lewis and family." Under the authority of these provisions, the interest upon the one-fifth part to which Mrs. Poole and her children were entitled was paid by Simpson Bobo, administrator with the will annexed, annually, to John Poole, the husband of the testator's said daughter. In an accounting had in the Ordinary's Court, between the children of Mrs. Poole and the administrators of their father, who is dead, on the one side, and Mr. Bobo, in his representative capacity, on the other, the Ordinary allowed to the latter the regular commission of two and one-half per centum for receiving and the same for paying out the annual interest as well as the principal sum. From the decree made by the Ordinary, based upon this mode of stating the account, Mr. Bobo has appealed to this Court, on the ground of error in this, that the commission on the interest annually received and paid out should have been calculated at the rate of ten per centum. It appears in point of fact that the interest was not annually paid to John Poole; but, in anticipation of the annual period, Mr. Bobo lent and advanced to Poole a sum exceeding the aggregate of the interest which he would have received otherwise in annual payments during his life, and for the sum so advanced took his note or notes. He claims now, in a settlement with the administrators of Poole, to add the interest accruing on Poole's notes, up to the 1st January in each year successively, and to credit on each 1st January the amount of the annual interest then payable to Poole on the property of his wife and children, as well in pursuance of the understanding and intention of the parties as upon the ground of legal right, independent of

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any such *intention. And this, it seems to the Court, he is entitled to do, provided the interest is calculated only on so much of the balance due from year to year on the notes as is principal, and not upon such part of these balances as is interest in arrear, if there be any such. If, indeed, the interest annually due on the money supposed to be invested for the benefit of Mrs. Poole and her children was insufficient to satisfy and extinguish the interest annually accruing on the notes of Poole to Bobo, then the result of the mode of calculation here directed will not vary from that attained by the mode

adopted in the Court of Ordinary. Poole being, during all the time of the currency of this annual interest, indebted to Mr. Bobo, and the latter having the right to apply the interest, annually payable to Poole, in satisfaction pro tanto of that indebtedness, it seems to the Court that he is entitled to whatever benefit he can derive from being supposed to have, in fact, made the application. How far this concession affects the question of the rate of commission remains to be ascertained.

An Act of Assembly of 1789, in the 29th section, 5 Stat. 112, allows to an executor, &c., for his trouble and attendance in the execution of his duties, a commission of two and one-half per centum on all sums of money received, and the same upon all sums of money paid away in credits, debts, decrees, or otherwise, during the period of administration. If the Act had stopped there, a narrow and literal interpretation might have induced a sharp-witted executor to put out the moneys in his hands at interest, and again, at annual or shorter intervals, gather in and put out both principal and interest, or interest alone, insisting upon his right to retain two and one-half per centum at each receipt and payment. To guard against so gross an abuse, and at the same time not discourage proper efforts to increase the estate by lending out, from year to year, the annually accruing interest on moneys invested, the proviso was

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added, which, while it prohibits the indefinite multiplication of commissions upon the same sum, yet allows double commissions upon the aggregate profits, accumulated for the benefit of the estate, by the active movement of the moneys thereof, in annual collections and reinvestments. The Act contemplates a benefit to the estate in compounding the interest upon the original corpus, by making that interest, as it annually accrues, a part of the corpus, in its turn yielding interest, which is to become again in its turn prolific of like profit. If, omitting actually to invest the money of the estate, the executor, &c., suffer it to accumulate in a like ratio of progression in his own hands, by adding the interest, year by year, to the principal, the benefit to the estate is the same, and the enlarged rate of compensation earned; [Wright v. Wright] 2 McC. Eq. 196; [Massey v. Massey] 2 Hill Eq. 495; [Briggs v. Holcomb] 3 Rich. Eq. 15.

In the present case, so far as the Court is informed, there was in fact no investment made. The body of the testator's estate was sold in 1847, and from this sale was derived the chief part of the corpus of this fund. In each subsequent year, however, until 1853, further sums were occasionally reported in annual returns, but from what source

they were derived is not disclosed in the report. All these moneys appear to have remained in the hands of the administrator, except so much as may have been advanced to John Poole. There was and there could be no accumulations of the fund by gathering in the annual interest and putting it out in its turn to yield interest. In the administration of his trust, the interest, as it accrued each year, was paid out and gone from the control of the administrator, to come back no more with or without accretions. It is the simple and ordinary case of receiving the annual income of the estate, and paying it out again in a due course of administration, and the Court is unable to discover any ground or reason whatever for the claim of the increased rate of commissions at ten per centum.

It is proper to say that, in deducting the

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full amount of five per centum commissions at the date of the receipt of the fund, and so crediting the administrator with commissions for paying out, whereby he is allowed in effect commissions upon paying his own commission, and the fund which ought to be bearing interest for the benefit of the estate is prematurely reduced that much below what it should be, the mode of making up the account which has been adopted by the Ordinary is highly favorable to the administrator, and, in the judgment of the Court, subject to exception. But no objection is raised to the account and decree on this ground, and the only reason for alluding to it is, that the attention of the intelligent Ordinary may be turned to the point in cases hereafter arising in his Court. It is ordered that the appeal be dismissed, and the decree of the Ordinary affirmed.

The administrator appealed, and now moved this Court to reverse the decree, on the ground:

That he was entitled to ten per centum on the annually accumulating interest.

Edwards, for appellant.

Wright & Orr, contra.

The opinion of the Court was delivered by

JOHNSTONE, J. We think the decision in this case conforms to the law as laid down in Wright v. Wright, 2 McC. Eq. 196. There was, in fact, no accumulation of interest by letting out the principal, and taking in the interest and loaning it again as principal, which is held, in that case, to be a condition of allowing ten per centum commissions.

It is ordered that the decree be affirmed and the appeal dismissed.

O'NEALL, C. J., concurred.

WARDLAW, J., absent at the hearing.
Appeal dismissed.

12 Rich. Eq. *229

*JOHN McKNIGHT v. GEORGE S. WRIGHT
and Others.

(Columbia. May Term, 1861.)

[*Executors and Administrators* ⇨111.]

Where a will is proved in common form and afterwards is proved in solemn form, but on appeal is set aside by the verdict of a jury, the executor is entitled to be reimbursed out of the estate all his expenses and costs up to the time of the rendition of the verdict; the costs of an appeal which is dismissed he will not be allowed.

[Ed. Note. For other cases, see *Executors and Administrators*, Cent. Dig. § 448; Dec. Dig. ⇨111.]

Before Inglis, Ch., at York, June, 1860.

This case will be sufficiently understood from the decree of his Honor, the Circuit Chancellor, and the proceedings in the case of McKnight v. Wright, 12 Rich. 232, which were in evidence. The decree is as follows:

Inglis, Ch. A paper, purporting to be the last will of George Wright, was admitted to probate in common form, and the present plaintiff was qualified as executor thereof. Afterwards, at the instance of the two infant grandchildren of the deceased, defendants hereto, who were wholly unprovided for therein, proper proceedings were instituted in the Court of Ordinary, for the purpose of inquiring into the legal validity of the alleged will. The decree of the Ordinary, in favor of the will, was reversed, upon appeal in the Common Pleas, and the judgment of reversal was affirmed by the Court of Appeals in Law. The contestants, in whose favor the final judgment was then pronounced, taxed their "costs, charges, and expenses," and process of execution to enforce payment thereof has been lodged with the Sheriff. (A. A., 1839, Ordinary's Act, sec. 13.) The plaintiff seeks to restrain proceedings under this process, and to compel the administrator of the estate to pay out of the assets of the deceased, not only the costs of the prevailing party in the litigation so taxed, but also the

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costs and "expenses necessarily incurred by himself while acting as executor of said supposed will, and until the suit about its validity had terminated."

If the litigation, on the one side or the other of which these costs, &c., have been incurred, was carried on by the plaintiff in good faith, solely with a view to maintain the purposes of the deceased as to the disposition of his property, or, at least, what he had sufficient reason to believe were his purposes, he was doing only what his supposed fiduciary relation exacted of him, and the expenses of such litigation ought to fall upon the general estate. *Hillam v. Walker*, 1 Hagg. 71, 3 Eng. Eccl. Rep. 30; *Butler v. Jennings*, 8 Rich. Eq. 87; *McClellan v. Hetherington*, 10 Rich. Eq. 202 [73 Am. Dec. 89].

The circumstance that he had a personal interest coincident with his official duty would not, of itself, deprive him of the benefit of this rule. If, however, on the contrary, the plaintiff was setting up a paper which, as he knew, did not express the free wishes of the deceased, but had, by the practice of deception or undue influence, been procured for his own profit, in fraud of those who were the objects of natural affection, and but for his interference would have been of testamentary bounty, and, pursuing his unjust purpose through all the forms of the law, was seeking to sanctify it by the judgment of the Court, he ought to pay the costs of such a speculation in the fallibility of human tribunals.

George Wright was, at the execution of this paper, more than eighty years old, and had already begun to show, both in mind and body, signs of the imbecility which is incident to such advanced age. His four children were deaf, dumb, nearly blind, and of feeble intellect, and his grandchildren were infants, poor, and dependent on the tender mercies of a stepfather. The condition, therefore, of his own issue, was such as might well appeal to the charity even of a stranger. The plaintiff, a neighbor in whom he had peculiar confidence, and who, therefore, had more than

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ordinary influence over *him, himself wrote this alleged will. When the old man would give his property to his son Leander, the more intelligent of the two, the plaintiff interposed, and, at his instance, Robert, almost an idiot, was substituted. "Leander," it was said, "might spend it," especially with the aid of his wife, who was extravagant, and then the ultimate beneficiary would be the loser. When he would provide for his helpless grandchildren, the plaintiff interposed again, and reminded him that their father had received already more than his fair share. But that was not a reason for withholding the ultimate disposition from them to give to a stranger. The four children are allowed a support out of the estate during the life of Robert, and, at his death, all the property, his six negroes, his plantation, his mill, and his stock, are placed at the disposal and management of the plaintiff. It does not appear that this paper, which represents George Wright so forgetful of the fruit of his own loins, so bountiful towards a stranger who did not need his charity, was ever read to him, or that he was, in any way, made acquainted with its disposition. He seems, however, to have known that he had made no provision for those grandchildren, who, he remembers, had shared in the tender care of his aged wife, and, troubled at this omission, he sent for the plaintiff, but the plaintiff would not come. When, in order to secure the decree of the Ordinary, it was necessary that the plaintiff should renounce all per-

sonal benefit under the alleged will, it is observable that the paper, executed for this purpose, declares no trust beyond the lives of the four children. There is, indeed, a promise that the power of disposition will not be exercised in favor of himself or his heirs. Who would enforce that promise? Who would have such interest in it as could move a Court to act? The Court of Appeals in law, in affirming the verdict of the jury in the Common Pleas against the testamentary validity of this paper, rests the judgment on the ground, that the circumstances

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are such *as to induce a strong suspicion of undue influence exerted by this plaintiff, and, therefore, to require evidence, which had not been furnished, that the deceased was acquainted with the contents of the paper.

It appears to this Court that the present is not a case in which one, supposing himself rightfully executor, ought to be reimbursed out of the assets of the deceased for the costs and expenses which he has incurred in his unsuccessful attempt to set up and establish a supposed will. And it is, therefore, ordered and decreed, that the injunction be dissolved and the bill dismissed.

The complainant appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because, as the Ordinary of York District had admitted to probate, both in common and solemn form, the paper propounded by the complainant as the last will and testament of George Wright, deceased, the costs, fees, and expenses, incurred by the complainant as executor of said supposed will in sustaining said judgments of the Ordinary, should be allowed to him out of the estate of said deceased.

2. Because, when said expenses were incurred, the complainant had no such interest in the estate of George Wright as stated by the Chancellor; and even if he had, it is submitted that the expenses of maintaining and defending the will as admitted to probate, and his title as executor, were properly and necessarily incurred, must be referred to his fiduciary relation, and should be allowed out of the estate of said deceased.

3. Because there was no proof of any fraud or unfair dealing on the part of the complainant.

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*4. Because the injunction granted by the Commissioner, and set aside by the Chancellor, should be made perpetual, and the administrator of George Wright ordered to account to complainant for all sums properly and necessarily incurred and expended by him, as executor of said supposed will.

Williams, for appellant.
Smith, contra.

The opinion of the Court was delivered by

O'NEALL, C. J. It seems to me that the rule settled by the Court of Equity in *Butler v. Jennings*, 8 Rich. Eq. 91, is decisive of this case. The Court there say: "So long as the judgment of the Ordinary remained unreversed, the executor was entitled to be reimbursed all the necessary expenses incurred by him in sustaining the judgment."

The Ordinary had, both in common and solemn form, admitted the will to probate. His judgment stood unreversed until after the trial at law.

The verdict, on a very doubtful state of facts, found against the will, and was allowed to stand more as a finding upon the facts than anything else. The defendant was right in attempting to sustain the will. The allegations of fraud in the bill, on the part of the executor, are, I think, altogether unsustained. When the verdict was found against the will, he had discharged his duty; and costs incurred after that must be charged upon him.

But I think he ought to be allowed all his costs until after the verdict was rendered. It is therefore ordered that the Chancellor's decree, dissolving the injunction and dismissing the bill, be reversed; and that the Commissioner do ascertain and report the costs of the complainant to the rendition of the verdict, and that the amount thereof be reimbursed to him out of the testator's estate.

WARDLAW, J., concurred.
Decree reversed.

12 Rich. Eq. *234

*S. L. FOUNTAIN v. ALEXANDER BRYCE
and Others.

(Columbia. May Term, 1861.)

[*Chattel Mortgages* ⚡6.]

An unrecorded, informal instrument held to be a mortgage of slaves, and not a sale with an agreement to repurchase by a given time, and a purchaser without notice, who had not paid the purchase-money, ordered to deliver up the slaves to the mortgagor.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 23; Dec. Dig. ⚡6.]

Before Dunkin, Ch., at Pickens, June, 1860.
The decree of his Honor, the Circuit Chancellor, is as follows:

Dunkin, Ch. In January, 1858, there were in the Sheriff's office of Pickens District two or more executions against the plaintiff, Simpson L. Fountain, amounting to about five hundred and fifty dollars. Two of his negroes, to wit, Leah and her child Earle, were under levy, and were advertised for sale on the sale-day in January, which was the fourth day of the month. On the night before the sale was to take place, the plain-

tiff and the defendant, Alexander Bryce, stayed at the same house, and came together to the court-house on Monday morning. James E. Hagood, who is the Clerk of the Court, testified, that on that morning he offered to purchase the negroes from the plaintiff for nine hundred dollars, which he declined in consequence of the arrangement he had made with the defendants; witness said he would have thought it a good bargain on his part to have purchased the negroes at that price. L. C. Craig testified, that he would at that time have given for the negroes between eight hundred and a thousand dollars. The defendants, the Bryces, paid off the executions and took an assignment of them. Leah and her child were carried by the defendants, the Bryces, to Walhalla on

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that evening. An instrument bearing date on the same day, January 4, 1858, was executed by the parties; this paper was drawn up by the defendant, Alexander Bryce. The defendants' witness, C. C. Terry, proved the execution of the instrument; he said that the other witness, Hauenschil, was dead; that he did "not know on what day of the week the deed was executed; but that the negroes had been carried to the court-house and returned, and that the deed was read over two or three times to the plaintiff." A copy of the paper is exhibited with each of the defendants' answers; it is as follows:

"The State of South Carolina, Pickens District:

"Know all men by these presents, that we, Gambrell Bryce and Alexander Bryce, of the District and State aforesaid, having this day purchased a negro woman named Leah, about thirty-two years of age, and a child named Earle, about two years old, for five hundred and fifty dollars, which we bind ourselves, our heirs, executors and administrators, to deliver until the said S. L. Fountain shall desire the negroes for his own use, and make the arrangements so he is to have them solely for himself, without pawning them for the money or selling them for the same to any other person but us, and pay the sum of five hundred and fifty dollars, with interest on the same and necessary expenses about medical aid or waiting on when sick, by the 25th day of December, 1858, then and in that case we agree to deliver the aforesaid negroes; in case the said S. L. Fountain shall fail in complying with the above obligation, then and in that case the negroes is to be solely ours. These conditions is expressly agreed on between the said parties—that is to say, Gambrell Bryce and Alexander Bryce, Sr., on the one part, and S. L. Fountain on the other; if the said S. L. Fountain complies and the said Bryces do not, we, Gambrell Bryce and A.

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Bryce, bind ourselves to pay him *the

amount of damage that may be adjudged to him by three honest men.

"J. G. Bryce. [L. S.]

"A. Bryce. [L. S.]

"S. L. Fountain. [L. S.]

"Given under our hands and

seals in presence of—this

4th January, 1858—

"C. C. Terry,

"W. Hauenschil,

"Witnesses."

The instrument thus prepared by Alexander Bryce and executed by the parties was deposited, by consent, with D. Biemann, with the understanding, as Alexander Bryce says in his answer, that it was to be "kept by Biemann until after the 25th December, 1858; and if the condition of the above obligation had then been complied with by the complainant, it was to be delivered up to him, and if not, then Biemann was to deliver it to J. Gambrell Bryce and this defendant," A. Bryce.

It is not proposed to analyze this paper, or subject it to criticism either in a literary or moral point of view; it is manifestly a mortgage, was so understood by the plaintiff, Fountain, and it was intended by the Bryces that he should so understand it. Whatever might have been their own opinion of the construction of which it was susceptible, it is in its strongest sense, against the plaintiff, an instrument provided for and described by the Act of Assembly, A. D. 1712, 2 Stat. 587, and in which the plaintiff would not be barred of his right of redemption until two years' possession by the defendants, after condition broken. But, disregarding the plain character of the transaction, the Court will assume the correctness of the defendants' assertions, that

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on January 4, 1858, the plaintiff sold them absolutely, for five hundred and fifty dollars, two slaves, for whom he had, on that morning, refused nine hundred dollars, but with a condition that the plaintiff might repurchase if, "by the 25th December, 1858, he should pay them the sum of five hundred and fifty dollars, with interest and the necessary expenses of medical attendance;" and, it may be added, that the plaintiff was not at liberty to raise the money by a mortgage or sale of the negroes.

It was abundantly established at the hearing that, on the 15th December, 1858, the plaintiff applied to the defendants, (the Bryces,) and tendered to them the amount due to them, in gold, having procured the money on the day previous from Colonel William S. Grisham, who had loaned it to the plaintiff (as Colonel Grisham himself testifies) without any mortgage or other lien upon the negroes or other property of the plaintiff. The defendant, Gambrell Bryce, says, in his answer, that he refused the money because the plaintiff "did not make it appear that he

had not raised the money by pawning or selling the negroes." The answer of Alexander Bryce puts the refusal on the ground that the plaintiff "had not raised the money by his own labor," a new feature which he sought to interpolate into the written agreement, and which, if admitted, would only have stamped the transaction with more flagrant marks of fraud and oppression. The defendant further says that, the plaintiff having thus failed to comply with his agreement, the woman Leah and her three children (she having been delivered of twins in June, 1858) "were the property of this defendant and Gambrell Bryce after the 25th December, 1858, free from all lien or incumbrance;" that he some time afterwards procured the paper, 4th January, 1858, from Biemann, as Biemann says, on a promise to return it. On 9th September, 1859, the defendant, Gambrell Bryce, with the consent of his co-operative defendant, Alexander Bryce, "sold the slaves, as he says, to Ed-

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win M. Cobb for *thirteen hundred dollars, for which sum he now holds the notes of the said Cobb; that he stipulated with Cobb to deliver said slaves at Cobb's depot for slaves, in Carnesville, Georgia, kept by one Reynolds, for the sum of five dollars, and that on the day after the sale he did deliver the slaves to Cobb's agent in Georgia."

These proceedings were instituted 4th October, 1859. After the narrative presented, it remains only to declare the judgment of the Court. It is ordered and decreed that, within sixty days after notice of this decree, the defendants, J. Gambrell Bryce, Alexander Bryce, and Edwin M. Cobb, deliver up to the plaintiff the slave Leah, with her three children, Earle, Jane, and Sarah, and any subsequently born issue of the said Leah, and that the defendants, J. Gambrell Bryce and Alexander Bryce, account for the hire of said slaves since 15th December, 1858; that it be referred to the Commissioner to state an account between the parties, charging the plaintiff with the sums paid by the Bryces on the executions against him, and giving him credit for the negro hire ascertained to be due, and that he report the same, and that the slaves stand pledged in the hands of the plaintiff for the payment of any balance that may thus be found due by him. Finally, it is ordered and decreed that the costs of these proceedings be paid by the defendants, Alexander Bryce, Sr., and J. Gambrell Bryce.

The defendant, E. M. Cobb, appealed, and now moved this Court to reverse or modify the Circuit decree, on the grounds:

1. Because there was no proof of any notice on the part of E. M. Cobb, of the claim of complainant to the said slaves at the time or before his purchase of the said slaves.

2. If the paper set forth in the decree, and executed by A. Bryce and J. G. Bryce and complainant, was, in effect, a conditional sale by the Bryces to the complainant, then

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defendant, E. M. Cobb, having purchased the said slaves without notice of complainant's equity, should not be affected by it.

3. If the said paper is, however, in effect a mortgage of the said slaves, then it is respectfully submitted that the said paper, not having been recorded, is void against E. M. Cobb, who was a subsequent purchaser without notice. 11 Stat. 256.

4. Because it is respectfully submitted that the presiding Chancellor erred in decreeing a specific delivery of said slaves, inasmuch as defendant, E. M. Cobb, purchased them without notice, and had removed them from the State before the filing of complainant's bill.

5. Because it is respectfully submitted that the Chancellor erred in not settling the equities between all the parties who were before the Court, and ordering the notes of E. M. Cobb, in the possession of A. Bryce and J. G. Bryce, for the purchase-money of said slaves, to be delivered up or cancelled.

The defendants, A. Bryce and J. Gambrell Bryce, also appealed, and now moved this Court to reverse or modify the decree of the Chancellor, on the grounds:

1. Because it is respectfully submitted that the presiding Chancellor wholly misconceived the testimony of James E. Hagood, said witness testifying that he made no offer for the slaves Leah and child Earle, to the complainant, but that he would have given nine hundred dollars for said slaves, if complainant had not made the arrangement with the defendants Bryces, and this not communicated to the complainant.

2. Because the Chancellor erred in not giving full weight to the answers of defendants, A. Bryce, and J. G. Bryce, inasmuch as the complainant called for a discovery by them as to whether the paper filed as Exhibit A

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contained the *contract between said parties, and all statements made by them, explanatory of said contract, in response to the bill, and not controverted, became evidence in the cause. *Chambers v. Hize*, 2 Dev. & B. Eq. 305; *Chapman v. Turner*, 1 Call Va. R. 244.

3. Because it is respectfully submitted that the instrument of writing set forth in the Chancellor's decree was a conditional sale by the defendants, A. Bryce and J. G. Bryce, to Fountain, the title of the said slaves Leah and child Earle having been vested in the said A. Bryce and J. G. Bryce on the 4th day of January, 1858, previous to the execution and delivery of said paper.

4. Because it is respectfully submitted that the Chancellor erred in decreeing a specific delivery of said slaves, as the writing between the parties, if violated by the defendants, A. Bryce and J. G. Bryce, prescribed the mode and character of redress on the part of complainant, which was to be in damages, and not by specific delivery.

5. Because it is respectfully submitted that

the decree, if not wholly erroneous, should be modified, so far as to extend the reference ordered to an account of any expenses incurred by the defendants, A. Bryce and J. G. Bryce, as provided for in said written agreement.

Harrison, for defendant, Cobb.

Orr, for defendants, A. Bryce and J. G. Bryce.

Norton, contra.

Curia, per O'NEALL, C. J. In this case, we concur in Chancellor Dunkin's decree.

We think that he overlooked the necessity

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of making a decree between the defendants.

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The defendant, Cobb, on *surrendering the slaves to the complainant, is entitled to his note held by his co-defendants. It is therefore ordered and decreed, that on his delivering the slaves mentioned in the decree to the complainant, the defendants, Alexander Bryce and J. Gambrell Bryce, do deliver to him his note for the price.

JOHNSTONE, J., and WARDLAW, J., concurred.

Decree modified

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER TERM, 1861

JUSTICES PRESENT:

HON. JOHN B. O'NEALL, CHIEF JUSTICE.

HON. JOB JOHNSTONE, ASSOCIATE JUSTICE.

12 Rich. Eq. *254

*SARAH GREER and Others v. R. McBETH
and NANCY GREER.

(Columbia. Nov. and Dec. Term, 1861.)

[*Executors and Administrators* ⚡327.]

The testator directed that his widow, the stepmother of his children, and such of his children as may see fit, should have the possession and use of his real estate, until his youngest child should arrive at seventeen years of age, when he directed it to be sold and the proceeds divided equally between his widow and children; and he authorized his executor, if he should find it more beneficial, to make the sale sooner, and divide the proceeds. The children left their home, and, the youngest being eight years of age, filed their bill to compel a sale of the real estate, on the ground that the widow had an illegitimate child born before her marriage, and that she was low in social position and of vulgar reputation:—*Held*, that the Court could not, under the circumstances, and against the wish of the widow, interfere with the discretion of the executor, he not thinking proper to make the sale.

[Ed. Note.—Cited in *Jennings v. Teague*, 14 S. C. 240; *Anderson v. Butler*, 31 S. C. 189, 9 S. E. 797, 5 L. R. A. 166; *Rice v. Coleman*, 87 S. C. 349, 69 S. E. 516, 518, *Ann. Cas.* 1912B, 1016.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1344; Dec. Dig. ⚡327.]

Before Carroll, Ch., at Union, June, 1861.

The bill in this case was filed by the plaintiffs, who are the children of Jason Greer by a former marriage, against Robert McBETH, his executor, and his widow, Nancy Greer. The testator, by his will, devised as follows:

"Third. I will and direct that my beloved wife, Nancy Greer, and said eight children, or such of them as may see fit, shall have and remain in possession of, and have the use of, all my real estate until my youngest child arrives at the age of seventeen years, and, upon my youngest child arriving at the age

of seventeen years, I will and direct all my real estate to be sold, and the proceeds of such sale be equally divided between my said wife and eight children share and share alike; it being expressly understood that

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the provision *made in this my will for my said wife is in lieu of all claims she may have in my estate.

"Fourth. I will and direct after a time, if, in the opinion of my executor or administrator, it will be more beneficial to sell all my real estate than to retain it as provided for in the third section of this will, then and in that case I hereby authorize and direct them to sell the same, and divide the proceeds of such sale according to the provisions of the third clause of this my will."

The bill alleged that the plaintiffs had left the homestead, and had gone to reside with a relative in York District, where they intended to remain; that their stepmother was "low in social position and of vulgar reputation," which induced them to leave, with the determination not to return.

The defendant, McBETH, did not admit that the reputation of his co-defendant called for or justified their removal; he stated that he had advised Sarah A. E. Greer against it; and that Nancy Greer, since her intermarriage with testator had demeaned herself reputably, and is a member in full communion in the Baptist church. The defendant further stated that he is satisfied that at no time since last fall would the interest of the parties have been advanced by a sale of the land.

The defendant, Nancy Greer, did not complain or wish to interfere with the exercise of the discretion given to the executor. She admitted the plaintiffs left her home, of

which she had no knowledge until the night previous, and says she gave no cause of complaint, and was anxious that some of the children should remain; that she can barely make a support on the place.

There was evidence offered to the effect that Nancy Greer had had an illegitimate child previous to her marriage, but since that time nothing was proved against her; that her child had not lived with her until plaintiffs left; and that she is a member of good standing in the Baptist church.

The decree of his Honor is as follows:

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*Carroll, Ch. From the pleadings, and my notes of the testimony, the facts involved may readily be collected.

There seems to have been good and sufficient reasons for the removal of the testator's children from his plantation. By means of it they at least escaped the evils of low associations, and were restored to the higher social position to which they were entitled prior to their father's last marriage. Perhaps such a removal was even demanded by a proper regard to the moral purity and virtuous rearing of the younger children of testator. The widow, with her natural child, has now the exclusive possession of the testator's plantation. If she remains there, his children, (all of whom, except one, are infants,) without the slightest fault on their part, will be practically deprived of their father's land until the youngest, now about eight years of age, shall have attained to the age of seventeen years. In the judgment of the Court the condition of the testator's family renders it undoubtedly "more beneficial" to all the parties interest "to sell his real estate than to retain it," as proposed in the third clause of his will. The authority confided in the executor to sell the land is regarded as not a mere naked power, but as a power in the nature of a trust. "If," says Lord Eldon, "the power is one which it is the duty of the party to execute, made his duty by the requisition of the will, he is a trustee for the exercise of that power, and not as having a discretion whether he will exercise it or not; and the Court adopts the principle as to trusts, and will not permit his negligence, accident or other circumstances, to disappoint the interest of those for whose benefit he is called upon to execute it." The Court is much more ready to control trustees in the exercise of discretionary powers, which apply to the management of the trust estate, than in other matters of private opinion and judgment. Such powers involve, to be sure, a discretion on the part of the trustee, but not an arbitrary and capricious discretion, and the Court will enter into the

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consideration of the circumstances, and decide upon the propriety or impropriety of executing such power. Hill on Trusts, 494, 495. In Sugd. on Powers, 393, it is said that "a man may be intrusted with a trust to be

effected by the execution of a power which, in that case, is imperative, and if he refuse to execute it, or die without having executed it, equity will carry the trust into execution." "This," he adds, "is the case where a power is granted by a will to trustees to sell an estate and apply the money upon trusts." The conclusion of the Court is, that it was the duty of the executor, under the circumstances, to have sold the land of his testator, and that the plaintiffs are now entitled to have such sale effected under its order. Whether the interference of the Court would not have been authorized upon other grounds, is an inquiry not necessary now to be considered.

It is ordered and decreed that the lands of the testator, mentioned in the pleadings, be sold by the Commissioner, at public auction, in one body or in separate parcels, as may be convenient, and at such time and place and upon such terms and credit as he may determine, after conference with the parties, due notice of such sale, by public advertisement, to be given, and the purchase-money to be secured by bond and adequate sureties.

And it is further ordered that the costs of the suit be paid out of the proceeds of the said sale, and that the residue of such proceeds be distributed among the testator's widow and children in the proportions specified by his will, the shares of such of the children as are infants to be paid to their guardians respectively.

The defendants appealed, and now moved this Court to reverse his Honor's decree on the grounds:

1. Because the effect of the decree is to set aside the will, making a disposition of his estate different from what he directed.

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*2. Because the right to sell the real estate was given by the will, and the time to sell was left to the discretion of the executor; and as there was no pretence or proof that his discretion was improperly used, he should not have been interfered with in opposition to his own judgment as to the time of the sale of the real estate.

3. Because, from the case made, the Court had no jurisdiction, and the bill should have been dismissed.

Dawkins, Gadberry, for appellants.

Moore, contra.

The opinion of the Court was delivered by

O'NEALL, C. J. The right of the testator to dispose of his estate, in such way as he might think best, cannot be questioned. He thought proper to give to his wife and the children living with her the use of his real estate until his youngest child arrived at the age of seventeen years. This gift could only be defeated by a sale by his executor or administrator, who was in his discretion authorized to sell before that time arrived.

The executor has not thought it prudent or necessary to sell. It is now attempted to force a sale against his will, and against the wish of the widow, at the instance of the children of the first marriage, who have abandoned the home left for them by their father on the ground that their stepmother is an improper associate for them.

She is now as she was in the father's lifetime. She has exhibited no new vices; she has not pursued a course in which she

had indulged before marriage. She has reformed, and is now the member of a Christian church.

I do not perceive any ground on which the Court can interfere with the real estate devised to her and the children.

It is therefore ordered and decreed that the Circuit decree be reversed.

JOHNSTONE, J., concurred.

Decree reversed.

CASE IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, NOVEMBER TERM, 1863.

12 Rich. Eq. *259

*ELIZABETH R. JOHNSON v. SILAS
JOHNSTONE, Exor. of James A.
Johnson.

(Columbia. Nov. Term, 1863.)

[Wills, ¶511.]

Bequest to the testator's executor in trust for his, the testator's, "legal representatives and next of kin:"—*Held*, that the testator's widow was entitled, as one of his legal representatives.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1107; Dec. Dig. ¶511.]

Before O'Neill, C. J., at Newberry.

This case will be sufficiently understood from the opinion delivered in the Court of Appeals.

Fair, for appellant.

Jones, contra.

The opinion of the Court was delivered by

WITHERS, J. The will of James A. Johnson contains the following provision, to wit: "To my esteemed friend and fellow-citizen, Silas Johnstone, Esq., Commissioner of the Court of Equity of Newberry District, I give

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the entire of *my estate, absolutely, for the express purpose of distributing the same, according to equity, among my legal representatives and next of kin, when he may find it convenient to do so, after satisfying himself with whatever he may see proper to select, out of my cash, railroad stock," &c.

The testator left surviving him a widow, from whom he had separated, and lived apart from her many years. The question is, Shall she be included in the words, "among my legal representatives and next of kin?" If she be, she must seek that position by virtue of the words, "legal representatives."

The Courts have often been exercised (and have had conflicting views) in the duty of giving these same words interpretation where they were not employed, in devises and bequests, as words of limitation, i. e., to express the quantity of estate or interest given. They were surely not employed in this lat-

ter office in the present case. The legal representatives contemplated by James A. Johnson were intended to take a beneficial interest in such residue of his estate as was declared to be distributable. The strict, professional acceptance of the words points to executors or administrators. But strict, professional, technical interpretation of testamentary language is not the course of judicial exposition, since testators are too often inops concilii, and, therefore, capable of using language only in a popular or loose sense, to make such technical interpretation subserve purposes plainly disclosed by the testament. It is contrary to common experience and the general sense of mankind to suppose that, in the testamentary disposition of property, one intends to place a party who has merely a fiduciary character, who is remunerated by provision of law for his trouble and service, who is wholly uncertain, (for no testator can know whether a nominated executor will survive him, or will serve him if he does, and cannot know who may become administrator,) one who may be insolvent, or a

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profligate, *among the natural objects of his express bounty, or among those whom the law appoints to the succession. We are not surprised, therefore, to find in the books evidence of a strong leaning, by Judges of repute, to the construction of such words as are in question, (and which unquestionably point to succession or representation,) the sense of next of kin, or of those who would be distributees by a Statute of Distributions. Nor are we surprised to find, also, instances even where it has been adjudged that executors and administrators are the legatees, that nevertheless they should hold in trust for the benefit of those who fulfil the character of distributees under statute. Examples illustrating both of the foregoing observations may be found in 2 Jarm. 39, et seq., and other text-books treating the same subject.

Where nothing in the testament forbids it, there is much reason, in this State, to construe "representatives" or "legal representatives" to indicate those who would succeed

to, and be among, the distributees of an estate in case of intestacy. Our Statute of Distributions is familiar to the people beyond any other statute, perhaps, and furnishes the rule of succession very generally approved, as to all or some of an estate which is to descend. In the second category of our Statute of Distributions the language is, "the lineal descendants of the intestate shall represent their respective parents;" and the phrase, *jure representationis*—by right of representation—is the usual professional language, in speaking of distributees by substitution, according to that statute. Such legislative example in an old and familiar statute—one so often spoken of, in common parlance, as providing an equitable disposition of an intestate estate—gives aid to the idea that "legal representatives" in the case before us may well be construed to mean such as would take Johnson's estate in case of intestacy. His widow fulfills the character of one of the class who stand in the line of those who, by law, succeed to the testator,

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and so represent him touching his estate, if the Statute of Distributions acted upon it. In such view there is, therefore, no shock to ideas of the rational interpretation of language in holding a distributee to be one legal representative of an intestate. Nothing in the will is made known to us that can have the effect of giving a different exposition to the words, "my legal representatives."

If we give any other exposition to these words, we shall be pointed by them to the executor, Silas Johnstone, and then we

should have the following result, to wit, that the testator, by explicit language, gives to Silas Johnstone, in propria persona, as much as he may "see proper to select," and the residue he holds "for the express purpose of distributing, according to equity, among" Silas Johnstone, in character of executor, and the next of kin of testator. Such a scheme cannot be supposed to have been contemplated by the testator.

His conduct, in respect to his wife, is not a controlling circumstance, even if it be legitimate to consider it at all. In the last solemn act concerning the disposition of his estate there may (for aught we know or can know) have been a relenting mood; and he put it in the power of his favorite legatee to reduce her, as well as the next of kin, to a diminutive portion. It is possible, for aught we know, that he acquired some of his property through his wife. It is not fit we should be guided by the consideration of a fact ambiguous as to its influence in the structure of the will.

This is not the proper occasion to ascertain the persons who may come within the words, "legal representatives and next of kin." The widow is, we think, a legal representative of testator, in the partition of what is to be distributed; and this is all the case, as now presented, warrants us to decide.

The motion is dismissed, and the decree below affirmed.

O'NEALL, C. J., and DUNKIN, J., concurred.

Decree affirmed.

CASE IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, MAY TERM, 1864.

12 Rich. Eq. *263

*SUSANNAH TISDALE v. BENJAMIN MITCHELL and Others.

(Columbia. May Term, 1864.

[Wills. \hookrightarrow 534.]

Testator, by one clause of his will, gave his plantation and some personalty to his wife during life or widowhood. He next declared that certain property which he had given by deed to his daughter S. and her children she should have "in lieu of any further share or part of his estate." To his six other children, by name, he then gave parts of his estate; and, finally, he directed, that if any of his children should die before arriving at twenty-one years of age and without issue, that his part or share revert back to his estate, and be equally divided among his "surviving children," and that the remainder or residue of his estate, when his youngest child should arrive at age, or at the death of his wife, be equally divided among "his children:—*Held*, that S. was not included in the terms "surviving children" and "children," as used by the testator, and consequently that she was entitled to no part of the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1153; Dec. Dig. \hookrightarrow 534.]

Before CARROLL, Ch., at Sumter, June, 1863.

The testator, Stephen Mitchell, died in August, 1820, leaving his wife and children named in his will surviving him. Daniel Clark Mitchell died shortly after the testator, intestate, a minor, unmarried, and without issue. Winney married William McCoy, and she is dead, leaving issue. Stephen A. Mitchell, son of testator, is also dead, leaving issue. Abigail married Minor McCoy, and is now a

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widow. *Abigail Mitchell, widow of testator, died in 1860. Of the negroes bequeathed by the testator to his widow for life, Luna and fifteen of her descendants survived her, and the bill was filed against Benjamin Mitchell, James Mitchell, Samuel Clark Mitchell, Abigail McCoy, Chapman L. McCoy, administrator of Winney McCoy, and James C. Hicks, administrator of Stephen A. Mitchell, for partition of Luna and her issue, and also for an account of Samuel C. Mitchell of their hire, he having taken possession of them at the death of Abigail Mitchell.

The Circuit decree is as follows:

Carroll, Ch. The questions presented by the pleadings depend upon the construction of the eleventh and twelfth clauses of the will of Stephen Mitchell, deceased, which bears date August 24th, 1820. After providing for payment of his debts, by means of his crop then growing, and so much of his stock as might be necessary in addition, the testator, in the second clause of his will, gives to his wife for life or widowhood the use of his farm, plantation tools, household and kitchen furniture, all his stock of horses, cattle, and hogs, not otherwise disposed of, "and three female slaves." In the third clause, the testator refers to a deed whereby he had given to his daughter, the plaintiff, and her children, "a tract of land, a negro girl, and a stock of cattle," and declares it to be his "will and desire that she shall have the said property in lieu of any further share or part of his estate." The testator then directs that his sons as they marry, or arrive at the age of twenty-one years, shall "have an equal dividend of his plantation, except that part whereon his dwelling-house is situate, which he wills to his youngest son, Samuel, as his part of said land, subject, however, to the use or support of his mother, during lifetime or widowhood." The six succeeding clauses contain specific bequests of negro slaves to his children, exclusive of the plaintiff, to be

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de*ivered to them as they respectively may marry or attain to the age of twenty-one years. Then appear the clauses of the will out of which the controversy arises, and they are expressed in the following terms:

"11. Also, it is my will, should any of my children die before they arrive to age of twenty-one years, or without leaving issue, then in that case that their share or part revert back to my estate, and be equally divided among my surviving children.

"12. Also, should any of the negroes die which are named as legacies before the child to which it is named arrived at the age of twenty-one years, then the loss to the child

so losing its legacy shall be made good out of my estate; the remainder or residue, when my youngest child arrives at the age of twenty-one years, or at the death of my beloved wife, to be equally divided among my children."

The will was admitted to probate September 15th, 1820. One of the testator's sons, Daniel C. Mitchell, died soon after his father, an infant, unmarried, and without issue. The widow, Mrs. Mitchell, died in March, 1860. Of the negroes bequeathed to her for life, all have died, except the slave Luna, whose descendants, born since the testator's death, are now fifteen in number. Upon the death of the life-tenant, Mrs. Mitchell, her son, Samuel C. Mitchell, took possession of those negroes. The bill seeks a partition of them, and also an account of their hire since her death.

The questions to be considered are, whether the plaintiff is embraced within the description, "my children," in the twelfth clause, and "my surviving children," in the eleventh clause of the will. If included within the former, she takes one of the original shares in remainder, after the death of her mother, in the slaves and their descendants that had been bequeathed to her for life. If included in the latter description, then she in addition takes of her brother Daniel's

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*share in remainder of those slaves an equal portion with his other sisters and his brothers who survived him.

In support of the plaintiff's claims, it is urged that she is as clearly embraced within the terms of description referred to as any one of the testator's other children; that the words in question are not words of art, or of dubious import, but are plain and unambiguous in their sense; that they comprehend her too clearly and palpably to admit of the supposition that her inclusion was the result of inadvertence or misconception of the meaning of the words employed; and that the supposed inconsistency between the clauses in question thus construed and the testator's prior declaration that the plaintiff should hold the property given her by deed, "in lieu of any further share or part of his estate," may be entirely reconciled by understanding that declaration to refer, not to any interest in his estate expectant merely or postponed in possession, but to any interest in the same coupled with the right of immediate enjoyment. The testator has certainly employed wide and sweeping terms of exclusion in regard to his daughter, the plaintiff. The clause of his will referring to her declares, that what he has already given her by deed she should have "in lieu of any further share or part of his estate." He appears to have been fully aware of the true import of the words employed. The entire mass of the subject of property belonging to him, and which he was about to dispose of by his will, in the intro-

ductory paragraph of that instrument, he terms his "worldly estate."

The construction which would interpret the words, "any further share or part of my estate," as meaning any further immediate share or part of my estate, finds nothing to support, but much to oppose it, in the language of the sequel of the will. The parts of his plantation which he devises to his five sons were surely regarded by the testator as not unimportant portions of their "shares or

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parts" of his estate, *yet possession is withheld from the four elder sons until they respectively married or attained the age of twenty-one years, and it is expressly provided as to the youngest son that "his part of the said land" should be subject to the "use or support of his mother during life or widowhood." Seven out of the ten slaves disposed of by the will are given by the testator to his seven younger children, exclusive of the plaintiff. Yet it is expressly directed that those slaves are not to be given up to the legatees respectively until their marriage or majority. Undoubtedly these slaves composed material portions, and, in respect of the daughters, the great bulk, of their "shares or parts" respectively of their father's estate.

It does not admit of question that the interests of the younger children in the slaves bequeathed to their mother for life come within the operation of the limitation over contained in the eleventh clause of the will. But those interests are there designated only by the words, "their share or part." Those words appear therefore to be repeatedly employed by the testator in describing interests, not immediate or in possession, but expectant and deferred in enjoyment. There is also something of significance in the form of the limitation over expressed in the eleventh clause.

In the contingency there specified, the portion of the deceased child was not to pass directly to the ultimate donees, but first "to revert back to his estate," from "any further share or part" of which the plaintiff is expressly excluded. The construction which the plaintiff proposes to place upon the words of exclusion in the third clause of the will is regarded as inadmissible.

It is undoubtedly an established rule in the construction of wills that, when two clauses are irreconcilable, so that they cannot possibly stand together, the clause which is posterior in local position shall prevail. "But the rule referred to is not to be applied until

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after the failure of every attempt to *give the whole such a construction as will render every part of it effective." 1 Jarm. 415. It is added by the learned author whom I cite that, "in the attainment of this object, the local order of the limitations is disregarded, if it be possible, by transposition of them, to deduce a consistent disposition from the entire will." The conflicting clauses, it is

conceived, may be reconciled by reading the words descriptive of the donees, under the limitations of the eleventh and twelfth clauses of the will, as referring to the testator's children, exclusive of the plaintiff, if such construction shall seem warranted by the context. General words in one part of a will may be restrained, when it can be collected from any other part of the will that the testator did not mean to use them in their general sense; 2 Wms. Exrs. 790. After designating a fund out of which his debts are to be paid, and making a provision for his widow, the testator addresses himself to the task of disposing of the entire residue of his estate in respect of his children. The remaining clauses of the will are devoted to this purpose solely.

His first step in that direction is to consider the claim of his daughter, the plaintiff, upon his bounty, and to reject it, declaring in effect that she had received an equivalent for her portion already, and should have no further share or part of his estate. After such a preface, to which of his children would we naturally and at once infer that the testator intended to give the remainder of his estate? Surely not to the child who had already been satisfied as to her portion, but to his other children, who as yet had been wholly unprovided for.

Had the third clause of the will immediately succeeded the twelfth, would not the former have necessarily qualified and restricted the meaning of the words, "my children," and "my surviving children," in the preceding clauses? When a testator makes a bequest to a plurality of persons, describing them not nominatim, but as a class, and in

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the clause *immediately following declares that one of the persons composing that class shall have no part or share of his estate—this, it is conceived, amounts to declaration plain that the person excluded by the latter clause is not intended to be embraced within the former. It is not perceived why less effect upon the construction of the limitations in question should be assigned to the third clause, standing where it does. Perhaps it derives even greater significance, in that regard, from its actual position in the will, operating, as it does, as a distinct premonition that the words descriptive of the donees in the limitations of the eleventh and twelfth clauses of the will should be read in a restricted and not in a general sense.

That the words in question are used in other portions of the will in the limited sense imputed to them may be easily shown. In the second clause of that instrument, the testator gives to his wife certain portions of his estate during life or widowhood, to be held (in his own language) "for her use and benefit and for the maintenance and education of my children." Assuredly the plaintiff was not intended to be included in the description, "my children." She was at the

date of the will a wife and a mother, dwelling with her husband and children apart from her father, and having already received a provision out of his estate, which he at least deemed competent.

The persons who are to take, after the widow's death, the most valuable portion of the property bequeathed her for life, are designated by the same description which is employed to denote those who, during her lifetime, are to be provided out of it with maintenance and education. Having ascertained who the latter are, is it an irrational construction to conclude that the same persons were intended by the testator to be designated by the same description in the further disposition which he afterwards makes of the same property?

It may be inferred from the will that the

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testator's children, *exclusive of the plaintiff, were all in their minority at the date of the will. The words, "my children," where they first occur in the eleventh clause of the will, undoubtedly do not include the plaintiff, and the "surviving children" afterwards mentioned, it is apprehended, should therefore be construed to mean the survivors, exclusive of her. In general, words occurring more than once in a will should be presumed to be used always in the same sense, unless a contrary intention appear by the context.

After no little hesitation the judgment of the Court is, that the words, "my surviving children," and "my children," in the eleventh and twelfth clauses of the will, respectively mean the younger children of the testator—those for whom he had not antecedently provided—and do not include the plaintiff.

It is ordered and decreed that the bill be dismissed.

Copy Will.

"State of South Carolina, Sumter District:

"In the name of God Amen: I, Stephen Mitchell, of the State and district aforesaid, being weak in body, but sound in mind and memory, do make and declare this my last will and testament, in manner and form following: first, I resign my soul into the hands of Almighty God, hoping and believing in a remission of sins, by the merits and mediation of Jesus Christ, and my body I commit to the earth, to be buried at the discretion of my executors hereinafter named; and my worldly estate I give and devise as follows:

"1. I will that my debts be paid out of my crop now growing, and, provided the crop is not sufficient, that so much of my stock as may be necessary be sold to pay the balance of the debts.

"2. Also, I give and devise unto my beloved wife Abigail Mitchell, the use of my farm,

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plantation tools, the house *where I now live, household and kitchen furniture, all my stock of horses, cattle and hogs, not otherwise dis-

posed of; also the following negroes: Sally, Sarah and Luna, and their future increase, during her lifetime or widowhood, for her use and benefit, and for the maintenance and education of my children; and provided my beloved wife Abigail should or does marry again, in such case I will and bequeath unto her, during her lifetime, a negro woman called Sally and a bed and furniture, all of which I give to my beloved wife Abigail in the foregoing manner in lieu of dower.

"3. In consequence of a deed of gift made to my daughter Susannah Tisdale and her children, of a tract of land, whereon she and her husband Christopher Tisdale now live, also a negro girl called Lucy and a stock of cattle, it is my will and desire that she shall have the said property in lieu of any further share or part of my estate.

"4. Also, I will that my sons, as they may marry or arrive at the age of twenty-one years, have an equal dividend of the plantation where I now live, except that part whereon my dwelling-house is situated, which I will to my youngest son Samuel Clark as his part of the said land, subject, however, to the use or support of his mother during lifetime or widowhood.

"5. I will to my son James a negro woman named Hannah. I will to my daughter Winney a negro girl named Ginny.

"6. I will to my son Stephen a negro man named Shadrick.

"7. I will to my daughter Abigail a negro girl named Eliza.

"8. I will to my son Benjamin a negro boy named Adam.

"9. I will to my son Daniel Clark a negro boy named Samson; and

"10. I will to my son Samuel Clark a negro boy named Nat.

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"*Those legacies to be paid over or given up to the heirs as they may arrive to the age of twenty-one years, or as they may marry.

"11. Also, it is my will, should any of my children die before they arrive to age of twenty-one years or without leaving issue, then in that case that their share or part revert back to my estate, and be equally divided among my surviving children.

"12. Also, should any of the negroes die which are named as legacies before the child to which it is named arrives at the age of twenty-one years, then the loss to the child so losing its legacy shall be made good out of my estate; the remainder or residue, when my youngest child arrives at the age of twenty-one years, or at the death of my beloved wife, to be equally divided among my children.

"13. Lastly, I constitute and appoint my son James Mitchell and Hartwell Macon my executors, to carry this my last will and testament into execution and effect.

"Witness my hand and seal this 24th August, 1820. Stephen Mitchell. [L. S.]

"Test: Charles F. Gordon.

"C. Miller.

"Zachariah McKinney."

The plaintiff appealed, and now moved this Court to reverse the decree of his Honor, on the grounds:

1. That the plaintiff is as clearly and unequivocally designated by the words, "my children," used in the twelfth clause of the will, as any other child of the testator, and the argument upon which it is contended that the testator did not intend to include her is altogether conjectural, and therefore insufficient to sustain the decree.

2. That is is equally as clear that the

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plaintiff is included *within the words, "my surviving children," used in the eleventh clause, and therefore if the provision of that clause defeated the share of Daniel C. Mitchell in the "remainder or residue" mentioned in the twelfth clause, then the plaintiff is entitled as a remainderman designated by the words, "my surviving children," to a share of the share in the "remainder or residue" to which Daniel C. Mitchell would have been entitled to had he lived to be twenty-one years old.

3. But it is submitted that Daniel C. Mitchell's interest in the "remainder or residue" has not been defeated, and therefore that the plaintiff is entitled as his distributee to a share of the share in the "remainder or residue" to which he was entitled.

J. S. G. Richardson, for appellant.

1. "Merely negative words are not sufficient to exclude the title of the heir or next of kin. There must be an actual gift to some other definite object." 2 Jarm. 741. The plaintiff is not only a child, but she is one of the heirs or next of kin. The negative words do not exclude her, and the words of gift clearly embrace her as one of the objects of gift.

2. If two clauses of a will are so inconsistent that they cannot be reconciled, the last shall prevail. *Fraser v. Boon*, 1 Hill, Ch. 360. As the terms of gift clearly embrace the plaintiff as one of the objects of gift, would it not be better to hold that the testator changed his mind, as he had a perfect right to do, than to adopt the view taken by the Chancellor?

3. *Cleabury v. Beckett*, 14 Beav. 583; cited 4 Chit. Eq. Dig. 3572.

4. One of the general rules of construction as laid down in 2 Jarm. 742, is "that an ex-

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press and positive devise cannot *be controlled by inference and argument from other parts of the will."

5. In *Smith on Real and Personal Property*, 776, 16 Law Lib. 6th Series, 504, the third and fifteenth rules of construction of wills are thus stated: "3. An express dis-

position, though probably involving an oversight or mistake by the testator, cannot be controlled by inference which is not necessary or indubitable." "15. Where an estate or benefit is conferred in one part of an instrument in terms which are free from all doubt, such estate or benefit cannot be taken away except by equally clear words in another part of the instrument." These rules would seem to be conclusive. The twelfth clause of the will contains an express and positive bequest; it confers an estate in terms which are free from all doubt, and it may be conceded that it probably involved an oversight or mistake by the testator, but then on the other hand it must be also conceded that it can only be controlled, if it can be controlled at all, by inference and argument from another part of the will; that the inference that there was an oversight or mistake is not necessary or indubitable, and that the words upon which it is attempted to take away the estate conferred by the use of the words, "my children," and "surviving children," are not equally clear.

6. We submit that the different clauses of the will can be reconciled, and the thirteenth rule of construction, as stated in *Smith*, 779, is, that "mistakes in a will are never to be intended if a reasonable construction can be found out." We say that the testator, when he wrote his will, had two leading purposes in view: the first was, to make some provision for his wife and children to be enjoyed immediately, or within a reasonable and proper time after his death; and the second was, to provide for certain contingencies and to dispose of the remainder in the negroes given to his wife for life; and that in the third clause of his will he had reference only to his first purpose. Upon this point see *Rivers v. Fripp*, 4 *Rich. Eq. 276, which shows, we think, that the direct legacies to the children vested immediately upon the death of the testator, and that the delivery only was postponed, and not the right of property or the right to the profits.

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ers v. Fripp, 4 *Rich. Eq. 276, which shows, we think, that the direct legacies to the children vested immediately upon the death of the testator, and that the delivery only was postponed, and not the right of property or the right to the profits.

F. J. & M. Moses, contra.

The opinion of the Court was delivered by

DUNKIN, J. By the third clause of the testator's will it is substantially declared

that he had already, by a deed of gift to the plaintiff and her children of certain real and personal estate, given to her what was to be regarded as her share of her estate. Recognizing the validity of that gift, the testator ordains that it shall be held "in lieu of any further share or part of his estate." The plaintiff held the property which had been given to her under a title independent of the will, and beyond the control of the testator. Any attempt on his part to engraft on the title any contingent limitation, as was done in relation to the bequests to his other children, would have been manifestly inoperative and futile. When, therefore, he provides, in the eleventh clause of his will, that, in the event of the death of any of his children under twenty-one years of age, or without leaving issue, their share should revert back to his estate, and be equally divided among his surviving children, he had no intention to exceed his powers, and cut down the estate already irrevocably vested in the plaintiff. Her absolute rights could not be thus abridged, and the Court would not readily impute to the testator any such intention. When, therefore, he declares that, "should any of his children die," &c., "their share shall be divided equally among his (testator's) surviving children," he referred to those children of whose shares he had authority to dispose, and not to the plaintiff, (although one of his children,) but whose share was beyond his control. As, in

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the event of the *plaintiff's death without leaving issue, the surviving children of the testator would (under the provisions of the will) take no part in her share of the estate, so, in the correlative contingency, the plaintiff is not entitled to participate in the share of a deceased brother or sister.

Such is the construction adopted by the Chancellor, and by it the several clauses of the will are rendered consistent and harmonious.

It is ordered and decreed that the appeal be dismissed.

WARDLAW and WITHERS, J. J., concurred.

Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

COLUMBIA, MAY TERM, 1866.

JUSTICES PRESENT:

HON. BENJAMIN F. DUNKIN, CHIEF JUSTICE.
HON. DAVID L. WARDLAW, ASSOCIATE JUSTICE.
HON. JOHN A. INGRAM, ASSOCIATE JUSTICE.

12 Rich. Eq. *337

*ANDREW WHERRY, Administrator of John Scott, v. MARTHA McCAMMON and Others.

(Columbia. May Term, 1866.)

[Judgment ¶876.]

Where less than twenty years have elapsed since a judgment was rendered, payment will not be presumed, unless other circumstances are shown, which, associated with the lapse of time, create a presumption, amounting to actual belief, that the debt has been paid.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1648; Dec. Dig. ¶876.]

[Judgment ¶876.]

A lapse of nearly nineteen years, with the other circumstances proved, held insufficient to raise the presumption of payment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1648-1652; Dec. Dig. ¶876.]

Before Carroll, Ch., at York, June, 1861.

This case will be sufficiently understood from the decree of his honor, the Circuit Chancellor, which is as follows:

Carroll, Ch. In December, 1849, Matthew McCammon bargained with the plaintiff Andrew Wherry, for a small parcel of land, at a stipulated price. William E. Kelsey became McCammon's surety for the payment of the purchase money, and, by agreement between the parties, received a conveyance of the legal title to himself as counter security against his liabilities as such surety. The bulk of the purchase-money was paid by McCammon in his lifetime, and the residue by the rents of the land after his death. The claim of his heirs (his widow and children) to the benefit of his contract of purchase being contested, they exhibited their bill in this Court against Kelsey and others: and

under a decree in that cause have obtained a conveyance to them of the land in fee. The personal assets of Matthew McCammon were wholly inadequate to pay his debts, and indeed are said to have been insufficient to discharge the ordinary expenses of administration. This suit is instituted against the administrator and heirs of McCammon, by the

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administra*tor of one of his judgment creditors, in behalf of himself and the other creditors of like grade, to have the land referred to subjected to the payment of their debts.

The single question discussed at the hearing was, whether the judgment debt of the plaintiff's intestate, John Scott, against Matthew McCammon, had been paid or not. There was an interval of nearly nineteen years between the rendition of the judgment and the filing of the bill. This period of time is insufficient of itself to bar the plaintiff's demand. After the full expiration of twenty years, every thing necessary to quiet title or possession will be presumed. Such presumptions do not rest upon actual belief, or upon the conviction that any particular fact had occurred, or any specific act been performed. *Riddlehoover v. Kinard*, 1 Hill, 511, 50.

It is otherwise where less than twenty years have elapsed. Associated with other circumstances, such lapse of time may undoubtedly create a bar by presumption. But such presumptions have no artificial vigor, and "depend upon their own natural force and efficacy as derived from those convictions which are pointed out by experience." 2 Stark. Ev. 684. Presumptions of this class must produce actual belief. They must im-

press upon the mind the conviction that some act has been performed, or some specific transaction between the parties has really occurred, by means of which the claim or demand has been satisfied or extinguished. If they fall short of this requisition they are unavailing.

The defendants do not suggest that the judgment debt had been discharged by release or by accord and satisfaction, or otherwise than by payment. We have but to inquire therefore whether the proof establishes the fact of actual payment. It is not pretended that any payment upon the debt has been made since the death of Matthew McCammon. If the debt was ever paid, its payment must have occurred in his lifetime. The judgment was signed October 28, 1841, and Matthew McCammon died June, 1858.

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The interval *was less than seventeen years. To support the presumption of payment from this lapse of time, but a single circumstance appears in the evidence, and that is, that John Scott, the judgment creditor, had removed to Arkansas some short time before his own death, and it is not shown that, though contemplating such removal, he had then made any effort to collect this debt, or otherwise turn it to account. His supposed indifference (which appears only by inference from the absence of evidence to the contrary) may have resulted from the consciousness that the debt was paid, or from despair of ever receiving. The latter explanation is certainly quite as probable as the former. In leaving the State with his judgment unpaid, he appears to have abandoned, not his claim to the debt, but the hope of ever collecting it. The circumstance adduced to aid the presumption of payment from lapse of time is in itself equivocal and ambiguous, and its effect is neutralized by other and opposing proof.

It appears with reasonable certainty that Matthew McCammon, after the judgment had been recovered, owned no property, or if any, property of very inconsiderable value, liable to levy under execution from a Court of law.

The execution of fieri facias founded upon that judgment is indorsed with an informal return of "nulla bona" to the spring term in 1842 of the law Court, and with a like return to the fall term of that Court in 1845; and no further proceedings under it seem to have been had.

It appears that Matthew McCammon's family consisted of a wife and three children, two of whom are still in their minority. He was a carpenter, and, though represented to be industrious by one of the witnesses, was thriftless and of intemperate habits. He resided with his family upon the parcel of land, for which he had bargained with the plaintiff. J. N. McElwee, who kept a store in the neighborhood of McCammon's residence, testified that the latter had contracted debts with him amounting to more than \$200, and

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*that McCammon's excuse for not paying that indebtedness was, that he was anxious to pay Kelsey what he owed for the land. It may reasonably be inferred that McCammon would be desirous to keep up his credit with the merchant from whom his supplies of necessities for his family were probably procured, by making payments to him whenever in his power. His failure to pay in that quarter was in all probability because he was without the means of doing so. Nor was his excuse that he was making payments to Kelsey for the purchase-money of his land a mere pretence. The fact appears, that at the time of his death he had paid the whole amount of the purchase-money, except a small balance of some twenty dollars.

The circumstances seem to warrant the opinion expressed by the witness, that all McCammon made over and above a support for his family went to pay Kelsey what he owed for the land. The fair conclusion appears to be that, after making the expenditures he is shown to have made, McCammon had not the means of paying his judgment debt to John Scott.

The nature of McCammon's interest in the land may have contributed to John Scott's forbearing any active efforts to compel payment of his judgment. Upon paying the purchase-money McCammon would become entitled to a conveyance of the legal title, and, as Scott might very well suppose, would then receive such conveyance, in which event the lien of his judgment attaching to the land would effectually secure the debt. The value of the land appears to have been entirely sufficient to pay the judgment, and it may well have been that John Scott was only awaiting the maturing of the legal title.

The burden of proof rests upon the defendants. Upon consideration of the whole evidence, it appears to the Court that the judgment referred to must be regarded as still of force and unpaid, and it is so adjudged and decreed.

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*No question has been made as to the disposition of the moneys to arise from the sale of the land, but delay and embarrassment in the future may perhaps be avoided by calling in the creditors generally, and thereby admitting those whose debts are of lower rank than judgments, to assert their right to participate in the fund, if they shall be so advised.

It is ordered and decreed, that all and singular the creditors of Matthew McCammon be required to come in and prove their debts respectively before the Commissioner, by a peremptory day to be fixed by him for that purpose, of which due notice is to be given by public advertisement for one month in some suitable newspaper that he may select; and that the Commissioner report the amount and grade of the respective debts

subsisting against Matthew McCammon at the time of his death.

And it is further ordered, that upon the coming in of the report, the plaintiff have leave to move for such further orders as may be fit and proper.

The defendants appealed, and now moved this Court to reverse the decree, on the grounds:

1. That the judgment should be presumed satisfied, from the lapse of time and other circumstances proved; that the demand is stale and ought not to be enforced.

2. Because the plaintiff is a mere volunteer, having sought the administration for the avowed purpose of defeating his own title; that he is estopped by the decree under which he made the conveyance to the defendants.

Smith, for appellants.

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*Curia, per DUNKIN, C. J. This appeal was submitted without any argument in behalf of the appellants.

The judgment of the Chancellor is well vindicated by the authorities cited in the decree, and the appeal is dismissed.

WARDLAW and INGLIS, JJ., concurred.
Appeal dismissed.

12 Rich. Eq. *343

*D. C. RODDY & CO. v. S. S. ELAM and Others.

(Columbia. May Term, 1866.)

[Judgment \hookrightarrow 780; Mortgages \hookrightarrow 11.]

Where one holds land under a contract to purchase, his equitable title is not subject to the lien of a judgment against him, but may be transferred by way of a mortgage.

[Ed. Note.—Cited in *Lake v. Shumate*, 20 S. C. 30; *Gilkerson v. Connor*, 24 S. C. 324; *Whitmire v. Boyd*, 53 S. C. 342, 31 S. E. 306; *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 423, 32 S. E. 513, 71 Am. St. Rep. 800; *Ridgeway v. Broadway*, 91 S. C. 546, 75 S. E. 132; *Good v. Jarrard*, 93 S. C. 245, 76 S. E. 698, 43 L. R. A. (N. S.) 383.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1344; *Dec. Dig. \hookrightarrow 780; Mortgages*, Cent. Dig. § 12; *Dec. Dig. \hookrightarrow 11.*]

[*Mortgages \hookrightarrow 11.*]

Where one having such a title mortgaged the land, and it was afterwards sold by the Sheriff under executions against the mortgagor, one of which was older than the mortgage, on bill against the original vendor, who had been paid his purchase-money, the mortgagor, and the purchaser at Sheriff's sale, who was in possession, it was held, that the mortgagee was entitled to have the land sold to satisfy the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 12; *Dec. Dig. 11.*]

[*Equity \hookrightarrow 118.*]

During the trial of the case the Chancellor permitted the plaintiff to amend his bill by mak-

ing the original vendor a party defendant; held, that his discretion was properly exercised.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 554; *Dec. Dig. \hookrightarrow 118.*]

[*Execution \hookrightarrow 42.*]

[An interest in a contract for the sale of land cannot be sold under an execution.]

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 106; *Dec. Dig. \hookrightarrow 42.*]

Before Carroll, Ch., at York, June, 1861.

This case will be sufficiently understood from the circuit decree, which is as follows:

Carroll, Ch. By their bill the plaintiffs, who are merchants and partners, seek foreclosure of a mortgage of land executed to them by the defendant, S. S. Elam. At the date of that instrument Elam was in possession of the premises under a contract of purchase with the proprietor, A. T. Black, to whom he had executed his promissory note for the price, and from whom he had received a bond for the title upon payment of the purchase-money. Subsequently to the contract the purchaser, Elam, erected upon the premises a house with other improvements, worth in the whole some four or five hundred dollars. In October, 1858, the purchase-money remaining wholly unpaid, by agreement among the parties the plaintiffs satis-

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fied Black his demand *against Elam, and that sum being added to their other debts against him, Elam thereupon made and delivered to the plaintiffs his obligation for the aggregate amount of his indebtedness to them; and to secure the same also executed the mortgage already referred to. Simultaneously with the execution of the mortgage, Elam delivered to D. C. Roddy Black's bond for the title, with a written assignment of the same under his hand and seal.

Black, the vendor, is one of the attesting witnesses to the mortgage, and appears to have been present, cognizant of the transaction, and assenting to it. The plaintiffs having recovered a judgment for their debt against Elam, sued out an execution of fieri facias, which was lodged with the Sheriff on the 6th of February, 1861. The premises comprised in the mortgage were levied on under that execution, were advertised as for sale under executions at the suit of Roddy & Co., and others, were exposed to sale by the Sheriff on the 4th of March, 1861, and at such sale were struck down to the defendant, J. N. McElwee, Jr., as the highest bidder, at the price of \$55. In the Sheriff's conveyance to McElwee it is recited that the sale was made by virtue of the execution at the suit of the plaintiffs. At the date of the Sheriff's sale there were other executions in his office against Elam, and among them one at the suit of McLure & Harris, senior to the mortgage. On the 6th of October, 1858, the day succeeding its execution, the mortgage was recorded in the Register's office, and on the day of sale the plaintiffs, through their at-

torney, gave public notice to the bystanders of their mortgage and its amount, and that the purchaser would buy subject to that incumbrance. This announcement was made in the presence and hearing of McElwee. After the Sheriff's sale, Elam surrendered the premises to McElwee, who thereupon passed into the possession, and still retains it.

It is indisputable that McElwee acquired

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no interest *whatever by his purchase from the Sheriff. Elam owned no estate in the land subject to levy under execution from a Court of law. Though there had been no precedent transfer of Elam's equitable interest, yet McElwee could not have constrained the vendor, Black, to convey to him the legal title on payment of the purchase-money. *Richards v. McKie*, Harp. Eq. 184. Still McElwee is in the occupancy of the premises by the act and with the consent of Elam, and may, therefore, urge all objections which the latter might have taken to any proceeding that might result in his dispossession.

It is contended that the mortgage is void because of the absence of all legal interest in the mortgagor. When a contract is made for the sale of land, the vendor becomes a trustee for the vendee, and the equitable interest of the latter is devisable and descendible as if it were real estate. "If the vendee, under such a contract, conveys the same to a third person, the latter, upon paying the purchase-money, may compel the vendor and any person claiming under him in privity, as a purchaser with notice, to complete the contract, and convey the title to him." 2 Story Eq. sec. 1212 and 788; *Willbanks v. Duncan*, 4 DeS. 539. As the vendee may dispose of his equitable interest absolutely, it would seem to follow of necessity, that he may carve out of it an interest of less quantity, by creating a defeasible estate, which is essentially the character of that is vested in a mortgagee. The mortgage in question, if defective in other respects, at least furnishes evidence of an agreement between the parties for that specific security. Mortgages of this class entitle the mortgagee to claim specific performance, and the execution of a legal mortgage. *Adams Eq. 123*. An agreement for a specific lien will be enforced, but not a contract for a general security to the prejudice of other creditors. *Johnson v. Slawson*, Bail. Eq. 465; *Lamar v. Simpson*, 1 Rich. Eq. 78 [42 Am. Dec. 345]; *Massey v. Mellwain*, 2 Hill, Eq.

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128. "The *language of all the books is, that an agreement to mortgage is an equitable lien, and has precedence of a subsequent judgment and all general creditors." *Dow v. Ker*, Sp. Eq. 417.

It is further objected that there was no consideration for the assignment of the bond for title; that neither at the sale, nor before, did the plaintiffs set up any claim under it;

that the fact of the assignment was not even disclosed by them at the sale, but was on the contrary dishonestly concealed; and that to allow them any advantage whatever from that source would subject McElwee to all the consequences of a fraud. The whole argument seems to be founded in misconception. The plaintiffs claim by virtue of that assignment no absolute transfer of Elam's interest as vendee. They are not understood as pretending to be invested under that assignment with any interest whatever independent of, or additional to, that belonging to them as mortgagees. The assignment is not to be regarded as a transaction separate and distinct from the mortgage.

On the contrary, it was incidental to it merely, and must have been intended only to confirm and render more effectual that security. Indeed it may well be doubted whether the interest or rights of the plaintiffs were in the slightest degree augmented or enlarged by the assignment in question, beyond the increased facility in asserting them resulting from the possession of the bond as a mere instrument of evidence. It is true that the assignment is made to D. C. Roddy, individually, but he claims no separate interest by virtue of it. In the whole transaction, of which it is parcel, he represented the mercantile firm of which he was a member, and must be regarded as having received the assignment for their benefit as mortgagees. It has not been suggested that any payments have been made upon the plaintiffs' judgment at law against the defendant Elam, and a reference to ascertain the sum due upon the mortgage debt may therefore be dispensed with.

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*The vendor, A. T. Black, was not made a formal party to this proceeding; but, by writing indorsed upon the bill and subscribed by him at the hearing, he "acknowledged himself to be in Court, waived the right to answer, and consented that the cause be heard." He may be regarded therefore substantially as a party defendant.

It is ordered and decreed, that unless the mortgage debt, as ascertained by the plaintiffs' judgment at law against the defendant S. S. Elam, with interest, and the plaintiffs' costs in this suit, be paid to the said plaintiffs by the first day of January next, then that the said Elam stand absolutely debarred and foreclosed of and from all equity of redemption of and in the said mortgaged premises, and that the same be sold by the Commissioner at public auction, after due notice, at Yorkville, on the first Monday of some month succeeding January next, to be appointed by the Commissioner, on a credit of four months from the day of sale—the purchase-money to be secured by bond with adequate securities; and that out of the proceeds of said sale, the plaintiffs be paid their said mortgage debt, with interest, and their

costs in this suit, and that the residue of the said proceeds of sale, if any, be held subject to the further order of this Court.

The defendants appealed, and now moved this Court to reverse the circuit decree, on the grounds:

1. Because S. S. Elam had no such title as could be the subject of mortgage and foreclosure in this Court.

2. Because the proceeds of the Sheriff's sale having been applied to executions older than the plaintiffs' mortgage, the defendant McElwee took the premises discharged of the lien of the mortgage.

3. Because his Honor erred in permitting

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the plaintiffs *to amend their bill, after going into the trial, by making A. T. Black a party.

Smith, for appellant.

Williams, contra.

Curia, per DUNKIN, C. J. Upon the matters discussed in the decree this Court concur with the Chancellor. As to the third ground of appeal, it is only necessary to say that A. T. Black was merely a formal party as holding the legal title, and the discretion of the Chancellor was properly exercised.

The appeal is dismissed.

WARDLAW and INGLIS, JJ., concurred.
Appeal dismissed.

12 Rich. Eq. *349

*O. T. PORCHER v. JOSHUA DANIEL, W. R. REID and Others.

(Columbia. May Term, 1866.)

[*Husband and Wife* ⇨119.]

Where an absolute estate is secured to the sole and separate use of a married woman, it is not inconsistent to confer upon her power to dispose of it by deed or will.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 424-429, 447; Dec. Dig. ⇨119.]

[*Wills* ⇨29.]

Where property of the wife is, by marriage settlement, surrendered by the husband to her "full and free disposal," she "to have and to hold the sole discretion guidance thereof," she has the power, during coverture, to dispose of the same absolutely by will.

[Ed. Note.—Cited in *Wallace v. Craig*, 27 S. C. 522, 4 S. E. 74.

For other cases, see *Wills*, Cent. Dig. § 60; Dec. Dig. ⇨29.]

[*Powers* ⇨33.]

Where a married woman has power, under her settlement, to dispose of her property as she sees fit, it is not necessary, it seems, that in disposing of it she should refer to the power. Her only right to dispose of it being conferred by the power, she must, it seems, be understood as having reference to the power whenever she makes disposition of it, either in whole or in part.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. § 111; Dec. Dig. ⇨33.]

[*Powers* ⇨34.]

The will in this case disposing of the property held to contain a sufficient reference to the power.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. §§ 121-127; Dec. Dig. ⇨34.]

[*Powers* ⇨20.]

The settlement gave the wife power to dispose not only of the property then existing, but also of the increase to arise or in anywise to proceed therefrom:—*Held*, that she might dispose of land purchased with the income.

[Ed. Note.—For other cases, see *Powers*, Cent. Dig. § 53; Dec. Dig. ⇨20.]

Before DUNKIN, Ch., at Abbeville, July, 1860.

For a full understanding of this case reference should be had to *Reid v. Lamar*, 1 Strob. Eq. 27; but as the copy of the settlement between Jane McKinney and William R. Reid, as contained in that case, is not accurate, it is here given in full, and is as follows:

"Georgia, Lincoln County:

"This indenture, made and entered into on the 21st day of July, 1828, between William R. Reid, of the one part, and Jane McKinney, of the other part, witnesseth, foras-

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much *as William R. Reid and Jane McKinney, both of Lincoln county and State aforesaid, have pledged their faith to each other, and fully intend to enter into the bonds of matrimony as husband and wife, owing to certain considerations they have thought proper, after due deliberation, to enter into a marriage contract to the following effect:

"The said William R. Reid doth hereby firmly agree that Harvey Wheat shall act as agent for and in behalf of the said Jane McKinney for the better securing and management of all and singular the property in her vested at this time, or in which she has or might hereafter have any interest, and all proceeds which may hereafter arise therefrom. And the said William R. Reid doth further agree and contract with the said Jane McKinney, through and by her said agent, to surrender to her the full and free disposal of all and singular the property which she has now in possession, consisting of negroes, stock of different kinds, household and kitchen furniture, together with all she has now or may have any interest in or claim, to wit, all the increase that may hereafter arise therefrom, or in anywise from them proceed, and all choses in action, to have and to hold the sole discretion guidance thereof.

"And the said Jane McKinney, of her own good will and feeling chose, and through Harvey Wheat, her chosen agent, doth hereby agree and firmly contract to afford to the said William R. Reid a decent and competent support, by his labor, and through the proceeds of her above-named property, provided that he also give his labor and assistance thereunto in rendering to his own and the support also of her and her family. And the

said Jane McKinney doth further agree not to interfere, dispose of, or in anywise intermeddle with any or singular the effects or property of said William R. Reid, which he has now or may hereafter have or accumulate by his own labor and industry, or with any of the proceeds arising therefrom. There-

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fore, know all *ye who are now or may hereafter be concerned, that we, the above-named William R. Reid and Jane McKinney, without intention of fraud, and after due reflection upon the above, our contract, do now, together with Harvey Wheat, the above-named agent, fully ratify and confirm the same; and in witness whereof we hereunto annex our hands and seals, in the date and day above mentioned.

William R. Reid. [L. S.]

"Jane McKinney. [L. S.]

"Harvey Wheat. [L. S.]"

After the decision in Reid v. Lamar, Mrs. Reid made and executed her will, a copy of which is as follows:

"In the name of God amen: I, Jane Reid, wife of William R. Reid, of the District of Abbeville, and State of South Carolina, but notwithstanding my coverture having the right and power to dispose by will of the property now in my use and possession, to wit: of the tract of land conveyed to me by William L. Boag, and the tract purchased by me of James P. Graves, for which a deed of conveyance has not yet been executed, which tracts of land adjoin and constitute the farm which I cultivate, and on which I now live, and the following slaves, to wit: Tend, Judy, Pennina, Mary, Manda, Caroline, Margaret, Kitty, Martha, Ellick, Lewis, Henry, Anderson, Bill and Amy, and the mules, horses, cattle, hogs and article of small value that are now in my use and possession: being of sound and disposing mind, memory and understanding, do make this my last will and testament, as follows:

"I give, devise and bequeath to my brother, Gabriel Cox, and my friend Octavius T. Porcher, all the property hereinbefore enumerated and described, which is now in my possession and use, to them, their heirs and executors, upon and for the objects, purposes and trusts following, that is to say: that the said property be kept together as it now is,

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until *the death of my husband, William R. Reid, and that with the proceeds of crops and profits of farm, my debt to James P. Graves for the purchase of the place upon which I now live, and all other just and legal debts of my contracting, be paid. I mean the debts which I may have contracted within the last four years. That my husband, William R. Reid, be allowed a home on my land, and a sufficient and proper support out of the crops which shall be made on the farm; but this provision for his support and maintenance is on the express condition that it is not, and shall not be, in anywise subject

to his assignment and disposal, nor to his creditors, either present or future. After the death of my said husband, it is my will and desire that all my property hereinbefore enumerated and mentioned, together with all the increase and profits thereof, be divided into ten shares of equal value, two of which I give, devise and bequeath to my brother, Gabriel Cox, one to my brother, Christopher Cox, and the remaining seven shares to my nephew and nieces, the children of my brothers, Cornelius Cox, Leroy Cox, and Bailey Cox, and of my sisters, Bethana Pace and Pherbey Price, and have and share alike.

"And I do hereby nominate and constitute my brother, Gabriel Cox, and my friend, Octavius Porcher, executors and trustees of this my last will and testament.

"In witness whereof I have subscribed my name this 29th day of April, A. D. 1857.

"Jane Reid.

"Signed and published as and for her last will in our presence:

"W. Tennant.

"Paul Rogers.

"J. A. Gibert."

The will was proved in common form be-

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fore the Ordinary *of Abbeville District, and O. T. Porcher, the plaintiff, qualified as executor. The defendant, Joshua Daniel, a creditor of William R. Reid, then instituted proceedings before the Ordinary requiring the will to be proved in solemn form; and thereupon this bill was filed, praying that the said will be established as a valid execution of the power conferred by the settlement, and the plaintiff instructed in the discharge of his duties as trustee thereunder.

The circuit decree is as follows:

Dunkin, Ch. The pleadings present the facts of this case. The plaintiff, in possession of the real and personal estate of the late Mrs. Jane Reid, under an instrument executed by her, and bearing date 29th April, 1857, seeks the instruction of the Court in the discharge of his trusts. The defendant, William R. Reid, the husband of the late Jane Reid, acquiesces in the validity of the instrument as made, in conformity with their antenuptial agreement. It is contested by the creditors of William R. Reid, who are made defendants.

In Reid & Lamar, 1 Strob. Eq. 27, the character of the antenuptial contract between William R. Reid and his intended wife, then Jane McKinney, was very fully considered. It was determined that it constituted a settlement of her property to her sole and separate use. In relation to her powers under it, Judge Johnson, who heard the case at the circuit, uses the following language: "The deed here confers on the wife sole direction and the full and free disposal of the property—powers as ample as any owner can exercise over property in which he has an absolute and unqualified right; and it is not questioned that, under this power, she might have

disposed of it by a parol or written contract, with or without consideration, or by will, or that it would be bound if she had mortgaged it for the payment of these debts."

The question is then considered by him,

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whether the estate *was liable for the payment of promissory notes in which she had joined with her husband, and upon the authority of the English cases he determined that her separate estate was so liable.

The Court of Appeals held that the act of a feme covert was only valid so far as authorized by the antenuptial contract, and that the notes were void, as Mrs. Reid (the complainant in that case) "had no power to charge her estate in that way," and the decree, subjecting her separate estate to liability, was reversed.

In *Wilson v. Gaines*, 9 Rich. Eq. 420, an instrument of this character executed by a feme covert was sustained by the Court; and see also the judgment of Lord Chancellor Hardwicke in *Ross v. Ewer*, 3 Atk. 156.

In the opinion of the Court, the instrument of the 29th April, 1857, was within the authority conferred by the antenuptial agreement of 21st July, 1828, and it is so declared.

It is ordered and decreed that the plaintiff proceed in the discharge of his trusts accordingly, and that he have leave to account before the Commissioner for his transactions in relation to the same; parties being at liberty to apply, at the foot of this decree, for such further orders as may be necessary.

The defendant, Daniel, and others, creditors of William R. Reid, appealed, on the grounds:

1. Because the Chancellor erred in holding that the paper purporting to be a marriage settlement conferred any power upon Jane Reid to dispose of the said property by will or otherwise.

2. It is respectfully submitted that the said paper only reserves to the said Jane Reid an absolute estate in the property to her sole and separate use; but reserves to her no power of disposition.

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*3. That all the expressions used in said paper are words creating and limiting a separate and absolute estate in said Jane Reid, and do not secure to her any power to dispose of said estate by deed or will.

4. That the paper purporting to be the last will of said Jane Reid is a nullity, being the act of a married woman; that it is in no way the execution of a power, and that the property of Jane Reid at her death vests in her next of kin under the Statute of Distributions.

McGowen, Wilson, for appellants.
Noble, contra.

The opinion of the Court was delivered by

INGLIS, J. A conflict of opinion upon the construction and legal effect of the contract

entered into between Jane McKinney and William R. Reid, on the eve of their intermarriage, has occasioned much litigation. This litigation in some of its previous stages has ascertained that the beneficial interest in the estate, which at the execution of this contract Jane McKinney held in the property therein described, was by the contract reserved to her separate use during the contemplated coverture, and the mere dry legal title left to pass by the operation of the marriage to the husband to support this separate use. *Reid v. Lamar*, 1 Strob. Eq. 27. It has now become important to ascertain further whether there was also reserved, by the operation of this contract, to Jane McKinney when become Reid, a power to dispose by will of the property in which she thus held a separate estate. She has attempted to do this, and if she has not the power, her attempt being ineffectual, she has died intestate. Her husband surviving her in such event, (there being no issue of the marriage living,) has succeeded under the Statute of

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Dis*tributions to the one-half of her separate property, and his creditors, made defendants here, are entitled to have his share subjected to the satisfaction of their general liens on his estate. Their appeal asserts such right.

The *jus disponendi* is necessarily inherent in ownership, certainly when the owner is *sui juris*. To attempt to superadd to a grant, or conveyance, of the absolute ownership of things, a power of absolute disposition over them, would be not unlike superadding to the creation of a perfect sun the power of shining. And when, as under the doctrine of the Courts of Great Britain, and of perhaps the larger number of the American States, the creation of a separate estate in a feme covert, *proprio vigore* clothes her with all the powers quoad hoc of a feme sole, except in so far as such power is curtailed by the express provisions of the instrument of creation, a general power of disposition, so far as not so expressly negatived, will attach upon and inhere in her ownership. Such seems to be recognized by the Supreme Court of Georgia as the law of this subject, in the case of *Fears v. Brooks*, 12 Geo. R. 195, (1852). If this be so, the present contract having been executed in Georgia where the parties were both then residing, where the marriage was consummated, and where the debts due to the defendants, creditors of Reid, were contracted, ought to have effect accordingly. We do not however rest our judgment on this ground. By a well-considered and for now a long time uniform course of judicial decision, which no individual dissent even has questioned, and which has commanded approbation and imitation elsewhere, it is ascertained to be the law of this State that, "when property is given or settled to the separate use of a married woman, she has no powers to charge, incumber or dispose of it, unless in so far as power to do so has

been conferred on her by the instrument creating her estate." "She can in no manner of respect be considered a feme sole. A feme sole disposes of or charges her property by

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her own act and according to her own will, by her inherent power as owner. A feme covert exercises a delegated authority, and cannot exceed it." Harper, Ch., in *Reid v. Lamar*, ut supra.

It becomes necessary, then, to inquire whether this contract, by its terms, gives or reserves to Jane Reid such power of disposition as she has attempted to exercise. The intention of the parties, to be gathered from the instrument itself, conforming by a liberal interpretation its particular terms to the general purpose therein manifested, is to be sought for and effectuated. In *Reid v. Lamar*, the Court, assuming, as the strongest aspect in favor of Reid's creditors which the case could take, that a general power of disposition was reserved to the wife, but not adjudging that such was the actual effect of the contract, and certainly not adjudging the contrary, held, that the mere act of joining with her husband in the execution of promissory notes, a form of merely personal charge or obligation, could not be regarded as an execution of such a power, or as evidencing an intention to subject her separate estate to a specific liability. This contract consists of two sections, which seem to be set over against each other, and each to aim at accomplishing a distinct part of a common design, which is consummated by the joint effect of the two. Jane McKinney was a widow, possessed of property, and seemed to have needed the assistance of a man upon whom she could depend in making her property productive. W. R. Reid had the physical ability to labor, and, it may be, skill to direct his labor to effect, but needed capital in combination with which to make his labor profitable. Mutually anticipated benefit of this kind seems to have prompted their intermarriage, but there is evidently pervading the instrument, as its prime purpose, an intention to exclude the legal effect of marriage upon the property of each, so far as to retain to each practically the continuance of that dominion in fact which had been hitherto exercised without the interference or participation of the other. Accordingly we find, in

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the first section, W. R. Reid surrendering to the intended wife the "full and free disposal of all and singular the property which she has now in possession," &c., "to have and to hold the sole discretion guidance thereof." And in the second Jane McKinney stipulating not to "interfere, dispose of, or in any way wise intermeddle with any or singular the effects or property" of the intended husband. And to this general purpose the terms themselves of grant or engagement on the part of Reid in the first section seem without violence to their import to conform.

These terms are, in the judgment of the Court, too large to be satisfied by merely securing to the wife the separate beneficial enjoyment of the property against the marital rights of the husband, or even against his active interference without her consent in its management or control. The purpose to effect so much as this is more than sufficiently manifested in the attempted interposition of a third person to act for and in behalf of the wife "for the better securing the property," in the consent of the husband that the wife shall "have the sole discretion guidance thereof," and in the stipulation of the wife to afford out of the proceeds of the property "a decent and competent support" to the husband. When, therefore, it is further agreed that there shall be "surrendered to her the full and free disposal of all and singular the property," there is superadded, to the covenant that the seizin or legal estate, which the contemplated marriage would transfer to him, should be held for her separate use, the further covenant that she should, notwithstanding her coverture, have a general power of disposition, such as was incident to the legal estate which she then held, but which would, by the doctrine of our Courts, be excluded from accompanying the reservation of the separate use unless it were itself also expressly reserved.

It is objected that inasmuch as the equitable estate secured to Jane Reid was, as to quantity of interest, an absolute one, any attempt to attach by distinct and independent

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grant a power of disposition is simply nugatory. It has already been remarked that that is true in reference to an estate held by one who is sui juris. But the reason is, that a power which is of the essence of and by necessity of nature subsists in an estate, cannot be added by independent grant, &c., to the creation of such estate, or, in other words, that such a grant creates nothing that did not already exist. But a separate estate or use in a married woman is the creature of equity, and has those attributes only with which equity clothes it. Its essence consists simply by the formal intervention of a trustee, or, without this, in excluding the marital right of beneficial ownership in the corpus of personality and usufruct of realty, which would otherwise, by the mere legal operation of marriage, attach upon the property; beyond this, the legal disabilities of coverture are not necessarily removed by the mere creation of such estate. Equity may go farther, and, as incidental to such creation, remove all or some of these disabilities absolutely, or under qualifications. This has not been done in South Carolina. There being here, therefore, no power of disposition necessarily incident to, or inherent in, such separate estate, of what quantity of interest soever it may be, there is no inconsistency or legal absurdity in adding such power, by grant or

and four younger children should be decently supported, and the said younger children educated out of the income of the estate in the style they had been supported and educated by the testator, and that an investment of two hundred dollars should be made to provide for the purchase of a horse, saddle and bridle, for Nicholas Franklin Priester, when he should attain his majority; and that if any of his children should marry during the five years, the executors should give off to them as much property as the testator had given to his other married children upon their marriage; all said property, as well that given off by the testator as that by the executors during the five years, to be accounted for in the general division of the estate at its value when given off; and that at the expiration of the said five years the testator gave and devised certain real and personal property to his wife for life or widowhood, to be sold at her death or marriage, by the executors, and the proceeds appropriated as afterwards directed by the said will. The bill further stated that the testator, in the sixth clause of his will, reciting that Matthew Moye, deceased, by a certain deed dated September 10th, 1828, conveyed to George W. Moye and Allen Moye certain property in trust for Elizabeth Priester (testator's second wife) for life, and, at her death, to and for her children; and recit-

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*ing also that the same Matthew Moye devised and bequeathed to his wife, Harriet Moye, certain negroes therein named, for her life, and directed that said negroes should be sold after her death, and the proceeds of sale equally divided between each and every one of the children which Gatsy McMillan and Elizabeth Priester had or might have, share and share alike; and did also by his said will, direct certain other property to be sold, and one-fifth of the proceeds divided among all the children which Elizabeth Priester might have, who should live to attain majority; and reciting also, that it was his (William Priester's) "desire so to dispose of my property as to place George J. Priester and Rebecca Williams (my two children by my first wife) on precisely the same footing in point of property with my children by my present wife, (except in so far as this will shall otherwise direct)," the said testator proceeded in the words following to wit: "Now I hereby direct my said executors, or the survivors of them, to sell at the expiration of five years, all the rest and residue of my estate, real, personal and mixed, and to divide the proceeds of sale among my children in such shares and proportions as they would have taken had I been the owner of the property above referred to, as being embraced in the said deed and will of the said Matthew Moye, as well as my own property, and had directed the whole to be equally divided among all

my children: in other words, supposing the property embraced in said deed and will to be worth ten thousand dollars, and the said residue of my own property to be worth twenty thousand dollars, my will would be effected by giving to each of my said children, by my first wife, the sum of three thousand seven hundred and fifty dollars, out of my own property, and I direct my executors to be governed by this principle of division." The bill further sets forth that the testator, William Priester, as to the property given to his said wife, for life or widowhood, directed, that the proceeds of the sale thereof,

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after her death *or marriage, should be equally divided among all his children upon the principle of division set forth in the sixth clause.

The bill further stated, that William Priester died in March, 1856, leaving his said will of force, and that his sons, George and William, were duly qualified, and during the continuance of the five years from the day of his death, kept the testator's estate together, in the mean time applying the income to the support of the widow and her four younger children, and the education of the said four children, and the payment of debts. That on the expiration of said five years, to wit, on the 12th March, 1861, said executors sold the entire residue of testator's estate, upon a credit of two years. That the gross amount of the sales was \$36,041.88, the net balance of which, after a final accounting, will be subject to distribution among all the children of said William Priester, according to the principle of division set forth in his will. The bill states that the testator left surviving him the following children, viz.: George J. Priester and Rebecca T. Williams, children of his first marriage, and William Priester, Susannah, wife of John C. Holley, Harriet, wife of W. M. Hunter, Eudora Priester, Henrietta Priester and Nicholas Franklin Priester, (children of his second marriage with Elizabeth Priester,) the last three of whom are infants; that the slaves given by Matthew Moye, to his wife Harriet, for life, and at her death to be sold, and the money divided between the children of Gatsy McMillan and Elizabeth Priester, were seven in number originally, and with their increase (at the filing of the bill) amounted to twenty-one in number. That Gatsy McMillan had living one child, and grandchildren representing a deceased child, so that the said slaves on the day of the sale aforesaid would have been divisible into eight parts, (if the life-tenant, Harriet Rice, had then been deceased,) the child and grandchildren of Gatsy McMillan taking two-eighths, and the six children of Elizabeth Priester taking six-

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eighths. That the one-fifth of the *proceeds of the residue of Matthew Moye's estate bequeathed "to be divided between all the chil-

dren that Elizabeth Priester may have to arrive to the age of twenty-one, share and share alike," was \$401.42, as appears by a decree of the Ordinary, dated 5th May, 1837. That the property conveyed by George W. Moye and Allen Moye, trustee for Elizabeth Priester and her children, was a tract of one hundred acres, known as the "Gill Tract," and slaves Jane and her children, Andrew and Billy; and that Jane's increase are Mor-decai, Martha, Geny, Paul, Charles, Harry, Laurens, and Martha's children, Andrew, Joe and Paul.

The bill further stated, that William Priester, the testator, gave off property to his children upon their marriage, and that his executors have since advanced Harriet Hunter upon her marriage. That at the filing of the bill, the time was near at hand when the proceeds of sale of testator's estate would be realized, and the net balance for distribution ascertained; that a difference of opinion as to the construction of the sixth clause of testator's will exists between the parties interested, which renders a resort to the Court indispensable; the complainants contending that the testator intended, when the period for division should arrive, that six-eighths of the value of all the slaves and increase bequeathed by the will of Matthew Moye to Harriet Rice for life, and one-fifth of the residue of said Matthew Moye's estate, and the value of the property and increase embraced in the deed to Moye's trustees, should be added to the net amount of the sales, and that from said sales one-eighth of the aggregate of sales and estimated values should be paid to complainants, Jones M. Williams and Rebecca his wife, in right of the latter, and one-eighth to the complainant, George J. Priester, and the balance of the said sales divided among the six children of the testator, by his second marriage; while, on the other hand, the adult defendants contend that the values of the life-estates of Harriet Rice and

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Eliza*beth Priester should be deducted in the estimate of the property, and the balance only be added to the sales.

The bill prayed that the defendants may answer; that evidence be taken under the direction of the Court, to ascertain the value of all the property given off by testator and by his executors, and also of the value of all the slaves before mentioned, as in the possession of Harriet Moye, (now Rice,) under the will of Matthew Moye, and of the slaves in the possession of Elizabeth Priester, under the deed of Matthew Moye, and also of the "Gill Tract;" and that complainants, George J. Priester, and Jones M. Williams and Rebecca his wife, (in right of the latter,) may be decreed to be entitled severally to be paid from the net balance of the sales, one-eighth part of the aggregate amount of sales and values of slaves and land conveyed, devised and bequeathed by Matthew Moye, (deducting

shares of child and grandchildren of Gatsy McMillan,) and one-fifth of residue of Matthew Moye's estate, as established by the Ordinary's decree; for general relief, &c.

The answer of defendants admitted the facts set forth in the bill, but submitted that the value of the life-estates of Harriet Rice and Elizabeth Priester should be deducted from the values of the property conveyed, devised and bequeathed by Matthew Moye, and that the value of the remainders only should be added to the sales of the estate of the testator, William Priester.

The circuit decree is as follows:

Carroll, Ch. There is no contest among the parties as to the facts. All that are material are contained in the pleadings and exhibits, and a recital of them here would but serve to incumber the decree. Under the deed of Matthew Moye, referred to in the bill, the children of the testator, William Priester, by his last wife, Elizabeth Priester, take interests in remainder after the life-estate granted to

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their mother, if they *survive her, subject to be divested, however, in the event of their all dying unmarried before attaining respectively the age of twenty-one years. They are also entitled under the will of Matthew Moye, who was their mother's father, to an interest in remainder in certain negroes bequeathed for life to his widow, and their maternal grandmother, Harriet Moye, now Harriet Rice, to the beneficial enjoyment of which, however, they are not to be admitted until attaining respectively their majority. Their maternal grandfather by his will also made a further provision for them, directing his residuary estate to be sold, and one-fifth of the proceeds "to be divided between all the children that their mother might have to arrive to the age of twenty-one years," the interest meanwhile to be appropriated by her.

The controversy between the parties relates to the construction of the sixth clause of William Priester's will. The testator, Priester, after referring to the dispositions of the deed and will of Matthew Moye, in favor of his children by his last marriage, declares it to be his desire to place the children by his first wife on precisely the same footing in point of property with his children by his last wife, except in so far as his will shall otherwise provide, and then directs the proceeds of the sales of his residuary estate to be divided among his children in "such shares and proportions as they would have taken had he been the owner of the property referred to as being embraced in the said deed and will of Matthew Moye, as well as his own property, and had directed the whole to be equally divided among all his children." As if conscious that there was something of ambiguity and inexplicitness in this provision, the testator, in the immediate sequel of the same clause, thus explains and defines his meaning: "in other words, supposing the property

embraced in said deed and will to be worth ten thousand dollars, and the said residue of my own property to be worth twenty thousand dollars, my will would be effected by

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giving to *each of my said children by my first wife the sum of three thousand seven hundred and fifty dollars out of my own property, and I direct my executors to be governed by this principle of division." At the date of his will, as also at his death, the children of the testator, Priester, were eight in number, two of them the issue of his first marriage, and the remaining six the offspring of his last marriage. Of the latter, three are still infants, and unmarried, and Elizabeth Priester, the testator's widow, and her mother, Harriet Rice, yet survive.

It is contended on the part of the defendants that the words contained in the sixth clause, "except in so far as this will shall otherwise direct," have reference only to the small pecuniary legacy of \$200, bequeathed to the testator's son, Nicholas Franklin; that beyond this, no inequality whatever was designed by the testator in the division of his residuary estate among all his children; that interests, though in fee, if contingent or defeasible, or postponed in enjoyment, are certainly not equivalent in value to absolute estates in immediate possession, and that to preserve the footing of equality of which he speaks, the words of the testator, "the property above referred to as being embraced in the said deed and will of Matthew Moye," should be interpreted to mean the legal interests, and not the corpus of the property accruing to the children of the second marriage under those instruments.

The testator's declaration of his desire to place the children of both marriages upon the same footing in point of property, it is apprehended, reflects but faint light upon his meaning in the sequel of the clause; it does not commit him to any measure of equality or to any given approximation to it. His children are all of them to be placed on the same footing, except in so far as his will shall otherwise direct. Exact equality was certainly not within his contemplation; for he recognizes his will as departing from it. The equality which he contemplates is to be discovered only in the dispositions of that instrument. To attempt any estimate of the

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*present value of the interests conferred upon the testator's children of his last marriage by the deed and will of their grandfather, would be to plunge at once into a wilderness of uncertainty and conjecture. It might perhaps result in producing inequalities greater than those complained of. If an attempt were made to estimate with exactitude the present value of the interests accruing to the testator's children by his last wife, in the estate devised to their grandmother for life by the will of Matthew Moye, differ-

ent valuations, it would seem, should be placed upon the interests of such as have married, or have attained their majority, and such as have not; for if the life-estate of the grandmother were now to fall in, while the former would be entitled to the immediate possession of their portions, it would be withheld from the latter until they were married, or had attained the age of twenty-one years. The same is true as to the interests of the children of the last marriage in the residuary estate of Matthew Moye. Those who have arrived at full age are entitled to receive, and perhaps have already received, their portions. While those who are infants, if they have any vested interests at all, (which may well be doubted,) are certainly precluded from possession until they have attained respectively to the age of twenty-one years. But the necessary effect of such a valuation would be to assign to the children of the second marriage unequal shares, as between themselves, in the estate of their father. Such a result would seem not to have been intended by the clause in question, the plain purpose of which was to prevent to some extent at least, inequalities between the children of the first and second marriages, and not to introduce them among those of the second marriage. It would be further objectionable as having the direct effect of aggravating the inequalities which already exist, in favor of the testator's infant children, whose maintenance and education are charged upon the entire income of the whole estate for the term of five years next succeeding his death.

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*It is further to be observed that the interests in remainder limited to the children of Elizabeth Priester, by the deed and will of her father, are not restricted to the issue of her marriage with her late husband, William Priester. Their expectant interests, under both deed and will, might be seriously diminished, should their mother contract a second marriage, and leave other children, and the like effect upon their interests in remainder, under the latter instrument, might result, if other children should be born to their aunt, Mrs. Gatsy McMillan. Thus another element of contingency and uncertainty is infused into the interests in question. The process by which the defendants propose that division shall be effected, appears therefore to be singularly artificial and involved. It has but little to commend it, and gives promise of none other than most unsatisfactory results.

The term "property" or "estate" will, in general embrace both realty and personalty, and will be construed, it is apprehended, to describe the quantity of interest, or the subject of it, or both, as may be required by the context of the will. 1 Jarm. 664; 4 Kent, 535. In the second, fourth, fifth and seventh clauses of his will, the testator has employed the word "property" to denote the corpus of

such property, or the absolute interest in it, associated with the right of immediate possession. There is nothing in the sixth clause to indicate that it is there used in a different sense. The division among his children which is directed by the clause in question, implies of necessity that the property there described "as being embraced in the deed and will of Matthew Moye" should be valued. But it is to be valued, not as the property of his children, but as though it were his own property—as though it were disengaged wholly from the control of the deed and will of Matthew Moye, and were made entirely subject to the dispositions of his own will. His children by the first wife are to take such a share of his own residuary estate as they would have taken of that estate added to the

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*property referred to "as being embraced in the said deed and will of Matthew Moye," had he been the owner of the latter as well as of the former property, and had directed the whole to be equally divided among all his children. The very scheme of division, the very language of the clause, supposes the testator to be the owner of the property embraced in the said deed and will of Matthew Moye, in the same sense and degree in which he was the owner of his own residuary estate. The latter belonged to him absolutely and in possession, a fit subject for the division proposed, while the former was given to his children upon contingencies still pending in unascertained proportions, and postponed in enjoyment—conditions which rendered it eminently unfit for immediate division. In his scheme of division, the testator supposes the two bodies of property to be assimilated, and if so, he must have regarded the property embraced in the said deed and will of Matthew Moye as conforming to his own absolute property in possession, and not the latter as conforming to the former.

Such it appears to the Court is the true construction of the clause in question. So far as the younger children of the second marriage are concerned, they have some and perhaps sufficient compensation for the inequalities complained of in the provision of the will, which charges their maintenance and education for the term of five years upon the income of the whole estate. As to the elder children of the second marriage, the bulk of the property which they derive from their maternal grandfather will come into enjoyment upon the death of their grandmother. In the course of nature this event will not probably be long delayed. The testator may have supposed that it would occur before the lapse of the five years, during which he directs his whole estate to be kept together. But whatever may be the inequalities to result, they are caused, it is conceived, by the dispositions of the will itself, and are beyond remedy in the Courts.

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*In his lifetime, the testator made gifts of property to certain of his children, and during the five years immediately succeeding his death, his executors, being authorized by his will, delivered a negro girl to his daughter, the defendant, Harriet, upon her marriage with W. M. Hunter. The property so acquired by his children respectively, the testator directs to be taken into account in the general division of his estate, "and to be then estimated at its value when given off."

It is ordered and decreed that the children of the testator William Priester, are entitled to have the net proceeds of the sales of his residuary estate divided among them, according to the construction of his will hereinbefore declared and adjudged.

It is further ordered that an account be taken of the testator's estate, and of its administration by his executors, and of the value of the property to which his children by his last wife are entitled under the deed and will of their grandfather, Matthew Moye, to be ascertained as hereinabove adjudged; as also of the portions of property given by the testator in his lifetime, and since his death, by his executors to his children respectively, with the value of such property when "given off."

And it is further ordered, that the Commissioner report the amount of the net proceeds of the sales of the residuary estate, and the proportions in which the same should be divided among the children according to their rights as hereby adjudged, taking into the account the property given to his children respectively, in his lifetime, by the testator, and since his death, by his executors.

Let the costs be paid out of the testator's residuary estate.

The defendants appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because his Honor has, in and by his

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said decree, ordered *and decreed that the absolute and entire fee simple value of the property conveyed, devised and bequeathed by the deed and will of Matthew Moye, be added to the sales of the estate of William Priester, prior to the distribution thereof; whereas, it is submitted that only the values of the remainder of said property, after the termination of the life-estates of Elizabeth Priester and Harriet Rice, should be added.

2. Because the rule of valuation of the property, conveyed, devised and bequeathed in remainder by Matthew Moye, prescribed and ordered by his Honor the Chancellor, in his said decree, is contrary to the true and plain intent and meaning of the will of William Priester, is unequal, unjust and unreasonable, and contrary to law and equity.

The complainants also appealed, and now moved this Court to modify the decree in this: That by proper construction of the will

of William Priester, the valuation of the property embraced in the deed and will of Matthew Moye should have been decreed to be computed as of the same date when the value of said William Priester's residuary estate was ascertained by the sale thereof, to wit, 12th March, 1861.

Hutson, for defendants, cited 1 Spence Eq. Jur. 508-9, 537, 557-8; 2 Wms. on Exors. 714-5; Wright v. Jennings, 1 Bail. 57.

Maher, for plaintiffs, cited Douglass v. McMaster, 1 Sp. 39; Wig. on Wills, 30; Church v. Mundy, 15 Ves. 396; Rosborough v. Hemphill, 5 Rich. Eq. 99; 5 Stat. 163; Buist v. Daws, 4 Rich. Eq. 413; Dargan & Bradford v. Richardson, Dud. 62; 2 McC. 344; 2 Hill's Ch. 240; Glover v. Harris, 4 Rich. Eq. 25; Geiger v. Brown, 4 McC. 418; Felder v. Felder, 5 Rich. Eq. 515; 7 Rich. Eq. 25; Bail. Eq. 298; Sp. Eq. 385; 2 Wms. on Exors. 923.

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*The opinion of the Court was delivered by

INGLIS, J. This appeal raises but a single question. The testator, William Priester, in the sixth clause of his will, reciting the provision which had been made for the children of his second marriage by their grandfather, Matthew Moye, and avowing his desire so to dispose of his own property as to place the two children of his first marriage "on precisely the same footing in point of property" with the children of his second marriage, thus prescribes the manner in which the residue of his estate shall be distributed in order to fulfil this desire: "Now I hereby direct my said executors, or the survivors of them, to sell, at the expiration of the said five years, all the rest and residue of my estate, real, personal and mixed, and to divide the proceeds of sale among my children in such shares and proportions as they would have taken had I been the owner of the property above referred to as being embraced in the said deed and will of the said Matthew Moye, as well as my own property, and had directed the whole to be equally divided among all my children. In other words, supposing the property embraced in the said deed and will to be worth ten thousand dollars, and the said residue of my own property to be worth twenty thousand dollars, my will would be effected by giving to each of my said children by my first wife the sum of three thousand seven hundred and fifty dollars out of my own property, and I direct my executors to be governed by this principle of division."

It will be seen from the pleadings that the interests which the children of the second marriage take in the things, to wit, lands, slaves, &c., given by their grandfather, are, at the best, estates in expectancy only, and that the actual participation of individuals of the class in the ultimate enjoyment in possession, and the extent of that participation,

are liable to be affected by various contingencies. It is claimed, on the one part, that in order to ascertain the share to which each

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*of the two children of the first marriage is entitled in the residue of the testator's estate now to be distributed, the executors must have respect to the value of the things themselves given by Moye to the children of the second marriage, as if these children were now in possession and absolute owners; and it is required, on the other part, that the value of such estate or interest only as they now have in those things shall be regarded. The Chancellor who heard the cause on the circuit adopted the former view, and the defendants below, disputing the correctness of his decree in this particular, have renewed the question here.

The judgment of the Court on such a question must, of course, conform to the intention of the testator, and that intention may be best discovered, ordinarily, from the language in which it is expressed. But all the language used for this purpose must be taken into consideration. If the testator has undertaken to explain in detail general or concise forms of expression previously used, his explanation must, for the purposes of the particular construction, be accepted as the correct one. When this testator, for example, in the eighth clause of his will, says: "If any devisee or legatee herein named, that is to say, if any one of my children shall happen to die," &c.; although the general words first used would include the wife, who is a devisee and legatee under the will, yet inasmuch as the testator has, by the subsequent words, defined and restrained the application of those general words, no one would question what interpretation it is proper to put upon the general words in the execution of the will. So when the testator, having avowed in general terms his desire to put "the children of his first marriage precisely on the same footing in point of property with the children of the second marriage," regard being had to the gifts to the latter by their grandfather, and proceeds immediately to direct in detail the mode in which this purpose, as it existed in his mind, shall be accomplished, whatever is the

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reasonable interpretation of the detailed explanation, must be accepted as the meaning of the general terms. In such case the inquiry is, not whether there shall be a sacrifice of a particular intent, as seemingly indicated by the terms of a separate and independent disposition of the will, to the general intent on the same general subject as disclosed throughout the will, but what is the general intent on the subject in the light of the testator's own explanation and definition of the general terms in which he is supposed to have expressed it. It seems not unworthy of observation here, too, that the

general words on which the appellants rest their claim occur in the preamble or reciting part of the clause, and the subsequent detailed explanation in the disposing part. It might well be thought to follow from this, that even if the words of disposition, in their fair and reasonable interpretation, are narrower than the words of recital, the former ought rather to control.

It is assumed by the appeal that the purpose of this testator, as expressed by the general terms relied on, was to bring about an absolute equality in point of fortune or estate among his children. The accomplishment of such a purpose it was not in his power, under the circumstances, to insure, and neither of the proposed interpretations will effect it. That which he does propose is to put them "on precisely the same footing in point of property." And this word "property" is that which is used in the detailed explanation following to describe the subject-matter which, as received by the second class of children from their grandfather, he requires shall be valued and added to the proceeds of the sale of the residue of his own estate, to constitute the fund, an equal share in which he directs that each of his children shall have. Certainly this word may be and is used to describe the quantity and nature of interest or the estate which one has or is to take in the subject of disposition, conveyance or ownership. And perhaps in etymological strictness it cannot com-

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prehend more *than such interest, for that is the exact extent or measure of the property or proprietorship which one has in things. And yet the popular and ordinary sense in which lay or unprofessional persons use the word, must, I think, be admitted to have respect rather to the things themselves than to the estate held in them. This testator, in the particular clause of his will under present consideration, employs this word not less than nine times, and it must be evident to every reader of his language that in, at least, seven of the nine, he means by it the things and not the estate held in them. It is equally true that the same word is used five times in the other clauses of the will, and in every instance in the same sense. And in the particular instance in which the testator uses it to describe the subject of valuation, to which the executors are to have reference in distributing the residue of his own estate, he says, "the property embraced in said deed and will," not the property given to or vested in or limited to the children therein. Comparing this language with that used in the early part of the clause when reciting the

gifts by Moye, it is difficult to doubt that he employs the word in this instance in the sense so often elsewhere conveyed by it. It does not seem a reasonable or fair interpretation of the testator's language, then, to regard him as having, on the only other occasion on which he employs this word, used it in a different, and that rather an artificial or else nicely radical sense.

We are of opinion that the testator—not at the time having in his view the uncertainties and contingencies to which the interests of the children of his second marriage in the lands, slaves, and other things given by Moye, were subject, or the exact legal nature of their estates therein, and overlooking the interposed interests which, it is probable, were not practically affecting their present enjoyment of a large part of those things, jointly with their mother—regarded the lands, slaves, &c., as substantially be-

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longing to the children. Not *looking beyond the period fixed for the final distribution of the residue of his own estate, he intended that the things themselves which Moye had, by deed and will, given, should then be treated as the "property" of the children of his second marriage, and valued and added to the residue of his own property, as at that period existing, to make the fund, an equal share in which was to be secured to each of the children of his first marriage out of so much of it as he could dispose of. No equality beyond this seems to have been aimed at. Such was the conclusion of the Chancellor on the circuit, and it is therefore ordered that his decree be affirmed, and the defendant's appeal dismissed.

The attention of the Chancellor seems not to have been called to the necessity of ascertaining the precise point of time, in reference to which, for the purpose of distribution, a valuation should be made of the property given to the children of the second marriage by the deed and will of Matthew Moye, as recited in the sixth clause of testator's will. It is the opinion of this Court that this property, in the sense ascertained by the present judgment, should be valued as of the time fixed by the testator for the distribution of the residue of his estate, to wit, at the expiration of five years from his death. This time, as it appears from the pleadings, was the 12th March, 1861. In order to supply the inadvertent omission, it is ordered that the valuation be made in conformity with this opinion.

DUNKIN, C. J., and WARDLAW, J., concurred.

Decree modified.

12 Rich. Eq. *379

*ELI C. DOUGLASS v. J. T. McAFEE and Others.

(Columbia. May Term, 1866.)

[*Husband and Wife* ⇐33.]

H., a widow, having three children, and being about to intermarry with M., she and M. executed a marriage contract, by which, after reciting that it had been agreed that M. should settle upon the three children of H. one moiety of her estate, and that the other moiety should become his proper estate, "subject to such provisions as are hereinafter expressed," he, M., agreed to stand seized and possessed of one moiety of H.'s estate in trust, for her three children; and it was agreed, that the second moiety should become M.'s "proper estate, subject to his sole control and disposal, and yielding him its profits without impeachment of waste, and subject only to the proviso, that if the said M. and H. have less than three children, that there shall be reserved out of second moiety the same amount only for each child of M. and H. as each child receives that is mentioned in division of first moiety, viz.," (naming the three children of H.) "then the balance, if any, to be divided equally among all the children at the death of said H. And if the said M. shall die without issue living upon the body of H. begotten, then said estate shall revert to H. if she be living, and if she be not living that the same shall descend to the aforementioned children of H." H. died, leaving her said three children and M., and two children by M., surviving her:—*Held*, that M. was entitled to a life-estate only in the second moiety of the estate; that upon the death of H. her two children by M. became each entitled to a vested interest in one-third of said moiety, and all five of the children to a vested interest in the remaining third, the interests of the two children by M. being liable to be defeated by the deaths of both before M., leaving no issue of either surviving, in which event their interests were to go over to the other children.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 196; Dec. Dig. ⇐33.]

Before Carroll, Ch., at Chester, July, 1861.

This case will be sufficiently understood from the circuit decree, and a copy of the marriage contract referred to therein.

The circuit decree is as follows:

Carroll, Ch. Mrs. Hannah Douglass, a

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widow and *mother of three children, intermarried with John T. McAfee, in 1848, and departed this life in December, 1855. By her marriage with McAfee she had issue, three other children, one of whom, Edward M. McAfee, died in her lifetime. Her husband McAfee, and her remaining children, five in number, have survived her. At the date of her last marriage, she was entitled to an undivided interest in the estate, real and personal, of her deceased father, Eli Cornwell, who had died intestate. Immediately before her marriage with McAfee, and in contemplation of it, she joined with him in executing a written instrument under seal, for the settlement of her portion in her father's estate upon certain trusts and limitations therein specified. The plaintiff is the eldest child of the first marriage, and, having attained his majority, exhibits his bill for an account of the estate comprised in the marriage con-

tract or settlement, as also to have his proper portion of the same declared and set off by partition.

The controversy between the parties relates to their respective interests in the property embraced within the written instrument referred to. On the part of the plaintiff, the claim is, that he is entitled to a third of one moiety, and, in addition, to a fifth of one-third of the other moiety, making his interest equal to a fifth of the whole property. The defendant, John T. McAfee, admits that the children of the first marriage are entitled to a moiety, and to be put in possession of their several portions of the same upon their respectively attaining the age of twenty-one years. But he contends that they took no further interest, and his children by Hannah Douglass no interest at all, because there were then children born of his marriage with her, and that the one moiety of her property is by the instrument in question conveyed to him as his absolute estate, to be divested, if at all, only in the contingency of his dying without issue living of that marriage.

The limitations of the intended wife's es-

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tate, under the *instrument of writing referred to, seem to belong to the class of executory and not executed trusts. 2 Jarm. 253.

The moiety of the estate designed for the children of the first marriage they take, not immediately under that instrument, but by means of it, in connection with a further act to be done by John T. McAfee. So far as that moiety is concerned, it amounts to a mere covenant on his part to stand seized and possessed of and to hold the same in trust for them, when it shall have come into his possession by virtue of his proposed marriage. But the contest between the parties relates to the remaining moiety.

As to that, the instrument in question stipulates merely that "it is understood and agreed that such moiety shall, after the marriage," be the proper estate of John T. McAfee, subject to certain conditions and limitations therein afterwards expressed. There is no transfer or conveyance made to J. T. McAfee of the legal title, nor is there any declaration of trust proceeding from her that she stands seized and possessed upon the trusts therein indicated.

The whole rests merely in covenant or agreement. If, as the deed recites, there were in fact "articles of agreement" between the parties for such settlement, the undertaking to carry them into execution had been already assumed. The super-addition of another undertaking of like import was no advance whatever towards completion of the trusts. In truth, the deed, as to this portion of it, purports in terms, to be a mere recital of so much of the articles of agreement referred to.

If the trusts indicated by the latter were executory in their nature, so also must be those manifested by the former.

Though the trusts set forth in the deed were regarded as in their nature executed trusts, yet it may be doubted whether they would not be held subject to the rules of construction applicable to trusts executory. The deed purports to be made "in pursuance and performance of the articles of agreement," which it recites. Such reference to

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the marriage articles is held to show "the intent of the parties to be still the same as at the making of the articles." *West v. Erirey*, 2 P. Wms. 349; *Legg v. Goldwire*, 1 White's Lead. Cas. 27.

In carrying into effect the trusts expressed in marriage articles the Court resorts to much latitude of construction. *Gaillard v. Porcher*, McM. Eq. 358; *Randal v. Wallis*, 5 Ves. 261; *Allen v. Rumph*, 2 Hill's Ch. 3; *Smith v. Maxwell*, 1 Hill's Eq. 105.

One of the leading objects of marriage articles is usually to provide for the issue of the marriage. The very nature of the instrument raises a presumption of intention in favor of issue. 2 Jarm. 262; 1 White's Lead. Cas. [Note] 19, and authorities there cited. In *Hill on Trustees*, 328, it is said that, "unless the contrary clearly appears, equity presumes that it could not have been the intention of the parties to put it in the power of the parent to defeat the object of the settlement by appropriating the whole estate."

The instrument in question it is conceived cannot be understood in its literal sense. If so interpreted, it would present a confused group of incongruous and conflicting provisions.

In the judgment of the Court, all the children of Mrs. McAfee must be held entitled to an interest in what is termed the "second moiety" of the property comprised in the marriage contract or settlement. The terms descriptive of the estate that J. T. McAfee was to have in that moiety, seem to imply that the issue of the marriage were regarded as having some interest also in such moiety, and that his possession of the same would be in some sort fiduciary. It is the form of description that would naturally have been adopted if the parties had been carving out, of what was designed to be a trust-estate, a partial and limited interest for the trustee personally. The estate he is to take, it is stipulated, shall be "subject to his sole control and disposal, and yielding to him its profits, without impeachment of or for any

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manner of waste;" such stipulations seem to impart a consciousness that, without them, there were other parties who might claim to participate in the control and disposal of the property, who might demand an account of the profits, and who being entitled to the

ulterior estate might hold him responsible for acts of waste. Still more significant is the provision which immediately succeeds: "that if the said J. T. McAfee and Hannah Douglass, by their marriage, have less than three children, there shall be reserved out of the second half or moiety the same amount only for each child of J. T. McAfee and Hannah Douglass as each child receives that is mentioned in division of first half or moiety, then the balance (if any) to be divided equally among all the children at the death of said Hannah Douglass." No new or additional interest is conferred upon the children of the second marriage by this provision. Its effect is the very reverse. It recognizes an interest in them as already subsisting, and diminishes it. If in the event specified there was to be reversed for them respectively out of the second moiety the same amount only as each child of the first marriage receives in the division of the first moiety, the strong implication is that, in the absence of this provision the whole of the second moiety was intended to have been reserved for them. The plain purpose of the provision in question was not to create an estate for the children of the second marriage, but to regulate its division if their number were less than three, by admitting into its participation the children of the first marriage in such proportions as would produce equality among them all in the division of the whole estate.

A more doubtful question, and perhaps the most embarrassing in the cause, relates to the quantity of the estate taken by John T. McAfee. Is it to continue for the period of his own life, or is it limited only to the lifetime of his wife? The construction suggested on his behalf is wholly inadmissible. It would exhibit this strange result, that

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if there were issue born of the marriage, three in number, his interest in one moiety would be an estate in fee. But if such issue were less than three, then his estate would be restricted to the lifetime of his wife, while at the same time, if there had been no such issue at all, it would have been extended throughout the period of his own life. Dispositions so strangely capricious could not have been intended by the parties.

It is apprehended that the estate carved out of the property for the husband was designed to be one and the same, if there was issue of the marriage, without regard to their number, whether three or less. The limitations last in order seem to assume that he continues in possession of the whole moiety after the death of his wife and up to his own decease, although there should be issue of the marriage, if such issue fail in his lifetime. This would seem to preclude a division among the children prior to his death. There is nothing in the instrument which appears to contemplate a divesting of the husband's interest, with a contingent re-

vesting of the same. It could scarcely have been intended that at the death of the wife, the issue of the marriage being less than three, and the husband surviving, there should be a division among all the children, with the right on his part, upon failure of issue of the marriage afterwards in his lifetime, to reclaim into his possession and retain to his death the portions not only of his own children, but those also of the children of the first marriage. On the contrary, the division among the children seems to have been the final and ultimate disposition contemplated.

The children are held to have taken in subordination to an estate carved out for the husband during the term of his own life. It is apprehended that those who are to participate after the husband's death in the division of the moiety in which he takes a life-estate, are the children that were in existence at the death of the wife. In the

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provision that the "balance, if any, be equally divided among all the children at the death of said Hannah Douglass," the words referring to her death may be construed as indicating not the date at which the proposed division is to occur, but the time at which are to be ascertained the objects who are to participate in that division.

There are objections, undoubtedly, to the construction adopted, but upon the whole it is conceived to be the nearest approximation attainable to what seems to have been the intention of the contracting parties.

The matters of account have been already referred to the Commissioner, and no further order in that behalf is deemed requisite.

It is adjudged and decreed that the plaintiff and his brothers of the whole blood are entitled to have partition thereof made among them, the portions of such of them as are infants to be retained, however, by the defendant, J. T. McAfee, until they respectively attain the age of twenty-one years.

It is further adjudged and decreed that the defendant, John T. McAfee, is entitled to the other moiety of said estate for and during the term of his natural life, with remainder to the five surviving children of his late wife, Hannah McAfee, to be divided among them in the proportions specified in the said marriage agreement or settlement, subject, however, as to the portions of the children of the said John T. McAfee and Hannah McAfee, to the limitations over which said marriage agreement or settlement prescribes, in the event of the said John T. McAfee's dying without issue living of his marriage with the said Hannah.

And it is further ordered that a writ of partition issue, under the direction of the Commissioner, to divide the visible estate comprised in said marriage agreement or settlement between the said J. T. McAfee and the children of his late wife, Hannah, by

her former marriage, and to subdivide the moiety to be assigned to the latter among

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them, according to their several rights and interests, as hereby adjudged: Provided always, that nothing herein contained shall in anywise prejudice the right of said John T. McAfee to have satisfaction out of said estate in respect of the claims and demands set up in his answer as charges against the same.

Copy of Marriage Contract.

"State of South Carolina, Chester District:

"This indenture of proposals, made this 6th day of September, in the year of our Lord one thousand eight hundred and forty-eight, between John T. McAfee, of said district and State, of the one part, and Hannah Douglass, widow, of said district and State, of the other part:

"Whereas a marriage is intended to be shortly had and solemnized between the said John T. McAfee and the said Hannah Douglass. And whereas the said Hannah Douglass is entitled to a considerable estate, both real and personal, in her right as a distributee of the estate of her father, Eli Cornwell, Sr., late of said District, deceased. And whereas, upon the treaty of the said intended marriage, it was agreed by and between the said parties that, previous to the solemnization thereof, the said John T. McAfee would relinquish to and settle upon the children of said Hannah Douglass, to wit, Eli C. Douglass, James Douglass, and Robert George Douglass, who are yet minors, the one-half part or moiety of such estate, real and personal, as by right of said Hannah Douglass, as distributee aforesaid, and by virtue of said marriage, shall come into the hands of said John T. McAfee, and that the other half or moiety of the said estate of Hannah Douglass shall become the proper estate of said John T. McAfee, subject to such provisions as are hereinafter expressed:

"Now this indenture witnesseth that, in consideration of said intended marriage, and

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in pursuance and performance *of the said article of agreement, the said John T. McAfee doth covenant and agree to stand seized and possessed of, and to hold in trust for the said children of said Hannah Douglass, to wit, Eli C. Douglass, James Douglass, and Robert George Douglass, the one moiety or half part of all such estate, real or personal, as by right of said Hannah Douglass as distributee aforesaid, and by virtue of said marriage, shall come into the possession of said John T. McAfee; and it is further understood and agreed, in consideration of the profit arising from the said moiety so held in trust for said children, the said J. T. McAfee shall furnish due maintenance and support to each and all of said children until they respectively attain the age of twenty-

one years, or marries, providing for them such food, clothing, shelter and medical attention as may be by each and every of them ordered and required; giving to each and all such schooling and education as may fit them for usefulness in life, and in all respects doing for said children as though they were the proper children of the said John T. McAfee.

"And it is further covenanted and agreed, that as each of said children shall respectively attain the age of twenty-one, or in case they marry before that age, the said John T. McAfee shall duly pay or cause to be paid to him so coming of age or marrying, the proper part or portion of said moiety so held in trust, to which he may be entitled: Provided always, that if either of said children shall depart this life before he shall attain the age of twenty-one years, then the part or portion of said moiety that would have accrued to him so dying shall go and accrue to the others or other of said children or child, in the same manner as their or his original portions or portion; and providing further, that if all of said children should die before attaining the age of twenty-one years, then the said moiety so held in trust for them shall remain in the hands of said John T. McAfee, in the same manner, and subject to the same conditions

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and *provisions as are hereinafter imposed with respect to the other moiety of the estate of said Hannah Douglass.

"And it is further understood and agreed that the other moiety of the estate of said Hannah Douglass shall, after the solemnization of said marriage, be the proper estate of said John T. McAfee, subject to his sole control and disposal, and yielding to him its profits, without impeachment of or for any manner of waste, and subject only to the proviso herein declared and expressed concerning the same, to wit, that if the said John T. McAfee and Hannah Douglass by their marriage have less than three children, that there shall be reserved out of second half or moiety the same amount only for each child of John T. McAfee and Hannah Douglass as each child receives that is mentioned in division of first half or moiety, viz., Eli C., James, and Robert George Douglass, then the balance, if any, to be divided equally among all the children at the death of said Hannah Douglass.

"And if the said John T. McAfee shall die without issue living, upon the body of said Hannah Douglass begotten, then said estate shall revert to the said Hannah Douglass if she be living, to become her own proper estate, subject to her absolute control and disposal; and if she be not living, that the same shall descend to the aforementioned children of said Hannah Douglass.

"And it is further understood and agreed that said Hannah Douglass shall relinquish

all claim to dower or distributive share of any part of the proper estate of said John T. McAfee in case she shall survive him.

"In testimony whereof the said John T. McAfee and Hannah Douglass have hereunto set their hands and seals, this 6th day of September, in the year of our Lord 1848.

"John T. McAfee. [L. S.]

"Hannah Douglass. [L. S.]"

The plaintiff appealed, and now moved

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this Court to re*verse the decree of his Honor, in the following particular, and on the following ground, to wit:

Because the Chancellor erred in holding that the said J. T. McAfee was entitled for life to the second moiety of the estate of his deceased wife, and that the same is not distributable among the children of his late wife until his decease; whereas by the said marriage agreement it is plainly stipulated that, out of the said second moiety, the issue of the marriage, if less than three, shall each receive the same amount as the plaintiff and his two brothers receive out of the first moiety, and that the balance of said second moiety shall be equally divided among the children of his said wife at her decease.

The defendant, John T. McAfee, also appealed, and now moved this Court to reverse the decree of his Honor, on the ground:

Because the Chancellor erred in holding that the said John T. McAfee was only entitled to a life-estate in one moiety of the estate of his deceased wife; whereas by the terms of the marriage settlement between them, the said defendant is entitled to one-half of all said estate in fee simple, subject to be diminished upon certain conditions, which have wholly failed.

McAfee, for plaintiff.

Hemphill and Melton, contra.

The opinion of the Court was delivered by

INGLIS, J. The difficulty, so familiar to bench and bar, of giving a satisfactory construction to wills and marriage settlements, is a mortifying illustration of the insufficiency of human forethought to anticipate

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the varying circumstances *of life, or of human language adequately to express the purposes by which the exigencies of its changing phases are to be met. The Chancellor, who heard this cause below, seems to have felt that the effort of Hannah Douglass, before her contemplated intermarriage with J. T. McAfee should put her lately descended patrimony beyond her own control, wisely to distribute it among the objects of her affection, has not escaped this infirmity. With this feeling we cannot fail to sympathize. It seems scarcely possible to adopt any interpretation of the instrument which embodies this effort, which

shall, at the same time, give literal effect to all its terms, and fulfil the ends which alone it can be reasonably considered to have proposed. The first aim certainly was to divide the beneficial enjoyment of the property at once in equal shares between the family of young children which she already had as the fruit of her former marriage, and the husband who, in her hopes, was about to become the stock of a new issue. It seems equally clear that while, as to the moiety which was left to the new husband, his beneficial use and enjoyment of the same, so long as his possession was authorized to continue, was not to be in anywise restricted or controlled; yet the prospective issue of her union with him were not left dependent upon his mere pleasure for their succession at the termination of this possession, but were direct objects of her care and bounty.

The particular question which it is necessary now to decide is, what portion of the property embraced in the terms of the contract exhibited with the bill, Eli C. Douglass, the eldest of the three children of the first marriage, having attained his majority, is now entitled to demand and have from his stepfather, J. T. McAfee. In determining this question, the Chancellor has found it requisite to give a judicial exposition of the whole instrument so far as to ascertain the extent of the interest taken by all the parties under it, and the time of enjoyment of their several shares. The

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appeal on each side *disputes the correctness of his exposition. That Eli C. Douglass is now entitled to be let into the possession and enjoyment in severalty of the one-third part of the first moiety, and that each of his brothers of the whole blood, upon attaining majority, will be entitled to a like part, is not questioned. The contest is as to the second moiety. The whole scheme of the contract as to this moiety requires that the possession and enjoyment thereof by the husband and father, J. T. McAfee, shall not be disturbed during his life. His death is certainly the event which is finally to ascertain its destination. If there shall be no issue of the second marriage then surviving, this whole moiety is thereupon to descend to the children of the first marriage. Yet it is not less clear that the death of the mother, Hannah, is, by the express terms of the contract, to have some effect upon the rights of the children. The form of expression does seem to import that a division in fact is then to be made. This is so wholly inconsistent with the manifest purpose, as to J. T. McAfee's interest, that the mind cannot assent to it as the true interpretation. The only other effect which can be given to this part of the instrument is to regard it as fixing the period which ascertains

the persons to share in the enjoyment of this second moiety when J. T. McAfee's interest shall have been determined by his death. It will result, that there having been at that period two children of the second marriage surviving, each of these has now an estate in an undivided share in this second moiety, equal in value to the share which each of the children of the first marriage now takes in the first moiety, and each of the five (5) children has now an estate further in one undivided fifth part of the residue of this second moiety, after those two shares shall be satisfied; all these estates in the second moiety are postponed in enjoyment until the death of J. T. McAfee, and the estates of the two children of the second marriage are liable to be defeated by the death of both

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before the period thus fixed for enjoyment, leaving no issue of either then surviving, and then in that event to go over to the children of the first marriage. This Court is thus led to the same conclusions which the Circuit Chancellor attained and has embodied in his decree; and our purpose herein has been rather to state our concurrence in these conclusions than to add any thing to the reasoning and authorities by which he has vindicated them.

It is ordered that the circuit decree be affirmed, and the appeals be dismissed.

DUNKIN, C. J., and WARDLAW, J., concurred.

Decree affirmed.

12 Rich. Eq. *393

*HENDERSON, KIRTLAND, NORTH & PLATT v. HADDON, SLAGER & CO.

(Columbia. May Term, 1866.)

[*Assignments for Benefit of Creditors* ⚡153.]

An assignment by one member of a firm of the effects of the firm, for the benefit of creditors, *held* fraudulent, because of improper provisions of the instrument and the circumstances under which it was concocted and executed.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 412–415; Dec. Dig. ⚡153.]

[*Partnership* ⚡209.]

Partnership creditors, whose demands were not due, *held* to have no equity to injoin separate creditors of a partner from attaching his individual property.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 402; Dec. Dig. ⚡209.]

[*Assignments for Benefit of Creditors* ⚡156.]

[An assignment of all the property of a firm by one of the members for the purpose—First, of paying debts due from a firm of which the assignor had formerly been a member; secondly, of paying certain preferred creditors; and, lastly of paying the creditors generally,—was *held* invalid, where the assignor was avoiding service of process when the instrument was

executed, and his partners were absent from the state.]

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 435; Dec. Dig. § 156.]

[Partnership § 151.]

[An assignment of all the property of a firm by one of the members for the purpose of paying debts due from a firm of which the assignor had formerly been a member, of paying certain preferred creditors, and of paying the creditors generally, was held invalid, where the assignor was avoiding service of process when the instrument was executed and his partners were absent from the state.]

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 269; Dec. Dig. § 151.]

Before Dunkin, Ch., at Abbeville, July, 1866.

This case came before the Court on exceptions to the following report of the Commissioner:

"The following statement of the facts of this case may assist in a full understanding of the same:

"In the latter part of 1858, Abraham Slager, A. W. Haddon and Elias Slager, entered into a co-partnership for the purchase and sale of goods, and opened a country store at Martinville, in Abbeville District, having purchased a stock of goods from various merchants in New York.

"About the last of January, 1859, A. W. Haddon left the State, carrying off some of his property with him, and nine or ten slaves. Elias Slager, another of the firm, left about the same time, or a few days after, leaving Abraham Slager, the third partner, in possession of the store, stock of goods, &c.

"On the 6th February, 1859, the Sheriff of Abbeville District, by virtue of sundry executions against Abraham Slager, and against the late firm of Slager & Livingston, levied upon the stock of goods of Haddon, Slager & Co., or Slager's interest therein—took pos-

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session thereof, and closed up the store. On the 9th February, the Sheriff having bail process against the said A. Slager, made search for him, but he was not to be found. On the same day, while concealing himself to avoid arrest, A. Slager executed the paper purporting to be an assignment (a) of his

(a) The following is a copy of the assignment: Whereas A. W. Haddon, one of the firm of Haddon, Slager & Co., has left the State, and carried off his property, whereby my individual and firm creditors have and are about to press upon me for payment; now, therefore, in order to pay and satisfy all my just creditors as far as my effects and estate will enable me so to do, I make this assignment of all and singular my goods, credits, effects and estate to Samuel S. Baker, as follows: I assign, transfer, set over and deliver to the said Samuel S. Baker, all my interest, claim and demand in and to the goods, wares and merchandise in the store at Martinville; also, all my right, interest and claim and demand in and to all the store books, embracing all the accounts taken for goods sold, and also all notes given for goods sold, so far as I can, and have a right and an authority so to do. I

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individual interest, and the interest of Haddon, Slager & Co., in the stock of goods and storehouse and lot to one S. S. Baker, for the uses and purposes therein mentioned. On the morning of the 10th, Slager left the State. So far as known, neither of the partners has been in the State since. Sundry suits by attachment were immediately commenced against the firm, and against A. W. Haddon individually.

"The bill was filed on 16th February, 1859,

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by Hender*son, Kirtland, North & Platt, merchants of New York, of whom goods had been purchased by the firm of Haddon, Slager & Co., in October, 1858, and whose demands were not due at the time of the filing of the bill, in behalf of themselves and others, creditors of the firm under the same circumstances, praying an injunction to restrain the Sheriff from selling the stock of goods of Haddon, Slager & Co., or Slager's interest therein, until an account could be had touching the partnership transactions—and injoining all and every creditor, either of the firm or the individual members thereof, from commencing suits at law, by attachment or otherwise, until the further order of the Court.

"An injunction in accordance with the prayer of the bill was granted on the 16th February, 1859. At the same time the firm of Haddon, Slager & Co. was largely indebted to merchants in New York, all or nearly all of which indebtedness had not matured at the time of the filing of the bill.

"Among other things, the bill charged that one John Thomas Haddon had aided and assisted the said A. W. Haddon to remove and carry off his property and slaves, with fraudulent intent to defeat the claims of his creditors, &c.

"On the 7th of March, 1859, upon application of complainant's solicitor, an affidavit

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being filed as to the truth of the charge of the bill relating thereto, an order for a writ of ne exeat against said John T. Haddon was granted, and the writ issued restraining him

also hereby assign, transfer and set over to the said Baker all the right, interest and demand of the said firm of Haddon, Slager & Co. in the said goods, wares and merchandise, and book accounts. I also set over and deliver to my said assignee my wagon and pedlar's wagon, two horses, one cow and calf, and two clocks in the house. I also assign and set over to my said assignee all the molasses and all other articles marked to the firm of Haddon, Slager & Co., now at the depot at Abbeville, and the remnant of goods and articles belonging to the firm at New Market. I also have bargained, sold and conveyed to my said assignee, and I do hereby sell and convey to him, all my interest in and to the tract of land recently bought of John A. Martin, on which my house and store are situate, containing forty acres, more or less, situate in Abbeville District, adjoining William Smith,

from going beyond the limits of this State until the further order of the Court. The said John Thomas Haddon was arrested under said writ on the 9th March, 1859, and entered into bond, with surety, before the Commissioner, on the 4th April, 1859. The said J. T. Haddon, to relieve himself of any liability in consequence of his aiding and assisting the said A. W. Haddon to remove his negroes from the State, acting under the advice of counsel, caused the said negroes to be brought back into the State and district, under the authority and control of one R. W. Haddon, a brother, and Pinckney Haddon, a son of said defendant. On Friday previous (1st April) the negroes were left in the possession of Pinckney Haddon, at Branchville, in this State, while R. W. Haddon came on to Abbeville to consult the attorney of the said John Thomas Haddon as to the course to be pursued in reference to the said negroes. In consequence of the information received from the said R. W. Haddon, suits in attachment were issued by Thomas Jackson, Thomson & Fair, and the "Trustees of De La Howe" against the said A. W. Haddon. On Monday, the 4th April, 1859, the said R. W. Haddon having been appointed a special deputy by the Sheriff to execute said attachments, left Abbeville in the cars and proceeded till he met the aforementioned Pinckney Haddon with the negroes on his way to Abbeville, and thereupon joined them, and upon their arriving within the limits of Abbeville Dis-

trict, levied the aforesaid writs of attachment upon the said slaves. Upon their arrival at Abbeville, they were taken into the custody of the Sheriff. On the same day (4th April) the complainants filed their amended bill, stating the fact of the return of the said negroes within the jurisdiction, then being in the custody of the Sheriff, and praying an injunction against his selling or removing the said slaves, and an order that he hold them

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*subject to the order of Court. The injunction and order prayed for were granted. Subsequently to this order, other attachments were issued. On 16th May, 1859, by consent of all parties, an order for the sale of said slaves was passed by Chancellor Wardlaw, and the sale made by the Commissioner on the sale-day in June following. At June term, 1859, an order was passed, directing the Sheriff to pay over the sums in his hands to the Commissioner, reserving the rights of attaching creditors, if any, and that the same be loaned out on bond, with security. By same decretal order, the Commissioner is ordered to call in creditors, partnership and individual, to establish and prove their demands.

"2d. To report as to the validity of the assignment.

"3d. To report as to the liens of attaching creditors, partnership and private.

John Allen Martin, et al., to have and to hold all and singular the said premises unto the said Samuel S. Baker, his heirs and assigns forever. In trust, nevertheless, for the following purposes, namely: First, to pay and satisfy three notes, one signed by H. A. Jones and A. W. Haddon to W. H. Parker, towards payment of a demand against the late firm of Slager & Livingston, for about eight hundred dollars, and two other notes signed by Peter S. Burton, given to Jones & Jones, towards payment of judgments that were obtained against the late firm aforesaid, one being for one thousand and seventy-two 98-100 dollars, with interest from 25th January, 1858, and the other for two hun-

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dred and fifty dollars, bearing *interest from same date—the date of said two last notes being 25th January, 1858, both of which are under seal; and also to pay and save harmless said Burton for all his liabilities he has incurred for Slager & Livingston.

Second. To pay and satisfy a note of six hundred and fifty-five dollars, due 15th January, 1858, in favor of T. Pearlstein, given by Haddon, Slager & Co., on 15th November, 1858, and also to pay and satisfy a demand of three hundred dollars, in favor of Sperling & Brother, of New York, for goods purchased by the firm of Haddon, Slager & Co.

Third. To pay and satisfy a note of one thousand dollars, due Maurice Meyer, of Charleston, on which Phares Martin is security; also to pay and satisfy one hundred dollars I owe Thomas Jackson, for rent; one hundred and fifteen dollars, with the interest, due the father of General S. McGowan; also, to pay and satisfy what may be sufficient to make up one thousand dollars, with what I have paid John A. Martin, for the land on which I live, provided this will satisfy him for what I was to give him, other-

wise nothing is to be paid him; and seventy dollars to Jonathan Johnson for work done on my store, with interest that may be due on it; and then I desire a debt of about three thousand eight hundred dollars due Smythe, O'Rourke & Herring, of New York, for goods purchased of them by the firm of Haddon, Slager & Co., paid, for which their notes have been given, with any interest that may be due, (\$3,800.)

Fourthly. To pay and satisfy all the other creditors of Haddon, Slager & Co., in New York, and all other creditors of mine individually, and especially all the creditors yet unpaid of their compromised debt due the late firm of Slager & Livingston, secured by surety or otherwise, share and share alike.

Before making the above distribution of my effects, I desire my assignee to pay H. A. Jones, Esq., a proper fee for counsel, advice, &c., and drawing up this assignment, and retain for himself seven per cent. commissions.

I empower my said assignee to make such sales of my effects and estate as he may think proper for the best interest of my creditors. He

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is also *authorized to employ a clerk or clerks to aid him in the sales of the goods, and to pay them properly for such services. It is desired that the whole matter be wound up within twelve months, if practicable.

In witness whereof I have set my hand and seal, this 9th February, 1859.

(Signed) A. Slager. [L. S.]
Haddon, Slager & Co.

Test—T. Pearlstein.
S. L. Jones.

I have heard the within read, and accept the trusts as assigned.

(Signed) S. S. Baker.

9th February, 1859.

"The following demands have been presented and proved:

[Here follows a long list of demands against Haddon, Slager & Co., which it is deemed unnecessary to report.]

"The following are the demands established against A. W. Haddon individually.

[This list is also omitted as unnecessary to be reported.]

"2d. As to the assignment by A. Slager to S. S. Baker, independent of the doubtful attestation of said assignment, I am of opinion it is not valid, for the following reasons:

"1st. Because the assignment is not made for the benefit of the creditors of the firm generally, but the partnership assets are assigned in the first place to secure certain debts of A. Slager and A. Levingston and their sureties.

"2d. Because at the time the assignment was made, the said A. Slager had not control and possession of the house and lot and stock of goods, &c., of Haddon, Slager & Co., the same having been levied on by the Sheriff of Abbeville, under certain executions against A. Slager and Slager & Levingston, and being then in his custody, and the said A. Slager being in concealment to avoid process of law.

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"*3d. Because the said assignment was without the privity and consent of the other partners of the firm of Haddon, Slager & Co., and was not made with the view of settling up the business of the firm.

"3d. As to liens of attaching creditors—

"The following attachments were issued against the firm of Haddon, Slager & Co., before the filing of the bill, and I am of opinion their liens are valid:

"Wm. McGowan v. Haddon, Slager & Co., February 8, 1859.

"S. S. Baker v. Same, February 11, 1859.

"J. Johnson v. Same, February 11, 1859.

"John Enright v. Same, February 15, 1859.

"J. J. Devlin v. Same, February 15, 1859.

"The demand of S. S. Baker is the note referred to as due T. Pearlstein, which is preferred under the assignment.

"The following were issued and served subsequent to the filing of the bill and amended bill, and the order thereon, passed 4th April, 1859, and were levied on the slaves of A. W. Haddon, which had been brought back into the State in consequence of the proceedings against J. T. Haddon, to hold him responsible for their value for aiding and assisting in their removal, viz.:

"1. Frederick Faithome v. Haddon, Slager & Co.

"2. A. Elias & Brother v. Same, 16th April, 1859.

"3. Josiah Burton v. Same, 16th April, 1859.

"4. Henry Welch v. Same, 16th April, 1859.

"5. L. Morris v. Same, 18th April, 1859.

"6. Partridge, Pinchot & Warren v. Same, 18th April, 1859.

"The case of 'Faithome' was issued against A. W. Haddon, A. Slager & Levingston, as composing the firm of Haddon, Slager & Co. on the 4th April, 1859, and service accepted by the Sheriff, who then had the custody of the slaves above referred to, and the pro-

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ceeds of the stock of *goods of Haddon, Slager & Co., sold by consent of parties. On the 16th April, 1859, the error being brought to the attention of plaintiff's attorney, the name of "A. Levingston" was erased, and that of 'Elias Slager' interlined, and the attention of the Sheriff was called to the alteration, and his acceptance requested to be considered as of that date, but no new written acceptance was indorsed on the writ.

"The attachments against A. W. Haddon individually, and which were issued and levied before the filing of the bill, are as follows:

"1. James H. Caldwell v. A. W. Haddon, 3d February, 1859.

"2. James T. Baskin v. Same, 3d February, 1859.

"3. Perrin & Cothran v. Same, 3d February, 1859.

"4. S. McGowan v. Same, 5th February, 1859.

"The two first have been paid in full from the proceeds of property attached. There will not be sufficient to pay the two last in full, but under the opinion of the Court in the case of Rennecker & Glover v. Davis, I am of opinion they must rely alone upon the property attached for their security.

"The following attachments against A. W. Haddon were levied upon the slaves brought back into the State in consequence of the proceedings against J. T. Haddon, subsequent to the filing of the original bill and order of injunction, but before the order of 4th April, 1859:

"1. 'Trustees of De La Howe' v. A. W. Haddon, 4th April, 1859.

"2. Thomas Jackson v. Same, 4th April, 1859.

"3. Thomson & Fair v. Same, 4th April, 1859.

"4. W. H. Parker v. Same, 4th April, 1859.

"The attachments of Frederick Faithome, Elias & Brother, Henry Welch, Josiah Burton, L. Morris, and Partridge, Pinchot & Warren against the firm were commenced subsequent to the filing of the bill and order

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of injunction granted *thereupon, and subsequent to the amended bill and order thereon of 4th April, 1859, and were levied upon the slaves, the individual property of A. W. Haddon, which had been removed from the State, but brought back by J. T. Haddon, under proceedings against him to relieve himself from responsibility in consequence of his complicity in their removal from the State. Of the proceedings in the case, the attorney of the attaching creditors, all of whom, but

one, reside in New York, had notice. For the reasons indicated above, I think the liens of the said cases are invalid.

"As to the attachments of 'Trustees De La Howe,' Thomas Jackson, Thomson & Fair, and W. H. Parker, I have felt much doubt, but am of opinion that they also should be declared invalid, for the following reasons, viz.: That they were commenced subsequent to the order of injunction first granted, the attorney of the attaching creditors having notice of the proceedings, and having obtained secret information as to the expected arrival of the slaves through the agent, J. T. Haddon, of the defendant, as already referred to, and which, with his connivance, were levied upon the negroes, with whose fraudulent removal he stood charged, and which were brought back to the jurisdiction for the purpose of relieving himself from responsibility therefor.

"These cases differ from the attachments against the firm last referred to in this respect, that they were issued and levied before the order of injunction of 4th April, 1859, was passed, but subsequent to the bill and injunction granted thereon.

"Your Commissioner has deemed it unnecessary to attempt to marshal the assets as further directed, as various exceptions will probably be filed against this report, and he has thought it proper to await their adjudication by the Court."

The defendants, Smythe, O'Rourke & Co., excepted to the Commissioner's report, in this:

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*1. That he was in error in not holding the deed of assignment by A. Slager to S. S. Baker, for the use of the firm creditors, as valid.

2. That he was in error in holding the liens of the attachments which issued against the firm of Haddon, Slager & Co. before the filing of the bill, valid.

Samuel S. Baker, assignee of Haddon, Slager & Co., and A. Slager, excepted to the Commissioner's report,

Because the Commissioner has decided that the deed of assignment, for the benefit of creditors, made to him, is invalid.

Thomas Jackson, the trustees of the estate of Dr. John De La Howe, and William H. Parker, attaching creditors, excepted to the Commissioner's report,

Because the Commissioner has, in his report, declared the attachments issued by them invalid, and without lien, which it is submitted is error.

Bazile Callahan and son, attaching creditors, excepted to the Commissioner's report,

Because the Commissioner has, in his report, declared the attachment issued by them invalid, and without lien, which it is submitted is error.

The decree of his Honor is as follows:

Dunkin, Ch. The first exceptions of

Smythe, O'Rourke & Co., and of Samuel S. Baker, involve the same question. The Court concurs in the conclusions of the Commissioner, and the exception is overruled.

The Commissioner has not made up his account, and for the reasons stated in his re-

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port. He has submitted for the *judgment and determination of the Court a report upon certain facts, and his ruling thereon, to which the several parties have excepted.

First. The Commissioner sustains the lien of certain attachments of creditors of Haddon, Slager & Co., lodged between 7th February, 1859, (when all the partners were beyond the limits of the State,) and 16th February, 1859, (when the bill was filed.) The assignment of Abraham Slager bears date 9th February, 1859, but the opinion of the Court is already expressed, that this instrument does not interfere with the lien of the attachments. The exception is overruled.

Second. Exceptions of Thomas Jackson and others. These exceptants were individual creditors of A. W. Haddon, and, on 4th April, 1859, issued attachments against certain slaves, the individual property of their debtor, then absent from the State. The Court is unable to perceive any equity on the part of partnership creditors of Haddon, Slager & Co., whose debts were not due, to restrain the proceedings or prevent the lien of these plaintiffs. They were not bound in any manner to connect themselves with the bill of the creditors, nor was it filed on their behalf. The exception is sustained.

Third. Attachments of Faithome and others. These were creditors of Haddon, Slager & Co., and the attachments were levied on 4th and 16th April, on slaves, the individual property of A. W. Haddon. In *Gadsden v. Carson*, 9 Rich. Eq. 252 [70 Am. Dec. 207], the right of a co-partnership creditor in the individual property of a member of the firm is recognized. In the matter of *Cyrus Chipman*, 14 John. 217, recognized in *Peter S. Smith's case*, 16 John. 102, the Supreme Court of New York ruled that an attachment might issue to subject the separate property of an absent co-partner to the payment of the debt of the co-partnership; but in that case the other co-partners were within the State, and amenable to the jurisdiction of the Court in

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the ordinary way. The Court is *unable to perceive on what principle the other contracting parties, Elias and Abraham Slager, are before the Court as defendants by an attachment of the property of A. W. Haddon. The case is not within the provisions of the Act of 1823, (6 Stat. 212,) and the Court has no authority to extend those provisions. This exception is overruled.

The Commissioner is instructed to complete his report according to the principles herein declared.

F. Faithome and others appealed, on the grounds:

1. Because his Honor erred in sustaining the Commissioner's report setting aside the attachments of F. Faithome, A. Elias & Brother, Josiah Burton, Henry Welch, L. Morris, and Partridge, Pinchot & Warren. It is respectfully submitted that the liens of these attachments are good, and ought to prevail.

2. Because his Honor erred in sustaining the attachments of Thomas Jackson and others, who were separate creditors of A. W. Haddon.

The complainants and others, partnership creditors, who had instituted no proceedings at law, and had no preference under the deed of assignment, appealed on the grounds:

1. Because the presiding Chancellor erroneously held valid the attachments issued 4th April, 1859, by Thomas Jackson and others, individual creditors of A. W. Haddon.

2. It is submitted that the said attachments were invalid, because issued after the filing of the bill, and after injunction granted by this Court to stay proceedings at law by any of the partnership creditors; and also to stay proceedings by any creditor of an individual member of said firm, of which injunction the said attaching creditors had notice.

3. Because the presiding Chancellor is in

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error in suppos*ing that the claims of complainants were not due at the time the attachments by the said defendants, Thomas Jackson and others, were issued, and also in supposing that said defendants were not bound to connect themselves with the bill of the creditors; that it was not filed on their behalf, when in fact they were enjoined from proceeding at law, and required to come into this Court to establish their demands.

4. Because the Chancellor has omitted to make any order or decree in regard to the real estate or possession of John A. Martin, alleged to be the property of Haddon, Slager & Co., or of Elias Slager, a member of said firm.

The defendants, Smythe, O'Rourke & Co., appealed on all the grounds of appeal above taken by complainants, and also on the following:

1. That the Chancellor was in error in not holding valid the deed of assignment by A. Slager to S. S. Baker, so far as made for the benefit of the creditors of the firm.

2. It is respectfully submitted that all the attachments against the firm of Haddon, Slager & Co., whether issued before or since the filing of the bill, are invalid.

3. That all attachments against the firm, issued since the execution of the assignment, (9th February, 1859,) are invalid.

S. S. Baker appealed,

Because his Honor held the deed of assignment for the benefit of creditors made to him invalid.

Fair, McGowen, Noble, Burt, were heard.

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*The opinion of the Court was delivered by

DUNKIN, C. J. This bill was filed 16th February, 1859, by the plaintiffs, creditors of Haddon, Slager & Co., in behalf of themselves and such other creditors of the firm as might think proper to make themselves parties.

The leading purpose of the bill is to impeach the validity of an assignment purporting to have been executed by Abraham Slager, a member of the firm, on 9th February, 1859, and transferring to the assignee all the partnership effects, which the plaintiff's charge to be "fraudulent and void."

By an interlocutory decretal order of Chancellor Wardlaw, the Commissioner had been directed, among other things, to report upon the validity of this instrument. He accordingly presented a detailed statement of the circumstances under which the assignment, 9th February, 1859, was executed, and of the particular provisions thereof, and concludes with the recommendation that it be declared invalid. In this judgment of the Commissioner, the Chancellor upon the hearing concurred. This constitutes grounds of appeal on the part of the assignee, Samuel S. Baker, and others. It is not proposed here to recapitulate all the facts detailed by the Commissioner. It is proper, however, to say, that at the time of the assignment the tangible effects of the co-partnership purporting to be assigned were in custody of the Sheriff of Abbeville District, under executions against the firm; the assignor was lying out in order to avoid the service of legal process; and his co-partners were absent from the State. Under these circumstances, on the morning of the 9th February, he transferred to Baker "all right, title and interest of the firm of Haddon, Slager & Co., in the goods, wares, and merchandise, and book accounts, &c.," in trust, in the first place, to pay and discharge certain large debts due by the late firm of Slager & Livingston, and also to save harmless one Peter L. Burton, "from all liabilities which he had incurred for Slager & Livingston;" next to pay two

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creditors of the firm \$655 and \$300, then to pay individual debts of the assignor, then a preferred creditor of the firm, and, lastly, the creditors generally of the firm, and of himself individually, share and share alike. As the Commissioner has remarked, there was no evidence of the assent of the absent partners to this extraordinary appropriation of their funds. One of the subscribing witnesses was a preferred creditor, T. Pearlstein, whose claim was transferred to S. S. Baker, the assignee of A. Slager, and who exhibited his own diffidence in the validity of the assignment by issuing an attachment

to recover this same demand two days afterwards (11th February) against the co-partnership of Haddon, Slager & Co. The transaction wears all the badges of fraud. The goods were purchased from the complainants and others some four months previously, on a credit of six and eight months. Before the credit had expired, and when the concern was already insolvent, one of the partners, in the absence of his co-partners, endeavors in a clandestine manner to make an appropriation of all these goods remaining unsold, and of the debts for which they had been sold, for the purpose primarily of paying the debts of a firm to which Haddon, Slager & Co. were strangers. Nor is the fraud sanctified because, after paying these debts of Slager & Levingston, there is a provision for paying two preferred creditors of Haddon, Slager & Co., and, after satisfying other individual creditors of Abraham Slager, to pay other preferred creditors of the firm. The Court cannot undertake to unravel the meshes of fraud, or to sustain an instrument concocted in fraud, although some of the provisions may be meritorious or harmless. The plaintiffs who were bona fide creditors of the co-partnership were well entitled to characterize the assignment as fraudulent, and to ask the aid of this Court to remove this obstruction to the satisfaction of their claims.

Then, as to the attaching creditors of A. W. Haddon, whose writings were lodged subse-

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quent to the order, 16th February, *but prior to that of 4th April, 1859. These were sustained by the Chancellor, and from his ruling, in this respect, an appeal is taken by several of the parties. It may be proper to elucidate what is said in the decree. On 16th February, 1859, when the bill was filed, A. W. Haddon had removed from the State and taken his property with him. At a subsequent period, and prior to the order, 4th April, slaves belonging to him were brought into the State and attached by his creditors, Thomas Jackson and others. The Chancellor has decided that on 16th February, 1859, the plaintiffs, whose demands against the firm of Haddon, Slager & Co. were not then at maturity, had no equity as against the private creditors of A. W. Haddon, and whose demands were past due, to restrain them from attaching his private property, which might subsequently be brought within the jurisdiction of the Court. If the plaintiffs' debts were then already due, and the fund in Court, the utmost extent of the equity of the co-partnership creditor would be, after previously substantiating the insolvency of the co-partnership, to be permitted to participate with the private creditors in the distribution of the individual estate, not to restrain such creditors from establishing their legal rights, or securing the property to

satisfy their legal claims. But, on the 16th February, there was no property of A. W. Haddon within the jurisdiction of the Court, and when it was afterwards brought within the limits of the State, the demands of the plaintiffs not being due, the proper and legal mode of making A. W. Haddon a party in Court, and subjecting his property to the payment of his debts, was in the course pursued by his attaching creditors. Nor does this proceeding in any manner defeat the only equity of the co-partnership creditors. The fund is in the custody of the Court, and if, after payment of legal liens, including the attachments, a surplus should remain, the plaintiffs may entitle themselves to participate with the private creditors of A. W. Had-

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don. It is not very *clear that the inhibition of these proceedings is within the purview of the prayer of the bill, 16th February, or of the order of injunction made by the Commissioner. But if so, the order was unadvised, and will not defeat the legal rights of the attaching creditors.

The Commissioner reported in favor of the validity of the attachment of William McGowan, as issued prior to the assignment of 9th February. The precise time at which A. Slager left the State is not fixed. But the regularity of the attachment was not disputed nor was it intended to call it in question.

The last ground of appeal on the part of the plaintiffs objects that no order was made in regard to the real estate in possession of John A. Martin. The case was heard on the report of the Commissioner, and the exceptions thereto, of which this matter forms no part, and was recommitted with instructions. The subject-matter of this exception will be properly considered on the plenary hearing of the cause.

Grounds of appeal were taken on behalf of F. Faithome and others, but were not urged in this Court.

It is ordered and decreed that the appeal be dismissed.

WARDLAW and INGLIS, J. J., concurred.
Appeal dismissed.

12 Rich. Eq. *410

*FRANKLIN MANNING v. ELI MANNING
and Others.

(Columbia, May Term, 1866.)

[Will's \S 758.]

The testator devised and bequeathed his estate to his ten children, by name, to be equally divided between them, and then directed that such of them "as have received property from me will account to my estate for so much;"—*Held*, that such of the children as had received property from the testator were bound to ac-

count for the same as in cases of advancements, and upon the same principles.

[Ed. Note.—Cited in *Allen v. Allen*, 13 S. C. 528, 36 Am. Rep. 716; *Hughes v. Kirpatrick*, 37 S. C. 171, 15 S. E. 912; *Hammett v. Hammett*, 38 S. C. 62, 16 S. E. 293, 839.

For other cases, see *Wills*, Cent. Dig. § 1957; Dec. Dig. ⚡758.]

[*Executors and Administrators* ⚡43; *Wills* ⚡759.]

The testator's will was executed in March, 1862, and he died soon after:—*Held*, that slaves which he had given to his children must be accounted for as advanced, and that slaves which he owned at the time of his death must be treated in the distribution as part of his estate.

[Ed. Note.—Cited in *McLure v. Steele*, 14 Rich. Eq. 116; *Rickenbacker v. Zimmerman*, 10 S. C. 120; *Hughes v. Eichelberger*, 11 S. C. 52; *Wilson v. Kelly*, 21 S. C. 539, 540.

For other cases, see *Executors and Administrators*, Cent. Dig. § 281; Dec. Dig. ⚡43; *Wills*, Cent. Dig. § 1965; Dec. Dig. ⚡759.]

[*Executors and Administrators* ⚡103.]

For Confederate treasury notes invested in certificates for four per cent. Confederate bonds, and for balances due for Confederate treasury notes received during the time such notes were the only currency of the country, an executor held not liable. *Per Lesesne*, Ch.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 421; Dec. Dig. ⚡103.]

Before Lesesne, Ch., at Marlborough, February, 1866.

This case will be sufficiently understood from the Circuit decree, and the opinion delivered in the Court of Appeals. The Circuit decree is as follows:

Lesesne, Ch. Mealy Manning, by his will, dated March 26th, 1862, after directing his debts to be paid as soon as convenient, gave to his wife, Mary, for life, a tract of land, seven slaves, and some other personal property, and directed that after her death the same should be divided among his "legal heirs." He gave the residue of his estate, real and personal, to be equally divided among his ten children, Eli, Thomas J., Sarah Jane, (wife of David W. Bethea,) William L., James R., Franklin, (the plaintiff,) John,

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Holland, Houston, *and Angenora, and willed that such of them as had received property from him should account to his estate for so much; and appointed his sons, Eli and Thomas J., executors.(a)

(a) The following is a copy of the will:
The State of South Carolina, Marlborough District:

I, Mealy Manning, of the district and State aforesaid, do make and ordain the following as my last will and testament:

I will and desire that all my just debts be paid as soon after my death as convenient.

Second. I give and bequeath and devise to my beloved wife, Mary Manning, for and during her natural life or widowhood, that portion of my land lying north of the new road, known as the Hunt Bluff road, to the Hilson Bay road, then with the Hilson Bay road to a lane, then with said lane to the back line dividing my land from Light Townsend. I also give to her seven negroes, viz., Barton, Hos, Peg, Levi, Andrew,

The testator died soon after, leaving a considerable estate, consisting of lands and negroes, stock, plantation implements, and choses in action, bacon, cotton and corn, and

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*leaving his widow and the ten children above named surviving him, Thomas J. Manning, one of the executors, proved the will, and having administered the estate in part, died intestate on the 28th December, 1864. Eli Manning then qualified as executor, and nearly all the personal estate had been sold, and all the testator's debts been paid, when this bill was filed, to wit, on the 19th October, 1865.

William L. Manning, one of the children, died intestate in August, 1862, leaving a widow, Martha J. Manning, (who administered on his estate, and has since intermarried with H. M. Stackhouse,) and one child, Willie Jane Manning.

The testator's widow Mary Manning, died intestate in September, 1863, never having received any of the property left to her. Thomas J. Manning left a widow, Ann M. Manning, (who administered on his estate,) and four children, viz., James H., Orletta Lawrence, Mary Jane, and Margaret Manning, who are all infants. Four of the testator's children, viz., John, Houston, Holland, and Angenora, are also infants. Several of the testator's children had received property from him.

The testator's debts have been fully paid.

The bill is filed by one of the testator's children against the others that are living, and the representatives and heirs of the two who have died, for an account, distribution, and partition.

The testator was the guardian of two infants, named Delaney J. and Mary A. Kinney, whose estate is mingled with his, and who are not parties to this proceeding.

Elizer and Abram, household and kitchen furniture, family carriage, two carriage mules, my horse Crockett, one four-horse wagon, one buggy, six cows and calves, six sows and pigs, twenty hogs. I further will and desire, that after the death of my beloved wife, Mary Manning, the above-mentioned property be equally divided among my legal heirs.

Third. I give and bequeath all the rest, residue and remainder of my estate and effects, real and personal, after satisfying the above bequests, to be equally divided among my children, Eli Manning, Thomas J. Manning, Sarah Jane Bethea, W. L. Manning, Jane R. Manning, Franklin Manning, John Manning, Holland Manning, Houston Manning, and Angenora Manning. I further will and desire that those of my children who have received property from me previous to the execution of this instrument, will account to my estate for so much.

Lastly. I do hereby nominate, constitute and appoint my beloved and trustworthy sons, Eli Manning and Thomas J. Manning, executors of this my last will and testament.

This the twenty-sixth day of March, A. D. 1862.

M. Manning. [Seal.]

Jos. H. Lane.
Susannah McRae.
A. L. McCormick.

The cause was submitted to Chancellor Inglis, who, on the 19th January, 1866, made a decretal order in these words:

"Upon hearing the pleadings in this case, it is ordered that the Commissioner do inquire and report which of the testator's children received property from him before the

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*execution of his will, the particulars of such property so received by each, its condition at the time of advancement, and value at the testator's death, regard being had to such condition as if then continuing; if the same or any part of such advanced portions consisted of negro slaves, whether all such slaves continued in the possession of the donees until practically freed by the authorities of the United States, or if not, which did not so continue; whether such so not continuing had died in the possession of the donees, and if so, whether before or after the testator's death, and the value according to the above rule of valuation of such so dying, or whether they or any of them had been sold by the donees, and if so, at what prices, and at what times, and the value of such according to the same rule, or if not sold, had been exchanged for other property, or otherwise converted into pecuniary value in other forms, with the same particulars in that event; that he also inquire whether any of the negro slaves, of which the testator died possessed, were sold by the executors, and when and at what prices, and take an account of the hire of the negroes advanced to each legatee, between the death of the testator and the date of emancipation aforesaid. That the Commissioner do also take the accounts of the administration of the testator's estate by the executors, Thomas J. Manning and Eli Manning severally, and their respective executions of the trusts of the will as such executors, and ascertain the balance due by each to the testator's estate; and that in so doing he inquire and report how much of the assets were received by each in treasury notes of the Confederate States, the circumstances under which such receipts by them took place, and from what sources, and on what account, and at what times; and also which items of the payments charged by them were made in like currency, and what investments were made by each in securities of the Confederate States, and under what circumstances, and that on the whole case re-

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ferred to him for inquiry he have *leave to report any special matters. The rights of infants are involved in this case, and some of the questions submitted in the pleadings are too important, too new, and of too extensive application to be determined at Chambers, or indeed elsewhere, without argument. It is not intended in this order to express or intimate any opinion either way, but only to gather for the information of the judgment of

the Chancellor who will hear the cause such facts as may by any possibility be regarded as entitled to affect such judgment. And because I think the questions need to be well examined and discussed, and the rights of the infant parties to be touched by them ought to be well guarded, it is ordered that Henry T. Moore, Esq., be appointed to represent the interests of the said infants in the argument of these questions on the Circuit, such appointment to continue further or not as the Circuit Chancellor shall judge proper. This order is made because the solicitor, whose name appears on the record as representing the infants, will be associated with the solicitor of the plaintiff, the whole proceeding having been amicable."

In pursuance of the above order, the Commissioner, on the 8th February, 1866, reported as follows:

"The Commissioner, in obedience to an order in the above-stated case, respectfully reports: That he has heard evidence on all the matters submitted to him, and that he finds that Eli Manning received as advancements from his father, Mealy Manning, before the execution of his will, the negro slaves, Isaac, Charlotte, Edward, and Louisa, and that reference being had to their condition at the time of the advancement, their value at the testator's death was two thousand and two hundred dollars, and that prior to the same period he received two hundred and sixty acres of land, twelve hundred dollars in money to be invested in land, one horse, two mules, six head of cattle, and two hundred bushels of corn, as other advancements, amounting in value to four thousand one hun-

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*dred and eighty-five dollars, the aggregate value of all the advancements being six thousand three hundred and eighty-five dollars. And that Thomas J. Manning received from his said father, prior to the same period, the negro slaves May, Alph, Alice, Laney, and Dille, and that reference being had to their condition as aforesaid, they were worth at the testator's death two thousand three hundred and fifty dollars, and that, prior to the same period, he received three thousand dollars in money to be invested in land, one horse, two mules, two hundred bushels of corn, and six head of cattle, as advancements, amounting in value to three thousand five hundred and seventy-five dollars, the aggregate value of all the advancements being five thousand nine hundred and twenty-five dollars. And that Sarah J. Bethea, wife of David W. Bethea, received from her said father, prior to the same period, the negro slaves, Jim, Jinney, Mariah, and that reference being had to their condition as aforesaid, they were worth at the time of the testator's death one thousand and nine hundred dollars, and that prior to the same period she received twenty-seven acres of land as another advancement, worth two

hundred and seventy dollars, the aggregate value of the advancements being two thousand one hundred and seventy dollars. And that William L. Manning received from his said father, prior to the same period, the negro slaves Peg, Jack, Manda and Anne Jane, and that reference being had to their condition as aforesaid, they were worth at the time of the testator's death two thousand three hundred and fifty dollars, and that prior to the same period he had received one thousand three hundred dollars in money to be invested in land, one horse, two mules, two hundred bushels of corn, and six head of cattle, as other advancements, amounting in value to one thousand eight hundred and seventy-five dollars, the aggregate value of all the advancements being four thousand two hundred and twenty-five dollars. And that James R. Manning received from his

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said father, prior to the said *period, the slaves Hector, Emanuel and Ann, and that reference being had to their condition as aforesaid, they were worth at the time of the testator's death two thousand and three hundred dollars, and that prior to the same period he received two mules worth two hundred dollars, as an advancement, the aggregate value of all the advancements being two thousand five hundred dollars.

"The Commissioner further reports that all of the parties respectively remained in possession of all the said negroes, not only up to the time of the testator's death, but also up to the time they were emancipated by the government of the United States, except the slaves Alph, advanced to Thomas J. Manning, Jim, advanced to Mrs. S. J. Bethea, Jack, advanced to William L. Manning, all of which slaves left their owners with the army of General W. T. Sherman, about the 7th day of March, 1865.

"The Commissioner further reports that the hire of the negroes given to Eli Manning from the death of the testator up to the time they were freed as aforesaid, which the Commissioner has supposed to be the first day of May, A. D. 1865, is two hundred and sixty-three dollars. And that the hire of those given to Thomas J. Manning for the same period is two hundred and thirty-two dollars. And that the hire of those given to Sarah J. Bethea for the same period is three hundred and ten dollars. And that the hire of those given to William L. Manning for the same period is two hundred and thirty-two dollars. And that the hire of those given to James R. Manning for the same period is two hundred and ninety-four dollars.

"The Commissioner further reports that the said Thomas J. Manning and Eli Manning, as executors of the said will, did not sell any of the negro slaves belonging to the estate of their testator, and that the testator had at the time of his death forty-five

negro slaves, worth, as inventory and appraisal shows, and as has been fully

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corroborated by other evidence, twenty-two thousand one hundred and fifty dollars. And that the five children to whom advancements in negroes had been made as above appears, had received in such property eleven thousand one hundred dollars, making an aggregate of thirty-three thousand two hundred and fifty dollars.

"The Commissioner further reports that he has audited the respective accounts of Thomas J. Manning and Eli Manning, executors, as will more fully appear by reference to exhibits A and B, herewith filed. That he finds that Thomas J. Manning, executor, had in his hands on the first day of February, A. D. 1866, seven thousand three hundred and eighty-five dollars and twenty-eight cents, which would be reduced by his commissions for paying it out to seventy-two hundred dollars and sixty-three cents, all of which is in Confederate treasury notes, except five thousand dollars in four per cent. bonds of the Confederate States, found after his death among his estate papers. That he finds that there was in the hands of Eli Manning, executor, at the same date, eleven thousand nine hundred and forty-five dollars and forty-nine cents, which will be reduced by commissions on paying it out to eleven thousand five hundred and nineteen dollars and seventy-one cents, out of which the costs and fees of this case will have to be paid; that of this amount seven hundred and thirty-one dollars and sixty-three cents are Confederate treasury notes.

"The Commissioner further reports that it appears from the evidence that Thomas J. Manning, executor, received, during the years 1862 and 1863, fourteen thousand nine hundred and fourteen dollars and seven cents in Confederate treasury notes, and during the year 1864 five thousand and seventy-five dollars and sixty-two cents in Confederate treasury notes, and that during the years 1862 and 1863 he paid out twelve thousand seven hundred and forty-three dollars and eighty-two cents in Confederate treasury notes, and during the year 1864

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twenty-six hundred and sixty dollars and ten cents in the same kind of currency. These expenditures were principally made for keeping up the plantation, supporting the family, educating the children, and considerable for the payment of debts due by the testator. Of the amount received by him most of it was for produce sold from the plantation, and some for debts due to the testator. The testator left at his death eighty-six dollars and forty-six cents in gold and State Bank notes, which is included in the above amount received.

"Eli Manning, executor, received up to the

17th day of April, A. D. 1865, two thousand five hundred and eighty-three dollars in Confederate treasury notes, and paid out one thousand seven hundred and forty-four dollars, and has now a balance on his hands of treasury notes seven hundred and thirty-one dollars and eighty-three cents. The amount received by him was altogether for negro hire and the sale of produce from the plantation, and the amount paid out was principally paid to the different legatees.

"The Commissioner further reports that all of the property of the testator which was appraised has been accounted for, and the accounts vouched as well as circumstances will permit.

"The Commissioner further reports that all the currency of the country from the year 1862 to May, 1865, was Confederate treasury notes, and the amounts received and paid out by the executors does not seem unreasonable, as the most prudent citizens of the country were in the habit of doing the same thing. That so far as the sales of the produce from the plantation were concerned, it was a necessity, as impressing officers of the Confederate army were seizing all the surplus produce in the country for the use of the army. That the testator owed as much, perhaps more, than was due him at the time of his death, and this the executors have extinguished in the payments they have made. That it was almost universal for the citizens in this section of the State

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to invest *their money in four per cent. Confederate certificates, as it was necessary to use them in the payment of taxes to the Government, or submit to a loss of thirty-three per cent. on the old issue of treasury notes on hand.

"The Commissioner begs leave further to report as special matter, that, in the inquiries submitted to him, it appears that the estate of Mealy Manning has still in its corpus the estate of the Kinney wards, of whom his father was guardian, and that, in the settlement of the accounts herewith filed against the executors of Manning, no allowance has been made therefor, the Commissioner having no means of arriving at the amount still due said wards."

No exceptions have been taken to the Commissioner's report.

The following questions were discussed at the hearing, and are to be now decided:

1. The slaves given by the testator to five of his children having been made free by the United States authorities before the division of the estate, and being valueless from the time they became free, whether they are to be taken into the account in estimating the amount of the property received by those children.

2. Whether the slaves who constituted part of the testator's estate, and were afterwards set free in the executor's hands, or their

value at the time of his death, are to be in any manner taken into account in estimating the amount of his estate for distribution.

3. As to the money reported to be in the executors' hands in Confederate notes, whether they are liable, under the circumstances, to account for the same in any other currency. And whether the investments by one of them in Confederate securities are to be allowed.

I. Advancements, properly speaking, apply
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only to cases *of intestacy. In the pleadings and argument in this case, however, the property given by the testator to his children, in his lifetime, and ordered by his will to be accounted for by them, has been treated as constituting advancements, and I think correctly. I shall accordingly consider the property so given as being subject to the principles that appertain to the doctrine of advancements.

It was urged that if the slaves that were left by testator, and who since his death have lost the character of property, are not taken into the account in the distribution of his estate, the slaves forming parts of the advancements made to some of his children, and who have undergone the same change, should in like manner be excluded in computing the advancements. But the questions are distinct; each of them must be decided according to the principles to which it is referable, and not according to what may seem to be the justice of this particular case. The children who were advanced suffered a misfortune, as it turns out, in receiving slaves. Those who were not advanced happened to be, in that, the subjects of good fortune. But if the negroes had continued to be slaves, and had increased greatly, the reverse would have been the case. While it is especially the province of this Court to do complete justice, it must not lose sight of settled principles, and cannot obviate or remedy the mischances incident to human affairs.

Now, an "advancement always embraces the idea that the parent has parted from his title in the subject advanced;" in other words that, when it was made, the child acquired the title. *Ison v. Ison*, 5 Rich. Eq. 19; see 2 Wms. on Exors. 1073. These negroes therefore became eo instanti the property of those to whom they were given. Unfortunately they continued so until they ceased to be property. But, until then, the donees might have sold them for gold, or exchanged them for land or other property of permanent value. If that had been done there

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would have been no *complaint on their part now. They could not have been deprived of their advantage, although the testator's estate at his death had consisted entirely of slaves, and the other children had lost their inheritance in toto, because, according to the principle of advancements, as we have

seen, the slaves were their indefeasible property. But principle is immutable. If the property was theirs, it was theirs for better, for worse. I cannot distinguish this case from that of a child who receives an advancement in gold, and is afterwards robbed of it.

Again, an advancement is to be estimated as of the time of the parent's death, relation being had to the situation of the subject at the time of the gift.

Interest is charged on its estimated value from the time for distribution, and an intestate's estate (and this estate stands on the same footing) is distributable as of the time of his death. *McDougald v. King*, Bail. Eq. 154; *Youngblood v. Norton*, 1 Strob. Eq. 122; *McCaw v. Blewit*, 2 McC. Eq. R. 90. The Commissioner has proceeded according to these rules, and the parties advanced must account for the value of their several advancements, and interest, unless they decline to take any part of the estate, which they are entitled to do.

II. The negroes left by testator are clearly not to be included or regarded in the distribution of his estate, because, since his death, they have ceased to be property. But it is contended that the executors are liable for the value they bore at the time of his death, on the ground of negligence or mal-administration, which, it is said, consisted in this, that the executors might have paid the debts in twelve months, and then divided the negroes, but failed to do so.

It appears from the executor's accounts, that the debts were all paid before the close of the year 1863. But I am not sure that it was his duty, of his own motion, as soon as that was due, to divide the estate. The Act

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does not in *terms make it so. There certainly is no precedent for holding him responsible for all the consequences of such an omission, when, as now, the good faith and honesty of the executors are not in the slightest degree impugned. It is usual for one of the parties in interest to apply for a division. The infants, it seems, have no guardians, and I admit in general terms that it was the duty of the executors to do what was proper for the security of their shares. But there were among the legatees four adults besides the executors, neither of whom deemed it necessary or advisable to have an immediate division. It would be very harsh to visit these executors with a severe penalty merely for failing to do for the infants what the others have not done for themselves. But, in view of the state of the country between the time when the debts were all settled in 1863, and the time when the negroes were set free in 1865, it is by no means certain that it would have been practicable for the executors to effect a division during that eventful period. Men in every condition of life, if not actively engaged in the defence

of the country, had their thoughts engrossed by the terrific struggle that was going on. Civil business, public and private, was suspended, and individual interests necessarily overlooked. The claim here made seems to show how it is already becoming difficult for men to carry their minds back and reproduce the condition of things during the period of tremendous anxiety through which we have so recently passed. And it is well for the Court to improve the first occasion presented to recognize distinctly the influence which it necessarily exercised in the transactions of life, and which cannot be justly ignored, in adjudications relative to these transactions. And it is not unworthy of remark, in passing, that if the division of these negroes had in fact been accomplished, non constat, that the situation of the legatees would have been better than it is, for the negroes allotted to them would in

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the same manner have ceased to *be property. If the rule of accountability was so stringent as to subject these executors to this claim, it would certainly evince great hardihood in any one to undertake the office.

An executor is liable to make good the property that comes to his hands, if it suffer loss or deterioration through his default. 2 Wms. on Exors. 1278. But, "not to deter persons from undertaking the office, the Court is extremely liberal in making every possible allowance, and anxious not to hold an executor liable on slight grounds." *Id.* 1186. "An executor stands in the condition of a gratuitous bailee, not to be charged without some default. Therefore, if goods are stolen, he is not chargeable in equity," a fortiori, "if taken by the king's enemies." In accordance with this view, "if money be put out, though without a decree on a real security, which there was no reason to suspect, but which turns out bad, the executor is not accountable." *Id.* 1286. And, in *Thompson v. Wagener*, 3 Des. Eq. 103, testator's lands were sold in September, 1785, under a decree which directed the proceeds of sale to be paid to the executor. The purchaser's bond was not sued by the Master until 1790, and when judgment was recovered he had become insolvent. The bill sought to charge the executor and the Master with the debt. It was proved that in 1786, 1787, and 1788, the executor frequently applied to the Master to get payment, and in 1792 employed a lawyer to make the Master do his duty, but did not take an assignment of the bond to himself. And the Court held that, considering these circumstances and the condition of the country from 1786 to 1790, the period between the time when the bond was payable and when it was sued, it would have been harsh and unreasonable to make the executor liable; that the debt might have been secured if sued as soon as due, but an executor is not

bound to act so rigorously. The Master was also exonerated.

The recent condition of the country was far more unfavorable to matters of business

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than that referred to in Thompson *v.* Wagner, and the loss of the slaves belongs strictly to the class of losses "by the king's enemies," for which an executor is not liable.

III. It appears by the Commissioner's report that there was a balance in the hands of the executor, Thomas J. Manning, (who died in 1864,) of two thousand two hundred dollars and sixty-three cents in Confederate treasury notes, and an investment of five thousand dollars in certificates for four per cent. bonds of the Confederate States. The moneys received by him were for produce sold and debts to testator paid up, besides the sum of eighty-six dollars and forty-six cents in gold and State bank notes left by testator at his death. The only currency of the country from 1862 to May, 1865, was Confederate treasury notes; the most prudent citizens of the country were in the habit of receiving them; the sale of produce was a necessity; the testator owed as much as was due to him, or more, and it has been all extinguished, and it was almost universal for the citizens of the district to invest their money in certificates for four per cent. bonds, as they were receivable at par in payment of taxes, and otherwise the money was liable to a loss of thirty-three and a third per cent. under a law of Congress. T. C. Weatherly and B. D. Townsend, gentlemen of great intelligence and large experience in business, were examined at the hearing, and testified that during the year 1862 and the greater part of 1863, certainly as late as September, 1863, when the last of the debts due to testator were collected, it was usual for all persons, including trustees, to receive payment of debts in Confederate treasury notes. Prudent men would have received payment in that currency of all the debts collected by the executors during those years. The sale of the produce of the plantation from the date of the testator's death up to March, 1865, when General Sherman's army passed through the district, was a necessity, to avoid impressment, and nothing but Confederate

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money could be *obtained in payment. The investment in 1864 of five thousand dollars in four per cents. was proper. In view of the value of the estate, it was not too large a sum to provide for the payment of taxes. Persons had to guess at the requisite amount.

It was urged that the sales of produce would have sufficed to pay all the debts and expenses, and the choses in action might have been saved for the legatees. But was there any certainty that the choses in action would be more valuable than Confederate notes? Is there any certainty that if they had been saved they would be so now? If we recur in

thought to that period, we will remember that not only was there hope, more or less confident that Confederate notes and securities would be ultimately good, but an impression even more prevalent that one of the consequences of the failure of the cause of the Confederacy would be universal, individual ruin, alas! but too nearly verified. Then it was, moreover, our earnest policy, evidenced by State legislation, to sustain the credit of the Confederacy, which could only be done by giving value to her paper.

I feel no hesitation in sanctioning all the accounts of this executor, including the investment in four per cents.

The report finds a balance in the hands of the executor, Eli Manning, of eleven thousand five hundred and nineteen dollars and ninety-one cents, whereof the sum of seven hundred and thirty-one dollars and eighty-one cents is in Confederate treasury notes, leaving a clear balance of ten thousand seven hundred and eighty-eight dollars and eight cents. The amounts received by him were altogether for negro-hire and sales of produce from the plantation. The entire account of this executor is also sanctioned.

The last-mentioned balance is distributable among the several legatees, or such of them as shall receive shares of the estate, according to their several interests, subject to the payment in the first place of the amount due

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to Delaney J. *Kinney and Mary A. Kinney. But these amounts have to be adjudicated by the Court before distribution can be made.

In stating the individual accounts of the parties, the payments made to them in Confederate notes must not be charged according to their face, but according to the value of those notes at the time the payments were made.

In accordance with the views above expressed, it is ordered and decreed that, in computing the advancements made to certain of his children by the testator, the negroes given to each of them be taken into the account at the valuation stated in the Commissioner's report, with interest thereon from the date of testator's death.

It is further ordered and decreed that the money balance reported to be in the hands of the executor, Thomas J. Manning, at the time of his death, and the investment made by him in certificates for four per cent. bonds of the Confederate States, also the sum of seven hundred and thirty-one dollars and eighty-three cents in Confederate treasury notes, reported in the hands of the executor, Eli Manning, be stricken from the estate of the testator remaining for distribution, and that the said executors be discharged from accounting for the same.

It is further ordered that Delaney J. Kinney and Mary A. Kinney be made parties defendant in the cause.

It is further ordered that the Commission-

er take an account of the remaining personal assets of the testator; also the individual accounts of the several legatees with the estate, embracing the property received by such of those who were advanced as shall be willing to throw the same into hotch pot; an account of the amounts due to the testator's wards, Delaney J. Kinney and Mary A. Kinney; and that moneys charged as paid to or for account of any of the parties be charged as of the true value of the same at the time of payment; and that he report a scheme for the distribution and closing of the estate, with leave to report any special matter.

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*It is further ordered that the Commissioner report a proper fee for Henry T. Moore, Esq., the solicitor appointed by the Court to represent the interests of the infant defendants, and out of what fund the same shall be paid. Mr. Moore's services in the cause are still needed, and his appointment is continued.

And, lastly, it is ordered that a writ of partition issue, according to the rules and practice of this Court, to make partition of the real estate among the parties entitled to the same under the testator's will. Costs to be paid out of the estate,

The defendants, Eli Manning, David W. Bethea and wife, Sarah Jane, James R. Manning, and the heirs at law of Thomas J. Manning, deceased, appealed and now moved this Court to reverse so much of the decree as relates to what are called advancements in negroes to several of the legatees, upon the following grounds:

1. Because his Honor erred in considering the gifts of negroes made by the testator, in his lifetime, to several of the legatees as advancements.

2. Because negroes having lost their character as property, since their emancipation, they cannot now be treated by the Court as property.

3. Because, if the negroes given by the testator in his lifetime to several of the legatees are to be considered as advancements, then the balance of the negroes, which had formerly belonged to the testator, and which were on hand at his death, should also be considered as property, and be estimated as part of the estate for distribution.

Dudley, for appellants.

Moore, contra.

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*The opinion of the Court was delivered by

DUNKIN, C. J. It is stated in the decree that the testator died soon after the execution of his will, 26th March, 1862. By the third clause of that instrument he devises and bequeaths all the rest and residue of his estate, real and personal, to be equally divided between his ten children by name, and he adds: "I further will and devise

that those of my children who have received property from me previous to the execution of this instrument will account to my estate for so much."

This Court concurs with the Chancellor in the construction of this clause of the testator's will. The Act of 1791 does not apply to a case of testacy, and the gifts of negroes (as insisted on in the appellants' first ground) may not be technically advancements. But the testator has made the law of his own property, and it is difficult to distinguish the effect of the language he has adopted in providing for its distribution from that chosen by the Legislature. In both, the period for fixing the rights of the parties is the death of the decedent. The value of the property to be divided is to be estimated as of that day, and so of the property which had been given off to the children, taking that property in the plight and condition it was when received by the children. In March or April, 1862, slaves had their usual value, and those in the possession of the testator at the time of his death have been estimated by the Commissioner, as well as those which had been received previously by the several legatees, and there is no dissatisfaction with the valuation.

But we are constrained to differ from the Chancellor, when he declares that the negroes left by the testator are not "to be included or regarded in the distribution of his estate, because since his death they have ceased to be property;" and in this respect we regard the third ground of appeal as well taken. "The true intention of the law," say the Court in *McCaw v. Blewitt*,

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2 McC. Eq. 90, in commenting on the Act of 1791, is, "that the estate of the ancestor is to be considered as a common fund, out of which each child is to draw at the death an equal proportion. That part of the estate which has been given is to be estimated at what it is worth at the death, relation being had to the situation at the time of the gift." "The rights of the parties are fixed at the death of the ancestor." Such was also the purpose of this testator in directing the distribution of his estate. The rights of the several beneficiaries were fixed at his death. No delay on the part of the executors in making the division, from whatever cause such delay may have arisen, no subsequent revolution in the affairs of the country, can affect the principle of distribution, or vary the relative rights of the parties as they existed in April, 1862, when the will took effect. It will therefore be necessary, in estimating the value of the testator's estate at the time of his death, that the Commissioner should take into the computation the value of the forty-five negroes left by him, and which were included in the inventory made by the executors. In this par-

ticular, the decree of the Circuit Court is reversed, and the decretal order of reference modified accordingly. In all other respects the decree is affirmed.

WARDLAW and INGLIS, JJ., concurred.
Decree modified.

12 Rich. Eq. *430

*N. RAMSAY, JAMES WINDSOR, and WILLIAM CLARKSON and Others, Trustees of the Church of the Mediator, v. JAMES T. SIMS, N. A. PEAY, and H. K. WITHER-SPOON.

(Columbia. May Term, 1866.)

[Execution ⇐268.]

Where a debtor's property, against whom there are judgments and executions to a large amount, is sold at private sale, under an arrangement between the debtor and all his judgment creditors, who could by any possibility be benefited by the sales, and with the consent of the Sheriff, and fair prices are realized, and the money arising from the sales is applied to the oldest judgment and execution, a junior judgment creditor, who did not consent to the sale, may have the property levied on and sold by the Sheriff; and a purchaser at the Sheriff's sale, with notice, will acquire a good title as against a prior purchaser at the private sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762-767; Dec. Dig. ⇐268.]

[Execution ⇐171.]

If the purchasers at such private sale, or the creditor who received the proceeds, have any equities to prevent the Sheriff's sale, they should apply to the Court for an injunction to restrain the Sheriff from selling; a public notice forbidding the Sheriff's sale will not be sufficient.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497-518; Dec. Dig. ⇐171.]

[Account ⇐1.]

Where a debtor's property is, by consent, sold at private sale by the oldest judgment creditor, and he receives the money and warrants the title to the purchaser, and the property is afterwards sold at Sheriff's sale, and the warrantor receives the proceeds, a bill in equity may, it seems, be sustained by the purchaser at the private sale, against the warrantor, to compel him to account for the proceeds of the Sheriff's sale.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 1; Dec. Dig. ⇐1.]

Before Carroll, Ch, at Richland, June 1859.

There being a large number of judgments and executions against Joseph A. Black, the oldest of which was a judgment by confession for fifty thousand dollars, given on September 19, 1848, and owned, principally, by N. A. Peay, and, in part, by James Fenton, he, Joseph A. Black, on November 9, 1853, gave Peay a power of attorney, authorizing him to sell, after due notice, at

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private or public sale, on some suitable day, on a credit, or otherwise, as he thought best all his, Black's, property, real and personal, mentioning the same in a schedule thereunto annexed. Most of the

other judgment creditors of Black gave their consent in writing to this arrangement; and Charles Neuffer, the then Sheriff of Richland District, also consented, on condition he should be paid commissions on the sales, as if they had been made by him.

Sales under the power of attorney were made of all Black's property in December, 1853, and January, 1854. They were conducted openly and fairly, and full prices were realized. Amongst the property sold was a lot of about two acres in Columbia. It was divided and sold in three parcels. The eastern parcel, containing half an acre, was purchased by the plaintiff, N. Ramsay, for one thousand seven hundred and fifty dollars; the central parcel, containing about one acre, by the plaintiff, James Windsor, for three thousand and fifty dollars; and the western parcel, containing half an acre, by James K. Friday, for eight hundred and seventy-five dollars. The conveyances to the purchasers were given in the name of Black by his attorney, N. A. Peay, and Peay and Fenton executed separate instruments under seal, whereby they jointly warranted the titles to the purchasers. The net proceeds of all the sales amounted to about eighteen thousand seven hundred dollars, and were applied to the judgment for fifty thousand dollars, leaving a large balance of that judgment unpaid.

On December 18, 1854, Friday sold and conveyed, for one thousand five hundred dollars, the parcel he had purchased, to the plaintiffs, William Clarkson and others, trustees of the Church of the Mediator, and they shortly afterwards erected valuable improvements on the same, and expended in such improvements considerable sums of money.

On October 21, 1854, Windsor and the defendant, James T. Sims, entered into a bi-

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lateral written contract, by which *Windsor agreed to sell to Sims the central parcel for three thousand seven hundred dollars, "and to make good and sufficient titles to the said property," and Sims, having paid one hundred dollars in cash, agreed to pay the balance of the purchase-money in instalments, with interest. Before this contract was made, Windsor had mortgaged the premises to the Columbia Building and Loan Association for two thousand dollars. Sims was put in possession of the premises, and expended considerable sums of money in making improvements thereon. In April, 1855, he paid Windsor one hundred dollars more on account of his purchase, but, learning about that time of the mortgage above-mentioned, he declined making any further payment.

Amongst the judgments against Black at the time of the sales of his property by Peay were two, owned by Mrs. N. M. Caldwell, one in her own name for one hundred and ninety-five dollars fifty cents, and costs, and the

other in the name of J. T. Goodwyn for two hundred and thirty-two dollars thirty-seven cents, and costs, both signed October 8, 1852. This creditor had not consented to the sales made by Peay, and in the fall of 1855, Jesse Dent, the then Sheriff of Richland District, by direction of Mrs. Caldwell's attorney, levied on the whole of the aforesaid lot of about two acres, as Black's property, and on sale-day, in October, 1855, he sold the same to Sims for six thousand three hundred and twenty-five dollars, who paid the purchase-money and received a conveyance from the Sheriff. The sale was publicly forbidden on behalf of the plaintiffs, and also on behalf of Peay, who was present, and who was the only bidder besides Sims. The proceeds of the sale were applied to the judgment for fifty thousand dollars, and paid by the Sheriff to Peay.

Before the Sheriff's sale Ramsay had expended a considerable sum in improvements on the parcel purchased by him. The defendant, H. K. Witherspoon, was his tenant, and, after the sale, he refused to pay him rent.

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Ramsay *then distrained for the rent due him, and Witherspoon issued writs of replevin. Ramsay also obtained from a Court of magistrate and freeholders a writ to have Witherspoon ejected from the premises, as a tenant holding over. This was done, and Witherspoon applied to a Judge for a writ of certiorari, which being refused, he appealed. Sims brought an action of trespass to try title against Ramsay, and gave notice to the trustees of the Church of the Mediator that he was the owner of the parcel they were in possession of, and demanded a recognition of his title.

Sims, in his answer to the bill, said, that he removed from Alabama to Columbia in the fall of 1854, and that his information in reference to the facts stated in the bill which had occurred prior to that time had been obtained since the fall of that year. He further stated (but this part of his answer was not responsive) that after the levy and before the Sheriff's sale he applied to Peay, and proposed to him that he, Peay, ought to purchase the property, and thereby protect the titles of all the claimants; that Peay declined, and that, when the bidding at the Sheriff's sale was going on, he approached Peay and appealed to him, saying it was unnecessary to run the property up, and if there could be an understanding that his, Sim's title should be protected, he would cease bidding, and that Peay again refused.

The prayer of the bill was, that Sims be enjoined from prosecuting his action of trespass to try title against Ramsay, and from bringing an action to recover possession of the parcel claimed by the trustees of the Church of the Mediator; that Witherspoon be enjoined from prosecuting his writs of replevin, and his appeal from the order re-

fusing a writ of certiorari; that the contract between Windsor and Sims be rescinded, and possession restored to Windsor, or that specific performance be decreed, and Sims be required to pay Windsor according to the terms of his contract; that, if the plaintiffs' titles should not be adjudged valid,

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then that Peay be *required to make good his warranty to plaintiffs respectively, and for general relief.

The bill stated and the answers admitted that Fenton was dead, and that he died insolvent.

Peay died after his answer had been prepared and sworn to, and his executors, having been made parties, adopted the same and filed it as their answer. In this answer no objection was taken to the jurisdiction of the Court in reference to the claim for relief under Peay's warranty of the titles of the plaintiffs.

The decree of his Honor is as follows:

Carroll, Ch. The material facts involved appear in the pleadings.

Of the questions that have been presented, the most important is that which relates to the purchase by the defendant, Sims, at the sale by the Sheriff, Jesse Dent, in October, 1855. To the allegation of the bill that that sale was brought about by his procurement, and at his instigation, James T. Sims opposes his explicit denial, which has not been controverted by proof. It was contended that the sales made by N. A. Peay in December, 1853, and January, 1854, were with the concurrence of all the judgment creditors of Joseph A. Black, who could rationally hope to be paid out of the property sold, and with the consent of Charles Neuffer, then Sheriff of Richland, to whom were paid the full costs and commission that he would have been entitled to had he sold the property directly; that the entire proceeds of the sale were appropriated towards payment of Black's judgment debts, according to their legal priority, and that therefore the sales in question should be regarded as having been made substantially by the Sheriff himself. It does not so appear to the Court. The sales referred to were effected through an auction-

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eer appointed by Peay, and the conveyances for the lots sold were by deeds executed by Joseph A. Black through his attorney in fact, N. A. Peay. The allowance of costs and commissions to the Sheriff, it is to be inferred, was to induce him to forbear interfering under any of the numerous executions against Black then in his office. It is apprehended that the sales in question must be regarded in substance, as they were in form, sales by Joseph A. Black himself. That they were unimpeachably fair must be conceded. To advance the sales and secure the highest prices, the lots in the town of Columbia were sold upon credit, Peay and James Fenton en-

gaging to guarantee the title, and the wife of J. A. Black consenting to relinquish her dower to the purchasers respectively. As might have been expected, the prices obtained for the lots were fair and full, and no complaint is made upon that head. It is true that there were judgments and executions against Black prior in date to those of Mrs. N. M. Caldwell and J. T. Goodwyn for sums in the aggregate greatly exceeding the value of Black's entire estate. Had the Sheriff permitted the whole of Black's property (supposing it to be personality) to be removed from the State, no action could have been maintained by Mrs. Caldwell or J. T. Goodwyn against him, because, upon its being shown that, had the property been sold by the Sheriff, no part of the proceeds would have reached their executions, it would have appeared that they had sustained no injury. *Gains v. Downs*, Harp. 72. It is argued that if the Sheriff would not have been answerable to the junior judgment creditors referred to, for allowing Black's property to be removed, still more clearly would he not have been responsible to them for simply neglecting to levy and sell; and, if so, then the plaintiffs in the junior executions had no legal remedy to have them enforced; that the rights of the plaintiff in execution indicate and limit the rights of the purchaser, and if the junior executions be not enforceable, it results that the sale under them was inoperative and void. The force of

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*the argument is not perceived. Judgments at law bind the land of the debtor according to their priority. The liens for their respective amounts which they impose are not, however, to be understood as successive assignments of equivalent portions of the debtor's land. If such was their character, there would be great merit in the view that has been suggested. But it is a misconception so to regard them. They do not constitute property in the land itself, nor a right of action for any portion of it, but are more properly charges upon it. 2 Story Eq. S. 12, 15. The lien, after all, amounts only to a security against subsequent purchasers and incumbrancers. The judgment creditor gets no estate in the land, and, though he should release all his right to the land, he might afterwards extend it by execution. 4 Kent. Com. 472; *Braic v. Duchess of Marlborough*, 2 P. Wms. 491.

The judgments at the suit of Mrs. Caldwell and J. T. Goodwyn, upon being duly signed and entered, undoubtedly bound the lots in controversy. Although no portion of the proceeds arising from the sale under the executions founded upon those judgments was applicable to them, the sale was nevertheless effectual. An execution is considered as a mere authority to sell, without regard to the distribution of the fund afterwards. *State v. Laval*, 4 McC. 336. It does not ap-

pear that the liens imposed by the judgments of Mrs. Caldwell and Goodwyn were removed, or in anywise impaired, prior to the sale by Sheriff Dent, in October, 1855. Certain of the senior judgment creditors of Black consented to the sale of his property by N. A. Peay. But there is no evidence, nor is it alleged that Mrs. Caldwell and J. T. Goodwyn, or either of them, ever assented to such sale, or were at all cognizant of it. The Court perceives no sufficient grounds to authorize its interference with the defendant, Sims, in his enjoyment and assertion of the legal title which he acquired under the conveyance from the Sheriff, Dent. The relief which is prayed on behalf of the plaintiff, Ramsay,

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*against the defendant, H. K. Witherspoon, is incidental to that sought against Sims, and must be denied, as that has been. As the defendant, Sims, was in possession of the lot conveyed to James Windsor by Joseph A. Black, under a contract with Windsor for its purchase, he cannot set up the title he acquired from the Sheriff as hostile or paramount to that of his vendor, or repudiate his agreement in that behalf.

There is no reason to doubt that Windsor believed himself the owner of the lot, unincumbered by any judgment debt against Black at the time of its sale to Sims. If a vendee, entering before conveyance, purchase an incumbrance or outstanding title affecting the land, the vendor is entitled to the benefit of such purchase, upon reimbursing the purchaser what he has paid to perfect his title. *Scott v. Woodside*, Car. Law. Jour. 178; *Sugd. Vend.* 188; 1 *White's Lead. Cas.* 57. From the price of the lot under his contract with Windsor, Sims has the right to retain its cost at the sale of the Sheriff, Dent, but no more.

In contracts for the sale of real estate, the agreement to sell implies an agreement to convey a good and unincumbered title, unless the contrary appears by countervailing stipulation or evidence. *Sugd.* 24; *Prothro v. Smith*, 6 Rich. Eq. 333.

But there is no occasion here to resort to such implication. Windsor having expressly engaged to make a good and lawful title before he can be admitted to the benefit of his contract with Sims, it is incumbent upon him to remove the incumbrance of his mortgage to the Columbia Building and Loan Association.

As the sale by the Sheriff, Dent, to James T. Sims is sustained, it results that the executors of N. A. Peay are responsible to the plaintiffs, under the covenants of warranty executed by him and James Fenton, already referred to. Fenton is dead and insolvent, and is not represented by any party to this suit. But no objection on that account has

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*been made by the executors of Peay, and the insolvency of Fenton's estate renders un-

availing, probably, any claim by them for contribution.

It is ordered and decreed that the bill be dismissed in respect to so much thereof as seeks to impeach the title of James T. Sims, under his conveyance from the Sheriff, Jesse Dent, and to restrain him in the assertion at law of his said title, as also in respect to so much thereof as relates to H. K. Wither- spoon.

It is further ordered and decreed, that if the plaintiff, James Windsor, shall, within thirty days next after the filing of this decree, disincumber the lot sold by him to James T. Sims of the mortgage above-mentioned, then that the Commissioner take an account of what remains unpaid of the purchase-money due by said Sims to James Windsor for said lot, after deducting therefrom the price, to be ascertained by the Commissioner, of said lot at the sale made by Jesse Dent, Sheriff, to said Sims; and that the balance of the purchase-money, when ascertained, be paid by J. T. Sims to said Windsor, upon the latter executing to the said J. T. Sims a proper conveyance for said lot, to be settled by the Commissioner. But if the said James Windsor shall fail to disincumber the said lot of the mortgage aforesaid within the time mentioned, then it is ordered and decreed that his bill stand dismissed out of this Court as against the said J. T. Sims; and it is further ordered, that the Commissioner inquire and report what sums are of right due and payable to the plaintiffs respectively by the executors of N. A. Peay under his covenants of warranty aforesaid.

The executors of N. A. Peay, deceased, appealed from the decree, upon the grounds:

1. That the sale made by N. A. Peay under the power of attorney from Joseph A. Black was a valid and legal sale, notwithstanding the existence of the two inconsiderable and

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*unsatisfied junior executions of N. M. Caldwell, and J. T. Goodwyn for Mrs. Caldwell, against Joseph A. Black, for the following reasons, viz.:

All the judgment creditors of Joseph A. Black, whose claims could by any possibility be reached by the sale of all of his property, real and personal, had given their written consent that said sale should be made by the said N. A. Peay instead of by the Sheriff.

That Sheriff Neuffer, having assented that the sale of Black's property should be made by Peay under the power of attorney, and having received his commission thereon as Sheriff, thereby adopted said sales as his own, and virtually made them Sheriff's sales.

That the object in making said sales by an agent instead of by the Sheriff, was to enable the sales to be made on a credit, and thus cause the property to sell for better prices, and thereby benefit the judgment creditors.

That said sales were bona fide, equitable and fair, and by extending credit to purchasers, and by the voluntary guarantee by Peay and Fenton of the titles to the property sold, the prices thereof were greatly enhanced, and the creditors of Black benefited to that extent.

That said sales being thus fair and equitable, and Black's creditors highly benefited, and nobody in any manner injured or prejudiced thereby, it would be contrary to the principles and practice of this Court to set them aside on a merely technical ground, viz., the existence of two small judgments, which have not been reached, and by no possibility could be reached by the sales of all of Black's property, nor by double that amount.

2. They respectfully except to so much of the decree as directs the Commissioner to take an account as against the executors of Peay, of the sums due and payable to the purchasers, whose titles had been warranted

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by Peay and Fenton *jointly, on the ground that this Court will not undertake to assess the damages for a breach of warranty of title to real or personal property.

The trustees of the Church of the Mediator and Nathaniel Ramsay and James Windsor appealed from the decree sustaining the purchase of the lots by J. T. Sims, and adopted the first ground of appeal taken by the executors of Peay, and the reasons therein assigned for reversing the decree.

2. Sims had notice of appellants' rights before he bought, and he ought not to be permitted, in this Court at least, to avail himself of the legal advantage he has sought to secure.

3. It is respectfully submitted that if Sims' purchase is set aside, he will merely lose the benefit of a speculation, and, provided the purchase-money he paid is refunded, he will sustain no loss. The estate of Peay received the benefit of the money, and should be required to refund.

4. And it is further respectfully submitted, that if Sims' purchase is sustained, he should be required to pay to these appellants or to the executors of Peay the value of Mrs. Black's dower, which was assigned to these appellants; all parties being before the Court.

Arthur and Talley, for the executors of Peay.

De Saussure, for plaintiffs.

Bauskett, for Sims.

The opinion of the Court was delivered by

DUNKIN, C. J. The rule of Sheriff's sale is caveat emptor. No one is obliged to purchase; but the officer is obliged to sell, if bidders can be found. It is for the interest of the public, not only of the creditor and

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the debtor, but also of *purchasers, that

these sales should be protected. The bidder is entitled to the legal interest of the defendant in the execution and whatever the plaintiff had the right to sell, neither more nor less. The purchaser must look to that; and no infirmity in the title of the defendant, no defect in the quality of the article sold, will release him from his obligation to comply with his bid. So, on the other hand, mere inadequacy of price, however startling, in the absence of all fraud, will afford no ground to impeach his purchase. See *Coleman v. Bank of Hamburg*, 2 Strob. Eq. 285 [49 Am. Dec. 671]. The plaintiff in a junior execution, has the right to require that his debtor's property shall be sold by the Sheriff, not only that free competition may secure a full price, but that he may have the official obligation of the Sheriff for the due and regular appropriation of the sales according to the legal priority of the executions. It is necessary to bear in mind these general and well-settled principles when the circumstances of this case are under consideration. The defendant, Sims, according to his answer, removed from Alabama to Columbia in the fall of 1854, and on 21st October, 1854, purchased from Windsor the central lot for three thousand seven hundred dollars, took possession of the premises, and had made improvements of considerable value, when, in the spring of 1855, he discovered that the premises were under mortgage by Windsor for two thousand dollars. Having paid one hundred dollars on his purchase, he declined to make any farther payment until the incumbrance was removed. In the succeeding fall he found the lot which he had thus purchased from Windsor, with the adjoining lots on each side of him, constituting together two acres, levied on by the Sheriff of Richland District, under two executions against the former owner, Joseph A. Black, and advertised by the Sheriff to be sold in a body on the sale-day in October. The answer denies any agency or interference whatever on the part of the defendant in procuring this

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levy, and *the Chancellor reports that this denial was uncontroverted by proof at the hearing. Nor does the sequel prove that he could have any reasonable ground to promise himself advantage from such supposed machinations or contrivance. With the knowledge of an incumbrance on the part of his immediate vendor, of which he had not been originally advertised, and the prospect of an ejectment by a purchaser at Sheriff's sales, under an execution against the former owner, the defendant, Sims, may well have entertained the embarrassment which would induce a proposal to N. A. Peay, which the defendant avers to have been made while the property was under advertisement. Of the proposal itself there is no evidence, except as derived from the answer which, not being responsive in this particular to any charge

in the bill, cannot avail the defendant. But it is suggestive of the relative duties of the parties under the then existing emergency. Sims knew or had been informed of the sale by Peay, as attorney of Black, to the plaintiff. His knowledge extended no further. He was ignorant of the amount which had been received by Peay, or whether it had been applied by him to the executions in the order prescribed by law, or of any other matter relating to his transaction with his principal. A third person, if permitted to bid off the property, might have even less knowledge than himself. Under these circumstances the obvious duty of N. A. Peay was to apply for the aid of this Court to enjoin the further proceedings under the junior executions. He was best able to say whether he had done all which the junior execution creditors had a legal right to require. If the plaintiffs were able to establish such equities, they might themselves have impleaded both N. A. Peay and the execution creditors. But it would be very detrimental to sales by the Sheriff if a notice to the bystanders by the defendant, or any other person, should take the place or have the effect of an injunction. If the defendant, Sims, had relied

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on this and refrained *from bidding, he might too late have discovered his error. Peay himself bid on the property to a larger amount than he had originally received in his sales to the plaintiffs, and when the defendant, Sims, paid his bid of six thousand three hundred and twenty-five dollars, the sales were received by N. A. Peay as the eldest execution creditor, who was thus twice paid for the same land. Whatever demands, legal or equitable, may exist between the plaintiff and the executors of N. A. Peay, deceased, the Court concur with the Chancellor that they have no ground to implead the defendant, J. T. Sims.

As between the plaintiff, James Windsor, his immediate vendor, and the defendant, Sims, there might have been this equity, that if he had purchased the central lot at the October sales, in 1855, for a trifle, the title thus acquired would have perfected Windsor's conveyance, and Sims would be entitled to credit on his purchase only to the extent of his bid at Sheriff's sale. But the facts do not warrant the application of this principle, and the decree of the Chancellor has given effect to the only equity which subsisted between them.

The question presented by the last ground of appeal on the part of the executors of N. A. Peay, deceased, was not made in the pleadings, either by demurrer or otherwise, nor has it been argued in this Court. The Chancellor may well have supposed, as is intimated in his decree, that there was no objection to the account on the part of the executors of N. A. Peay, deceased, and not being urged here, the Court might pass it without further notice. But it may be prop-

er to notice it to prevent misapprehension. Certainly this Court will not entertain jurisdiction to enforce damages for a breach of warranty. This is the general rule. But the defendant, Peay, by his answer, making no objection to the jurisdiction, admits that he received from the Sheriff the proceeds of the sale of the land which he had previously sold to the plaintiffs and whose title he

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had warranted. It would be difficult for him to resist the claims of the plaintiffs in this Court for an account of the sum thus received by him. It seems that the amount exceeded the purchase-money paid by the plaintiffs. The Chancellor, with a view of preventing protracted litigation, and assuming the acquiescence of the executors of Peay, restricts the accounting to the amount of liabilities under the breach of warranty, and the plaintiffs have not objected to the measure of relief afforded to them by the decree in this behalf.

It is ordered and decreed that the decree of the Circuit Court be affirmed, and that the appeal be dismissed.

WARDLAW and INGLIS, JJ., concurred.
Decree affirmed.

12 Rich. Eq. *445

*WHITFIELD WALKER and Others v. LUDY F. PINSON, Ex'r.

(Columbia. May Term, 1866.)

[*Executors and Administrators* Ⓒ469.]

A decree by the Court of Ordinary against an executor for payment of a legacy to the assignee of the legacy, from which decree no appeal is taken, is no bar to a bill in equity by the assignee against the executor for account; the Court of Ordinary having, under such circumstances, no power to enforce its decree.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2002; Dec. Dig. Ⓒ469.]

Before Inglis, Ch., at Laurens, June, 1861.

This case will be sufficiently understood from the Circuit decree, which is as follows:

Inglis, Ch. Joel W. Pinson, late of Laurens District, who died some time prior to the 17th June, 1856, left in force at his death a will, whereof Ludy F. Pinson, the defendant in the present cause, was named and qualified executor. Jabez R. Pinson, a son of the testator, entitled under the disposition of the will to a pecuniary legacy of three hundred dollars, and a distributive share in the residue, on the 17th November, 1856, by his deed of that date, for the consideration of two thousand five hundred dollars to him paid, as is therein recited, assigned and conveyed all his interest in the estate to Whitfield Walker and William G. Glenn, partners in trade under the name of Walker and Glenn. On the 16th October, 1858, Walker and Glenn made a general assignment to Henry L. Fuller of all their

joint and separate estates for the benefit of creditors. Proceedings were subsequently instituted in the Court of Ordinary for Laurens District for an account from the executor and a settlement and distribution of the estate, to which proceedings all the legatees and distributees appear to have been made parties. Walker and Glenn, in their capacity of assignees, intervened, and claimed the legacy to Jabez R. Pinson and his distribu-

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tive share in the residue under his deed to them. The Ordinary made his decree on the 10th June, 1859, determining the residue in the executor's hands, ascertaining the shares of the several parties therein and the amount in money due to each, and ordering payment thereof. He disallowed the claim of Walker and Glenn, on the ground that the deed under which it was asserted had been executed under duress, and was consequently void, and required the executor, Ludy F. Pinson, to pay to Jabez R. Pinson himself the sum which had been ascertained to be the amount of his interest in the estate, to wit, two thousand and ninety-six dollars and ninety-eight cents. All parties acquiesced in this decree except Walker and Glenn, who, affirming the validity of the deed of Jabez R. Pinson and their consequent title to his interest in the estate, either absolutely or at least as a security for the satisfaction of certain claims held by them against him, and alleging error in the judgment in these particulars, brought their appeal upon these grounds: first, to this Court, and failing here, prosecuted the same before the Court of Appeals. At December term, 1859, the cause came to a hearing, and the judgment of the Ordinary, which had been affirmed here, was reversed, and the cause was "remitted to the Court of Ordinary, without prejudice to any equitable defence or claim to equitable relief on the part of Jabez R. Pinson against the said deed, to be asserted before the Ordinary, if he have jurisdiction, or elsewhere, as the said Jabez may be advised."

On the 15th June, 1860, the Ordinary made his final decree in the cause, and therein ordered "that Ludy Pinson, executor of the estate of Joel W. Pinson, deceased, do pay the share of Jabez Pinson in the personal estate of said deceased, amounting to two thousand and ninety-six dollars and eighty-five cents, to Walker and Glenn, assignees under the deed of assignment made by the said Jabez to the said Walker and Glenn, with interest from the 8th March, 1859."

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*Whitfield Walker, William G. Glenn, and Henry L. Fuller bring the present bill against Ludy F. Pinson in his capacity of executor of the will of Joel W. Pinson, alone. It is said at the bar, and to this the stating part of the bill seems to conform, that the object of this suit is to enforce the execution of the Ordinary's decree, although no such relief is spe-

cifically prayed. The defendant objects that neither he nor Jabez R. Pinson was legally notified of the final hearing before the Court of Ordinary when the decree was rendered, of which the execution is now sought. The object of a citation or summons is to make the persons to whom it is directed parties to the proceeding in the Ordinary's Court. When this has been done, the parties must be considered in Court during the whole pendency of the suit, and until its consummation in the final judgment. It may be that, in a case like the present, where the hearing was not upon an adjournment from one day to another, of which all parties must take notice, those interested were entitled to some reasonable advertisement of the time and place of the further hearing. This much, according to the testimony of the Ordinary, the present defendant and Jabez R. Pinson seem to have had. The executor, in person, was verbally notified by the Ordinary of the time for the hearing, and in reply said, he should pay no further attention to it. The attorneys, who had represented Jabez R. Pinson throughout the whole previous course of the proceedings, were told of the day appointed for the hearing, and were requested to attend. They were present, and made no objection, on the ground of want of notice to their client personally, but declared they had no further showing to make for him. It seems to the Court that these parties cannot object to the Ordinary's decree for the want of notice of the hearing.

But has this Court jurisdiction to enforce the execution of a decree rendered in the Court of Ordinary upon a bill for this purpose merely? This Court will, of course, en-

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tertain *a suit to compel an executor to pay and deliver a legacy. But, in the present instance, what was originally only an equity has, by the proceedings before the Ordinary, become a clear legal right. Ordinary v. Mathews, 7 Rich. 30. The demand for a legacy of unascertained value, which the present plaintiffs were equitably entitled, as assignees, to make, has now become merged in a judgment of a Court of competent jurisdiction. That which is here sought to be recovered is a decree in favor of the plaintiffs, Walker and Glenn themselves, against Ludy F. Pinson, the executor, for the payment, by the latter to the former, of a specific sum of money. The proceeding here, in this aspect of the case, is a mere action of debt upon judgment. The remedy is exclusively at law by suit in the Common Pleas. The case of McCullough v. Daniel (Harp. Eq. 255) seems, in this respect, to have been just such a case as the present, and is conclusive against the plaintiffs' right to maintain the suit here.

In McCullough v. Daniel, the plaintiffs, besides seeking to enforce the judgment of the Court of Ordinary previously rendered against the executor, prayed also an account from

him of his administration. The Court, refusing the former relief, gave the latter, and ordered the executor to "account before the Commissioner for the administration of the estate of his testator," without regard to the Ordinary's decree. The report of this case in Harper is very brief. A particular or two may be found added by Hill, reporter, in a note to Miller v. Alexander, where the case is cited with approbation by O'Neill, J., 1 Hill's Eq. 28. In the present cause the only form of specific relief prayed for is, that the "executor, Ludy F. Pinson, may be required by the decree of this Court to come to an account with the plaintiffs for his actings and doings as executor aforesaid, and upon such accounting to pay over to them whatever amount may be ascertained to be due

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them as assignees of Jabez R. Pinson, *with interest and costs." The plaintiffs do not charge any specific errors in the accounting before the Ordinary, upon which his decree was founded, either apparent on the face of it or otherwise, or any fraud on the part of the executor, or collusion between him and the Ordinary, or any other matter of objection as constituting a ground for the examination of the account, or its restatement in this Court. O'Neill, J., in Miller v. Alexander, already referred to, expresses an opinion, obiter, that upon such grounds a decree of the Ordinary might be reviewed in this Court. The case does not, however, so determine, as the question was not necessarily involved. The plaintiffs here insist that the decree of the Ordinary, now under consideration, is final and conclusive. The Court of Ordinary certainly has jurisdiction, at the instance of a residuary legatee, to call the executor to account for his administration, and to ascertain and decree payment of the share, and, except upon appeal, its judgment ought, as it would seem, according to all rule, to be regarded and treated in every other tribunal as conclusive upon the parties. Brown v. Gibson, 1 N. & McC. 326; Starke v. Woodward, Ib. 329; Botifour v. Weyman, 1 McC. Eq. 156. When McCullough v. Daniel was decided, appeals from the decrees made in the Court of Ordinary were required to be taken in all cases (including matters of account) to the Court of Common Pleas, and the practical difficulties attending the investigation of extended accounts, according to the modes of proceeding in that jurisdiction, probably led to some relaxation here of the general rule, and induced this Court to exercise its concurrent jurisdiction, even after decree of the Court of Ordinary. Wallis v. Gill, 3 McC. 475; Ordinary v. McClure, 1 Bail. 7 [19 Am. Dec. 648]; Chambers v. Patton, 1 Bail. 130; Mitchell v. Connolly, Ib. 203; Neville v. Robinson, Ib. 361; Simkins v. Cobb, 2 Bail. 60; Clarke v. West, 2 Rich. 314, are cases conceding or illustrating the embarrassment which such appeals occasioned to the law

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Court. The Act of 1839, *Sec. 13, (11 Stat. 42,) directs that appeals from any judgment, decree, &c., of the Ordinary, "upon a matter of account," shall be brought to this Court; and provides, that "if the Court should approve of said decree, the party in whose favor it may be may forthwith issue his writ of fieri facias to enforce the same; if the Court should modify the said decree, it may order the Commissioner to restate the accounts, and, upon his report made and confirmed, the party in whose favor it may be shall be entitled to a writ of fieri facias to enforce the decree." It can scarcely be, that in this state of the law this Court will sustain an original suit for an account and distribution, when the whole matter of the suit has been already adjudicated between the same parties in the Court of Ordinary. Restrained by the authority of *McCullough v. Daniel*, as well as by sound reason, from decreeing the payment of the judgment rendered in the Ordinary's Court, this Court does not feel at liberty, in the new condition of the statute law, to grant the relief which was accorded in that case, and which is specifically prayed for here, by ordering an account from the executor of his administration. If this could be done in any case of this kind, there is here a defect in the pleadings, as it seems to the Court, which it would be necessary should be first cured. To a bill by a distributee or residuary legatee, calling upon the executor for a general account of his administration and a distribution of the surplus, all those entitled to participate in the distribution, being materially interested in the subject, ought to be made parties for the protection of the executor. And to a bill, by one claiming as assignee of one of the parties originally entitled, for such purpose, it would seem that the assignor should be a party. In the present case, the only parties are the claimants of the single share, as assignees, and the executor. With regret that a delay, already perhaps vexatious, should be further protracted, this Court feels constrained to dismiss the bill, and it is so ordered.

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*The complainants appealed from the decree, and now moved this Court to reverse the same, on the grounds:

1. Because the complainants had no plain and adequate remedy at law, and were relievable only in this Court.

2. Because Henry L. Fuller, the assignee of Walker and Glenn, as well as the said Walker and Glenn, by virtue of their assignment to him, had only an equitable interest in the legacy of Jabez R. Pinson, which was subsequent to the assignment decreed by the Ordinary to be paid to Walker and Glenn, and his only remedy to recover the same was in this Court exclusively.

3. Because the complainants' bill was well filed in this Court for an account against the executor, who was the only necessary de-

fendant, as the decree of the Ordinary fixed the amount of Jabez R. Pinson's legacy, and the other parties interested in the estate of Joel W. Pinson acquiesced therein as well as the said executor.

4. Because the established practice is not to sue at law for a legacy, but to file a bill in this Court.

Sullivan, for appellants, cited 1 Story Eq. Secs. 429, 430, 431; 3 Dan. Ch. Pr. 1689, 1691; *Ludlow v. Simons*, 2 Cain Ca. 1; 10 Johns. 587; *Caldwell v. Giles*, Riley Ch. 120; Sp. Eq. 427; 11 Rich. Eq. 110.

Young and Simpson, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. The principal inquiry is, whether the plaintiff had a plain and adequate remedy at law. After a delay in the proceedings before the Court of Ordinary and in this Court, which the Chancellor says

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has been "already protracted and perhaps vexatious," it would be a source of regret to find that, being now remitted by this Court to the ordinary tribunal, he should find the remedy incomplete. The plaintiff is satisfied with the final decree of the Ordinary made 15th June, 1860; has no ground of complaint or objection, and does not desire to appeal. Under these circumstances, the Act of 1839 affords him no remedy to enforce the decree, either by writ of fieri facias or otherwise.

The original demand in this case was that of a legatee against an executor for payment of a legacy: a subject peculiarly proper for the cognizance of a Court of Equity. The legatee had, however, invoked the aid of the Ordinary, and, pending the proceeding, Walker and Glenn intervened as assignees of this chose in action. They made a general assignment to the plaintiff for the benefit of their creditors. To carry into effect the decree of June, 1860, by requiring an account and payment, these proceedings were thereupon forthwith instituted. The Chancellor declared himself restrained by the authority of *McCullough v. Daniel*, Harp. Eq. 255. In that case it is worthy of remark that, although the prayer of the bill to enforce the decree was not allowed, the defendant was ordered to account in the Court of Equity for his administration of the testator's estate. It appeared in the sequel that he rendered an account, and, on such accounting, the bill of the plaintiff was dismissed. The right of the plaintiff to enforce the decree of the Ordinary in a Court of law is commended in the circuit decree upon the ground, as stated by the Chancellor, that, "according to all rule, the judgment of the Ordinary is to be regarded and treated in every other tribunal as conclusive upon the parties." In *McCullough v. Daniel* this is stated hypothetically. The judgment of the Ordinary, say the Court, "if conclusive against the defendant, may be enforced by an action at law."

The result, however, demonstrated that such judgment was not regarded as conclusive upon

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on the parties; and such has *been the decision of our tribunals even in an action upon the official bond of an administrator. See *Sinkins v. Cobb*, 2 Bail. 60. As we do not think the Act of 1839 affords any aid to the plaintiff in enforcing the judgment of the Ordinary in the existing circumstances, so neither do the provisions of that Act preclude him from asking the same measure of relief as was extended to the complainant in *McCullough v. Daniel*. If there be any defect in the pleadings, it may be amended by proper application to the Circuit Court, to which the cause is remanded; and the decree of the Chancellor is reformed accordingly.

WARDLAW and INGLIS, JJ., concurred.
Decree reformed.

12 Rich. Eq. *454

*THOMAS C. RICHARDSON v. ELIZABETH P. MANNING and Others.
(Columbia. May Term, 1866.)

[Wills ⚡614.]

The testator devised the residue of his estate, real and personal, to his executors in trust, "that they keep the same together during the joint lives of my two brothers J. and T., and that they divide the net proceeds annually between my said two brothers, share and share alike; subject, nevertheless, to the payment of fifty dollars per annum out of each share so divided" to C., and subject also to two other annuities of twenty-five dollars each. "At the death of my two brothers above named" the corpus he directed to be divided between his three nephews on certain conditions mentioned:—*Held*, that J. and T. took an estate in the net proceeds during their joint lives and the life of the survivor of them; that the survivor was not entitled to the whole by implication; and that the executors of J., who had died since the testator, were entitled to his share during the life of T.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1415; Dec. Dig. ⚡614.]

[Joint Tenancy ⚡6.]

An equitable estate *pur autre vie* in income derived from real and personal property is, it seems, personalty, but, even regarding it as an incorporeal hereditament, if there be no devise by the tenant *pur autre vie*, nor special occupant, it goes, on the death of the tenant *pur autre vie*, and during the life of the *cestui que vie*, to the executors of the tenant *pur autre vie*, and they must account for it.

[Ed. Note.—For other cases, see Joint Tenancy, Cent. Dig. § 4; Dec. Dig. ⚡6.]

Before Carroll, Ch., at Chambers, November, 1864.

James B. Richardson, late of Clarendon District, the testator in the cause, died in 1860. His will was dated in 1859. By the first clause he declared:

"First, after all my just debts are respectively paid and discharged, all my real and personal estate which I may die possessed of, I hereby dispose of in the manner following, viz."

In eight of the next eleven clauses he bequeathed specific legacies of inconsiderable value. By the fifth and twelfth clauses he directed his executors to pay two annuities of

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*twenty-five dollars each, and by the sixth clause he bequeathed a pecuniary legacy of one thousand dollars. He then, in the thirteenth clause, proceeded as follows:

"13. I give, bequeath, and devise to my executors hereinafter named all the rest and residue of my estate, both real and personal, in trust, that they keep the same together—that is to say, employ the negro slaves constituting the field-hands, with their families, on the plantation or lands as I may leave them at my death—during the joint lives of my two brothers, John P. Richardson and Thomas C. Richardson, and that they divide the net proceeds of said real and personal estate annually between my said two brothers, share and share alike; subject, nevertheless, to the payment of fifty dollars per annum out of each share so divided, to be paid or applied by my said executors in such way or manner for the sole and separate use and behoof of my sister, Camilla F. Cantey, during the term of her natural life, as they, in the exercise of a sound discretion, may think best; and subject in like manner to the payment of the two other annuities in the fifth and twelfth clauses of this will, already mentioned and directed. At the death of my two brothers above named, it is my will, and I hereby direct, that the whole of the real and personal estate last above given and devised in trust be divided between my three nephews—John Peter Richardson, Jr., Charles Richardson, and James M. Richardson—to them, their heirs and assigns forever, with limitations and restrictions, and in portions as follows, viz.: one-half or moiety to go to the said John P. Richardson, Jr.; the other half or moiety to be equally divided between the said Charles and James M. Richardson, share and share alike. And it is hereby declared that the bequest and devise to the said John P. Richardson, Jr., is made upon the proviso and express condition that he purchase from the said Charles and James M. Richardson the other half or moiety, given and devised to them, at a fair and rea-

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sonable price; and in the event of *disagreement, the price to be determined by two disinterested appraisers, mutually chosen, with liberty to call in an umpire in case of disagreement. It being my express will and desire that the real and personal estate aforesaid should not be divided or separated, whereby husbands may be parted from their wives, or children from their parents. And in the event of the death of the said John P. Richardson, Jr., or his refusal to purchase, my nephew, Richard J. Manning, to take the half or moiety hereby given and devised to

the said John P. Richardson, Jr., under the same proviso and conditions; and in the event of the death of the said Richard J. Manning, or his refusal to purchase as aforesaid, the said Charles Richardson to take the half or moiety last aforesaid, under the same proviso and conditions. And I do hereby enjoin my said executors, during the continuance of this trust, to see that the slaves herein given and bequeathed under it be well fed and clothed, and humanely treated; and that the laboring hands, besides the customary allowance of corn for bread, be allowed half a pound of wholesome meat daily."

The will was duly proved before the Ordinary and the plaintiff alone qualified as executor. The brother of the testator, John P. Richardson, having died, this bill was filed by the executor and trustee against the heirs at law and distributees of the testator, the executors of John P. Richardson and the remaindermen mentioned in the thirteenth clause of the will, praying that it might be determined who were entitled to the net proceeds of the estate since the death of John P. Richardson.

The decree of his Honor is as follows:

Carroll, Ch. James B. Richardson died in 1860, leaving of force a last will and testament. After sundry bequests, the testator gives the entire residue of his estate, real and personal, to his executors, in trust, that

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they keep the same *together during the joint lives of his two brothers, John P. Richardson and Thomas C. Richardson, and that they divide the net proceeds of said real and personal estate annually between his said two brothers, share and share alike. At the death of his two brothers, the testator devises the whole of his real and personal estate to three of his nephews, in absolute property, subject to certain conditions and limitations which he prescribes. The testator's brother, John P. Richardson, died in January, 1864. Thomas C. Richardson, the other brother, still survives. The matter to be considered and adjudged is, what disposition shall be made of the residuary estate, or its proceeds, during the period to intervene between the death of J. P. Richardson, the elder, and the decease, whenever it may occur, of his surviving brother, Thomas C. Richardson. If the residuary disposition in favor of the two brothers be understood to import a bequest for the term of their joint lives only, then, one of them having died, the interest of both has ceased. If the will be thus construed, can the nephews take presently, under the limitation to them, either the corpus or the net proceeds of the residuary estate? Their claim to the corpus is opposed by the invincible objection that the event has not yet occurred, upon the happening of which their estate is to vest in possession. That event is not the death of one, but of both the brothers, and one of them yet survives. The same objection presents

itself to any supposed right of the nephews to the net proceeds of the residue. Indeed, they have even less pretence of right to the proceeds than to the corpus. The interest of the brothers in the residue relates to the net proceeds only, while it is the corpus of the residuary estate that is given to the nephews. It follows that nothing whatever of what is given to the brothers is, in any contingency, limited to the nephews. The like consequences, in respect of the nephews, must ensue, should it be held that, upon the death of J.

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P. Richardson, Sr., his interest only *ceased, while that of his surviving brother continued unimpaired. The obstacles which preclude the nephews from taking the whole of the corpus, or net proceeds, of the residuary estate, would as effectually bar them from all interest in a moiety or any other portion of the same during the life of Thomas C. Richardson.

The bequest in favor of the testator's brothers, it is to be observed, forms a part of the residuary disposition of the will. It has been shown that if they were held to have taken an estate which terminated upon the death of J. P. Richardson, the elder, still no interest in the residue in that event would devolve upon the nephews, under the limitation to them, during the life of the surviving brother. The result would be that, from the death of J. P. Richardson, Sr., until the decease of his brother, Thomas C. Richardson, the entire residue, comprising the great bulk of the testator's estate, would be wholly undisposed of.

In the first clause of his will the testator declares that, by the execution of that instrument, his purpose was to dispose of "all the real and personal estate" of which he might die possessed. In the interpretation of wills, it is said that, of two modes of construction, that will be preferred which will prevent intestacy; and that, when a residue is given, every presumption is to be made that the testator did not intend to die intestate; 2 Roper Leg., citing 4 Ves. 59. It is worthy of remark that the words, "during the joint lives of my two brothers," are not to be found among the terms descriptive of the estate given to the executors in trust. Nor do they appear in the immediate description of the interest given to the two brothers. They are employed in the primary direction addressed to the executors, which is, that they shall keep together all the residue of the testator's estate, both real and personal, during the joint lives of his two brothers, John P. and Thomas C. Richardson. It is manifest that the testator never contemplated any disposition of

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his residuary *estate which would involve its division or separation into parts. On the contrary, to guard against it thoroughly and effectually seems to have been the object of paramount consideration with him. His di-

rection, that the executors keep the residuary estate together, is explained by the testator to mean, in his own words, "that they employ the negro slaves, constituting the field-hands, with their families, on the plantation or lands, as I may leave them at my death." It was an arrangement dictated by a sense of humanity, on the part of the testator, towards his negro slaves. He adheres to it, and pursues it throughout all the ulterior limitations of his residuary estate. At the death of both the brothers, although the entire residue is given to three of his nephews, it is upon the express condition that one of them, J. P. Richardson, Jr., shall purchase from the other two their shares in the same, at a reasonable price; and should they disagree as to the amount, provision is made for having it determined by two disinterested persons, with liberty to call in an umpire in case of disagreement. Should J. P. Richardson, the younger, refuse to purchase, or be then dead, the moiety given to him is devised to another nephew, Richard J. Manning, upon the same condition; and in the event of his death or refusal to purchase, it is given, for the third time, upon the same condition, to Charles Richardson, the brother of J. P. Richardson, Jr.; "it being my express will and desire," says the testator, "that the real and personal estate aforesaid should not be divided or separated, whereby husbands may be parted from their wives, or children from their parents." But if it be held that the estates of both the brothers, determined upon the death of J. P. Richardson, Sr., then, as we have seen, the entire residue is undisposed of from that date until the decease of Thomas C. Richardson. The trust being at an end, the executors would be bound to deliver up the whole residuary estate to the persons entitled under the statute disposing of intestate property,

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and they, at their *pleasure, might proceed at once to a partition of the same. Adams, Eq. 30. The effect of it would be, that the declared and persistent purpose of the testator to prevent the dispersion of his residuary estate would be utterly defeated, and that such result too would be the necessary and inevitable consequence of the primary arrangement made to avert it; for it would be too absurd to impute to the testator the expectation that both his brothers would die at the same instant of time. If the words employed by the testator are rationally susceptible of another construction, unattended by such consequences, such construction, undoubtedly, should be preferred.

If the testator be understood as intending that the trust created in favor of his two brothers should subsist until the death of the survivor of them, then there will be no chasm in the limitations of the residuary estate. His purpose to keep it together undivided will then be fully secured. It will re-

main *en masse* in the custody of the trustees, the executors, until the event has happened upon which it will devolve in possession upon the nephews; and in their hands it will be protected against division by the specific and guarded conditions to which we have already referred. No sufficient objections to such construction are perceived. The will is unskilfully framed, and is manifestly the work of a draughtsman unfamiliar with the rigorous exactitude requisite in the preparation of legal papers. If the words, "during the joint lives of my two brothers," be regarded as only restricting the estate of the trustees, then the gift to the brothers would be primarily indefinite. Its limitation, to be sure, would be found in the succeeding disposition in favor of the nephews. But that would imply a gift to the brothers until the death of the survivor, and the estate of the trustees would be correspondingly enlarged; 2 Jarm. 200. If, however, the words in question be considered as applicable to the interests given to the brothers, still they cannot be read

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*to import that such interests are to determine upon the death of either. Such a construction would present a singularly fantastic form of disposition; a bequest of the great bulk of the testator's estate to two of his brothers, determinable upon the death of either of them, and involving, of necessity, an utter intestacy of indefinite duration; a description of gift devoid of all rational motive or purpose on the part of the donor. But it is not deemed necessary to dwell upon this point. For the reasons already suggested, we are forbidden by the will itself to attach such meaning to the words under consideration. They cannot then be understood in their ordinary sense. It is admissible, therefore, to consider whether the words in question be not susceptible of some other meaning, not conflicting with the other provisions of the instrument in which they are found.

The words, "during the joint lives of my two brothers," may have been used in the sense of "during the lives of my two brothers both," or as equivalent to the phrase, "until the death of both my brothers." Either of the forms of expression suggested, it is conceived, when taken in connection with the context, would import a gift to the brothers not determinable until the death of the survivor. If the words referred to be not susceptible of such signification, then, it is apprehended, they must be rejected altogether, because wholly irreconcilable with the general plan of disposition, so plainly and distinctly expressed as to leave no doubt of its meaning.

It is considered, therefore, that upon the death of J. P. Richardson, Sr., no interest whatever in the residuary estate or its proceeds either passed to the nephews, under the limitation in their favor, or remained undisposed of by the will. The result is,

that Thomas C. Richardson of course retains unimpaired his moiety of the net proceeds of the residue; and the sole question now

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to be considered is, upon *whom devolved, at the death of J. P. Richardson, Sr., the moiety bequeathed to him?

It is contended, on the part of Thomas C. Richardson, that the bequest to the brothers created a tenancy in common, with an implied gift to the survivor for life. In support of this claim, reference has been made to the cases of *Armstrong v. Eldridge*, *Tuckerman v. Jeffries*, and *Pearce v. Edmeades*, all which are cited and commented upon in 2 Jarm. on Wills, 164, 165, 166. The cases referred to are not regarded as any authority whatever for the implication of an estate for life to the surviving brother. In each of them it was held that the surviving donee took, by virtue of the *jus accrescendi*, incident to the express estate of joint tenancy, conferred by the words of the will. In the two cases first mentioned the decision is placed avowedly upon that ground; and in *Pearce v. Edmeades* it may fairly be collected that the judgment was intended to stand upon no other foundation. Referring to the words of severance in the gift, Lord Abinger remarks: "But when these words are combined with, or followed by, others which would make a tenancy in common inconsistent with the manifest design of the subsequent bequest, they may be taken to indicate, not the nature, but the proportion of the interest each party is to take." Reading the words of severance in the sense suggested, the bequest in that case was, in effect, to the two children of M., without more—a form of gift which, it has long been settled, makes the donees joint tenants. 2 Jarm. 157. In the case of *Armstrong v. Eldridge*, and *Pearce v. Edmeades*, it is further to be observed that no claim was, or could have been, set up, as in this case, on behalf of the personal representatives of the deceased legatee. The bequest in each of them was expressly in equal shares, during the respective lives of the legatees; and, in the case last mentioned, the material circumstance occurs, which is wanting here, that if the surviving brother did not take his

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sister's *share, at her death, it was thenceforth for the remainder of his life wholly undisposed of by the will.

Of the case of *McDermot v. Wallace*, 5 Bevan, 142, which has also been cited, I have no knowledge, except such as has been furnished by the written argument submitted, not a volume of the English Chancery Reports being accessible to me. The testatrix there gave "to Mary and Elizabeth Grant the annual sum of twelve pounds in the long annuities, to be equally divided during their lives, after which" she gave the said sum to Elizabeth McDermot. Elizabeth Grant died in 1831, and Mary Grant in 1841,

and the question was, who was entitled to the dividends between 1831 and 1841? The contestants were the representatives of Mary Grant and Elizabeth McDermot. The judgment of the Master of the Rolls was in favor of the representatives of Mary Grant, but the ground of the decision is not indicated.

It is argued that infinite violence to the will would have been done by rejecting the words, "equally to be divided," and that the surviving legatee for life could not have taken by virtue of the *jus accrescendi*. The words referred to were not more potent to repel such construction than were the words, "in equal shares," in *Pearce v. Edmeades*. If the latter words were properly understood to indicate not the nature, but the proportion, of the interest to be taken by each legatee, it is not perceived why the words, "equally to be divided," having identically the same meaning, should not receive the same interpretation.

An estate is sometimes devised to a plurality of persons, as tenants in common, with limitation over, in the event of their all dying, leaving no issue. In such cases cross-remainders are implied between the donees, to take effect at the death of any of them, without issue surviving. The implication is founded upon the idea that the testator, by postponing the operation of the limitation over until the death of all the first takers without issue, has plainly manifested his

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intention *to give over the whole property at one and the same time as one estate. "The method to bring the estate together," says Mansfield, C. J., "is to imply cross-remainders." *Georges v. Webb*, 1 Taunt. 234. But the reasons for such implication have obviously no application to the present case. It is not necessary at all that what was bequeathed to the two brothers should be "brought together" in the hands of Thomas C. Richardson, to be delivered at his death, to the nephews in bulk, and as one estate; for, as already remarked, nothing of what is given to the brothers is, in any event, limited to the nephews. Whether from and after the death of J. P. Richardson, the elder, the net profits bequeathed were thenceforth divisible between his personal representatives and Thomas C. Richardson, or belonged solely to the latter until his death, cannot in anywise affect the corpus of the residue, which alone is limited to the nephews. That, in either event, will remain in the custody of the testator's executors, to be surrendered to the nephews at the death of the surviving brother.

It is said that "an estate by implication is never allowed in any case, except from necessity, which must be apparent on the face of the will;" and a necessary implication is defined to be such a strong probability that an intention to the contrary cannot be supposed. *Carr v. Porter*, 1 McC. Ch. 86; *Addison v. Addison*, 9 Rich. Eq. 61, 63; 1 Jarm.

465. The testator has bequeathed to his two brothers interests of the same nature. If, pursuing his idea of effecting equality between them in the measure of his bounty, he thought fit to make them equal also in the amount of actual profits to be derived from his bequest, by providing that the interest of each, whether he was personally to enjoy or not, shall endure for precisely the same space of time, it would be difficult to show that such a disposition was senseless or absurd. It may be an unusual form of

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gift, but surely it is *not so preposterous that the intention of making it cannot be supposed to have been entertained by the testator.

It has been shown that the interest taken by the two brothers in the residuary estate is to be had and held by them, in some mode or other, until the death of both. If this be assumed, then, in considering what disposition should be made of the share of J. P. Richardson, the elder, after his death, we have but to read and give effect to the plain and unambiguous words of the will. Certainly the interest bequeathed to the two brothers bears but little resemblance to an estate in joint tenancy. The bequest in their favor is to be found in the direction to the executors, "that they divide the net proceeds annually between my two brothers, share and share alike." Not only is there no necessity for implying cross-remainders between them, but there would be no propriety in doing so. There is nothing in the terms of the bequest importing that the testator contemplated that either of the brothers should ever take more than a moiety of the net profits; and we have seen that no such inference is deducible from the succeeding limitation, or the event upon which it is to go into effect. As the interest of the brothers in the residue is regarded as an interest to continue until the death of both, the will should be read as if directing the executors to divide the net proceeds of the residuary estate, annually, share and share alike, between the two brothers during their joint lives, and the life of the survivor. Bequests in those identical words have been adjudged to confer upon each of the legatees an interest which, upon the death of any one of them in the lifetime of the others, devolved upon his personal representative, and not upon the survivors. The cases referred to are *Jones v. Randall*, 1 Jac. & Walk. 100, and *Eales v. Earl of Cardigan*, 9 Sim. 384. If such is the construction adopted in England, where the right of survivorship among joint

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tenants still exists, surely it is *admissible in this State, where the *jus accrescendi* has been long since abolished.

It is adjudged that, under the will of James B. Richardson, deceased, his brother, John P. Richardson, the elder, took an interest in one moiety of the net proceeds of the

residuary estate, to continue for and during the joint lives of himself and his brother, Thomas C. Richardson, and the life of the survivor of them, and that, upon the death of J. P. Richardson, the elder, his said interest became transmitted to the defendants, his executors.

And it is ordered, if the executors of the said J. P. Richardson so desire, that the said Thomas C. Richardson account with them before the Commissioner for the one moiety of the net proceeds of the said residuary estate that have accrued since the death of the said J. P. Richardson, Sr.

Let the costs of all the parties be paid out of the net proceeds of the said residuary estate, in the hands of the plaintiff, Thomas C. Richardson.

The plaintiff appealed, and now moved this Court to modify the decree, on the ground, that his Honor has erred in decreeing that the interest in one moiety of the income devised to Governor John Peter Richardson continued for and during the joint lives of himself and his brother, Thomas C. Richardson, and the life of the survivor of them; and that, upon the death of Governor Richardson, his said interest became transmitted to his executors; whereas it is respectfully submitted that, on the death of Governor Richardson his interest in the said income was transmitted to the survivor, Thomas C. Richardson, for the residue of the life of the said survivor.

James Simons, for appellant.

J. S. G. Richardson, contra. The question arises under the thirteenth clause of the tes-

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tator's will, and relates to the *disposition of the income or net proceeds of the estate in the interval that has elapsed and will elapse between the death of John P. Richardson and Thomas C. Richardson.

There are four sets of claimants. It is said, (1,) that the net proceeds are only disposed of during the joint lives of the two brothers, and that, as one of them is dead, they must now go until the death of the other to the heirs at law, or distributees, of the testator; (2,) that they are disposed of as part of the rest and residue of the estate, and must accumulate for the benefit of the three nephews, the remaindermen or executory devisees; (3,) that the surviving brother is entitled to the whole of them for life; and, (4,) that they must still be divided as they were in the lifetime of the deceased brother, the surviving brother, Thomas C. Richardson, taking one-half, and the representatives of the deceased brother, John P. Richardson, taking the other half.

He should contend for the fourth position as the true legal construction of the will.

To elucidate his ideas and avoid, probably, much circumlocution hereafter, he would beg leave to preface his remarks by referring to a few elementary principles, and by inquiring

as to the nature of the estate taken: (1.) by the executors or trustees; (2.) by the two brothers or tenants for life; and, (3.) by the three nephews, the remaindermen, or executory devisees. This inquiry would seem to be proper, if not necessary, as the foundation of his argument upon the main point, that is, as to the quantity of interest taken by the two brothers.

Two of the divisions of things mentioned by the writers on the civil law, are, (1.) things corporeal and things incorporeal, and, (2.) principals and accessories. Things corporeal include every thing that is tangible, as land, slaves, horses, cattle and so on. Things incorporeal include estates and rights and duties of every class and kind. By prin-

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cipal *things they mean what we call the corpus, and by accessories they mean crops, profits, hire, rent, interest, dividends, and every thing that this testator calls "net proceeds."

Now a testator having an absolute estate, or interest, legal and beneficial, in the principal things or corpus, may carve out of his estate or interest as many smaller estates or interests as he pleases, and may annex to his gifts as many conditions and limitations as the law will permit. He may give the dry corpus to one absolutely, or for life, or for years, and may provide that in a certain event it shall go to others, and he may separate the accessories from the corpus and give them to others. What the testator in this case did, appears to be this. He gave (1) the dry corpus to his executors; (2) then, separating for a limited time the accessories from the corpus, he gave them, that is, the accessories, to his two brothers; and, (3,) he gave, after the death of both the brothers, the principal things or corpus, to his three nephews. The executors, or trustees, became the owners of the principal things or corpus, but their ownership is a dry one—that is, they have no beneficial interest in the income, accessories, or proceeds. The two brothers acquired an estate for a limited time in the income, accessories, or proceeds, and that estate gives them the right, as long as it shall last, to take for their own use and absolutely the income, accessories, or proceeds as they are annually produced; that is, their estate, or interest—their juridical, ideal, incorporeal right—is, for a limited time, but the fruits which that estate from year to year yields they take absolutely. Their estate is an incorporeal thing in the nature of a usufruct, or rent charge, or more properly of an annuity, and that estate they take but for a limited time; the fruits which that estate annually produces are corporeal things, and those they take absolutely. The gift to the three nephews is of the corpus and not in terms of the accessories; but, inasmuch as

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they will take the *corpus at a time when the

accessories will no longer be separated from it, they, the nephews, will take the accessories also, not because they are given to them in terms, or expressly, but because they are not given to others. They will take the accessories, not by direct gift from the testator, but under the maxim *accessorium sequitur suum principale*. It follows most clearly, that they do not take as remaindermen the estate which is given to the two brothers. That estate, when the interest of the two brothers ends, will simply have ceased. It was created for their benefit alone, and is not limited over at their deaths to any one. It is nothing more or less than an annuity of an uncertain amount, created for a special purpose and a limited time, which during the time is an incumbrance on the principal estate, and which, when that time is out, will simply cease and fall back into the principal estate. The importance of bearing these things in mind would, he thought, appear hereafter.

Having thus shown the nature of the estate or interest which the different parties take under the thirteenth clause of the will, the next question is, What is the quantity of interest given to the two brothers? How long did the testator intend that their estate should last? Did he intend that it should last only during their joint lives, or did he intend that it should last as long as they both should live, or, in other words, during their joint lives and the life of the survivor?

His first position was, and this he thought the true construction of the will, that the two brothers take, by the express provisions of the will, an estate which will last as long as they both shall live, or, in other words, until the death of the survivor of them. But if the Court should not adopt that view, then he submitted that they take an express estate during their joint lives, and an estate by implication, not in the survivor alone, but in both, from the death of one until the death of the survivor.

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*That the testator intended to dispose of his whole estate is clear. He says so in the first clause of his will. In the next eleven clauses he disposes of some comparatively inconsiderable parts of the estate, and then, in the thirteenth and last disposing clause, he says: I give to my executors "all the rest and residue of my estate, both real and personal, in trust, that they keep the same together during the joint lives of my two brothers," "and that they divide the net proceeds of said real and personal estate annually between my two brothers, share and share alike;" and "at the death of my two brothers above named, it is my will, and I hereby direct, that the whole of the real and personal estate last above given and devised in trust be divided between my three nephews," "to them, their heirs and assigns for-

ever." It is manifest, on reading this clause of the will, that the testator intended by it to dispose of the whole residue of his estate, and the whole difficulty in the construction arises from the use of the word "joint." Now the first remark he had to make in reference to that word was that, according to the grammatical construction of the sentence in which it occurs, it applies only to the period during which the executors are directed to keep the estate together, and does not directly limit the estate given to the two brothers. Still he must in all fairness admit, that a logical interpretation shows that the testator intended the estate to be kept together by his executors as long as they were required to divide the proceeds annually between the two brothers. He would therefore consider the question as if the word "joint" applied directly, as a word of limitation, to the estate given to the two brothers.

He thought it clear, looking at the clause as a whole, and not confining his attention to the particular expression mentioned, that the testator intended not only that the trust estate should last, but that his two brothers should in some way or other enjoy the in-

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come or profits until the death of *both of them. His three nephews were the principal objects of his bounty, and yet he postpones their possession and enjoyment until the death of both the brothers. Why does he do this? Not, certainly, either that his heirs at law should take the income after the death of one brother, or that it should accumulate for the benefit of his three nephews, but, most clearly, that his two brothers should in some way or other enjoy it until the death of both of them.

Such being the clear intention of the testator, as is manifest from all the provisions of the thirteenth clause, the proper and only way to read that clause is to reject the word "joint" as not expressing the intention of the testator.

That the Court has the power to reject words when they are inconsistent with the context, is clear, upon principle as well as authority. It is involved in the maxim *falsa demonstratio non nocet*. "Words and limitations," says Mr. Jarman, 2 Jarm. 744, "may be transposed, supplied, or rejected, where warranted by the immediate context, or the general scheme of the will." Smith on Real & Per. Prop. 778. The object in construing a will or any other unilateral instrument, is to get at the real intention of the writer. Words are but a means to an end; they are but the instruments which the writer or speaker uses for the purpose of conveying his ideas into the mind of the reader or hearer; and when it appears from the context, from all that is written, from the four corners of the instrument as it is sometimes expressed, and from the general scheme of

the will, that a particular word was not understood by the writer, that it is senseless, or that it contradicts the real intention, it should be rejected altogether, or changed for another word. In such cases the grammatical must give way to the logical interpretation. Qui hæret in litera hæret in cortice.

But he would not extend these remarks, for the case of *Townley v. Bolton*, 1 M. & K. 148, was direct to the very point he was considering. In that case the testator be-

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queathed as follows: "I give to my sister M. and her husband G. fifty pounds per annum, long annuities, for their joint lives, and at their decease I give the same to my nephew, P." M., the sister, died, and G., her husband, survived her, and it was held that G. was entitled to the annuity during his life. The case was decided, it seems, upon the ground that they took as joint tenants an estate during their joint lives and the life of the survivor. That case, then, must have been decided either upon the ground that the word joint should be rejected, or, what in effect was the same thing, that the joint estate was continued by implication until the death of the survivor. This gave the survivor the whole, on the ground that, in cases of joint tenancy, the whole estate goes, by the *jus accrescendi*, to the survivor. But it was perhaps unimportant to consider, in that case, on what ground the survivor was entitled, for, by the law of England, a husband surviving his wife is entitled, if he administers on her estate, to take the whole personal estate for himself. But upon the point he was now considering, that is, whether the estate given to the two brothers was intended to last until the death of the survivor—two cases could not be more alike. The proper way, then, to read this will is as follows: I give to my executors all the rest and residue of my estate in trust, that they keep the same together "during the lives" or "during both the lives" of my two brothers; and so reading it, there would be no difficulty in the construction.

He had contended so far that the will should be construed by rejecting or changing the word "joint." But, if that view should not be adopted, then he submitted that the estate of the two brothers should be extended by implication until the death of the survivor. The authorities upon this point are numerous. But as it had been discussed fully by the counsel for the complainant, he would leave it with this remark, that, in his opinion, it makes no difference whether the estate is extended to the death of the

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survivor by rejecting the word "joint," or by retaining it, and then enlarging the estate by implication; for in either view it is the same estate, that is an estate in both, that is continued or enlarged, and not, as he

would presently show, an estate in the survivor, as contended for by the counsel for the complainant.

He would assume then that the Court will hold that the estate will last until the death of both the brothers, and also that the estate will simply cease at the death of the survivor, or, in other words, that it is not limited over in remainder at the death of the survivor. The case then is simply a bequest of the usufruct of property, or more properly of an annuity to two persons during their lives and the life of the survivor of them; and in such case he submitted that the law of this State is, that each takes an estate for his own life and for the life of the survivor, or, in other words, that upon the death of one of them his representatives take his share until the death of the other; and, further, that it makes no difference whether they take as joint tenants or tenants in common. In *Eales v. Earl Cardigan*, 9 Sim. 384, "On a bequest of an annuity of two hundred pounds a year each to two persons for their lives and the life of the survivor of them, held that each was entitled to an annuity of the same amount during their lives and the life of the survivor of them, and that the representatives of one dying were entitled to it during the life of the survivor." In *Jones v. Randal*, 1 J. & W. 100, 1 Jarm. 477, on a bequest of an annuity to children, to be divided amongst them in equal shares, "such annuity to be paid during the lives of such children and the life of the survivor of them, it was contended that the survivors were entitled by implication; but it was held that the argument that because the annuity was for the life of the survivors, therefore the survivors were entitled to take, amounted only to conjecture. The children took as tenants in common an annuity for their lives and for the life of the survivor." These cas-

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es show what the law applicable to *such cases is in England, when the parties take as tenants in common; and in this State the law is the same when they take as joint tenants—the Act of 1791, 5 Stat. 163, having abolished the right of survivorship in such cases, so that it is unimportant in this case to consider whether the two brothers took as tenants in common.

But, in behalf of the complainant, it is said that he is entitled to the whole by implication. He would examine this claim; and in the first place he would remark that, putting out of consideration that numerous class of cases where the survivor takes the whole because the tenancy is held to be joint and not in common, he knew of but one class of cases where the survivor takes the whole by implication, and that is where the cross-remainders are implied between tenants in common or in severalty. Unless then it can be shown that the two brothers took cross-remainders by implication, it cannot be shown that the

complainant is entitled to the whole; for the same argument upon which he now claims the whole would have applied in behalf of the other brother if he had been the survivor.

So far as his examination has extended, all the writers who treat of cross-remainders by implication, with one exception, treat the doctrine as if it were confined to estates tail. 2 Bl. Com. 382; *Bart. on Real Prop.* 208; *Smith on R. and P. Prop.* 233; *Fearne's Shep. Touch.*; *Cruise*. Mr. Jarman is the only exception, and he contends that it should be applied to estates for life. 2 Jarm. 479. The doctrine in England appears to be this, that if an estate in common be devised to A and B to hold as tenants in tail, with remainder over if they both die without issue, upon the death of one of them without issue the other will take the whole by necessary implication, upon the apparent intention to give over the whole as one estate upon the death of both without issue. 2 Bl. Com. 382; *Chev. Eq.* 79. If this be the doctrine it is clear that it does

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not apply in this case, and that *for two reasons: (1.) Because there is here no estate tail; and, (2.) Because there is no remainder over of the estate given to the two brothers. But, as he had already said, Mr. Jarman contends that the doctrine is applicable to estates for life, and Chancellor Harper, without examining the question, takes it for granted in *Baldrick v. White*, 2 Bail. 442, and *Seabrook v. Mikel*, *Chev. Eq.* 80, that it is so applicable; and he might add that it appears to have been taken for granted by Judge Nott, in *Carr v. Porter*, 1 McC. Eq. 79, contrary to the English rule, (see 2 Jarm. Ch. 43, p. 481,) that it is also applicable to absolute estates determinable in the event that both legatees should die without leaving issue. But in neither of the cases mentioned was the question made and decided, and the opinions amount only to dicta. Nevertheless, if it appeared that Chancellor Harper or Judge Nott had had their attention directed to the objections he would now present to this particular class of implications, that is, implications which give the whole to the survivor, he would not be bold enough to question their authority. But, as it does not appear that they made any careful examination of the matter, he would venture to present it in the view it had occurred to him. He would say, then, that this class of implications is but an extension of the rule which in cases of joint tenancy gives the whole to the survivor, to a few cases of tenancies in common and estates in severalty; that the supposed necessity for making the implication does not, in fact, exist, and it is only made in England because it is favored by the policy of their institutions, which encourages the building up of large estates in one person's hands; that the policy of our American institutions is exactly the opposite; that our law gives the succession not to the eldest son, but

to all the children, and that when the right of survivorship was abolished by the Act of 1791, in cases of joint tenancies, this particular class of implications, so much like that right, was abolished with it; or rather,

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perhaps, it would *be better to hold, that as such implications had never been made before 1791, except in cases of estates tail, the notion upon which they are founded never had a place among the laws of this State. To illustrate his views he would state a hypothetical case. According to Mr. Jarman, if an estate be given to two for life as tenants in common with remainder over after the death of both of them, the survivor will take the whole by implication. Can that be the rule in this State, where the right of survivorship in cases of joint tenancy does not exist? Suppose a testator were by one clause of his will to give an estate to A and B for life, as tenants in common, with remainder over after the death of both of them, and by another clause were to give another estate to A and B for life as joint tenants, also with remainder over after the death of both, and then A were to die, leaving B surviving him. In England, B would take the whole of both estates for his life. In the case where the tenancy in common was created, he would take by implication; in the other case, where a joint tenancy was created, he would take as survivor under the *jus accrescendi*. In England, therefore, the rule in the one case is consistent with the rule in the other—they both lead to the same result. But how is it in this State? In the case of the joint tenancy, the *jus accrescendi* having been abolished, the survivor would not take, but the share of A would go to his representatives by the express provision of the law; and yet with strange inconsistency, it is said that in the case of the tenancy in common the survivor would take by implication. Can this be so? It may be contended that in this State cross-remainders would be implied in such cases, in joint tenancies as well as in tenancies in common. But that cannot be, for there is no authority for any such position, and it would be directly in the teeth of the Act of 1791.

He had made the question last mentioned merely *ex abundanti cautela*, for he thought

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it clear, as he would now *proceed to show that the rule has no application to the case before the Court. The rule, as Mr. Jarman states it, he had already stated. In *Baldrick v. White*, and *Seabrook v. Mikel*, Chancellor Harper states it thus: "If property were given to two for life, and at their deaths to their children, and if both should die without leaving children, then over, here would be cross-remainders by necessary implication, nothing being given to the remainder over until the death of both without children," 2 Bail. 415; Chev. Eq. 88. If every circum-

stance stated by Chancellor Harper is necessary to the implication, this case clearly does not come within the rule, for here there is no remainder to the children of the tenants for life; and if the rule in this State is to be assimilated as near as possible to the English rule, as it is almost universally understood by their writers, that circumstance is essential, for an estate tail is one in which the descent must be to the issue, and the remainder over is always on failure of issue. But he would assume that the rule, as stated by Mr. Jarman, is the true one, and that it is only necessary that there should be a remainder over upon the death of both the tenants for life. What, then, is the reason for holding that the tenants for life in such cases take cross-remainders by necessary implication? It is, as Chancellor Harper says, 2 Bail. 445, Chev. Eq. 88, "on the apparent intention to give over the whole property together as one estate;" or, as he again says, Chev. Eq. 89, citing *Georges v. Webb*, 1 Taunt. 234, "The method to bring the estate together is to imply cross-remainders." These extracts show the reason for making the implication, and it is this, that inasmuch as the testator has given over the estate as a whole at the death of both the tenants for life, he must have contemplated that it should be kept together as a whole until the event should happen upon which it was to go over, and the method of keeping the estate together is to imply cross-remainders between the tenants for

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life. It is clear, then, that the rule *was adopted not for the benefit of the tenants in tail or for life, but for the benefit of the remaindermen, the tenants for life being constituted quasi or implied trustees for the purpose of keeping the estate together. Now, if this be the reason of the rule, and it is the only reason given, it is difficult to perceive why, in any case, the implication is said to be a necessary one; the general rule in relation to all implications being that they must be necessary. 2 Bl. Com. 282; 1 V. & B. 466. "An estate by implication," says Judge Nott, *Carr v. Porter*, 1 McC. Eq. 79, "can never be raised to any one except from necessity. And where such implication is raised from the will, the necessity must appear on the face of the same will. And such an implication is never allowed where the provisions of the will can otherwise be carried into effect, for then no such necessity exists." But, although he did not perceive the necessity himself, yet he would take the rule as he found it, and he contended that it had no application to this case, and that for two reasons. (1.) Because in this case the estate for life given to the two brothers is not limited over in remainder at their deaths. Their estate, as he had already said, is a mere usufruct or an annuity, which will simply cease at their death and fall back into the principal estate. The testator does not give that usufruct or annuity to his three nephews,

but he gives them the principal estate, or, as he expresses it, "the whole of the real and personal estate last above given and devised in trust." The nephews have no interest in any thing given to the brothers. The net proceeds given to them, they, the brothers, take absolutely. (2.) The second reason is, because the testator has himself provided that the estate be kept together. He appoints trustees for that purpose, and directs them to keep his estate, his universitas juris, together. "There can be no implication against the express provisions of the will," *Smith v. Clever*, 2 Vern. 60; and as "the method to bring the estate together is

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to imply cross-remainders," the *will in this case leaves no room for any such implication. The estate must be kept together as a whole, and the tenants for life could not, if they would, divide it.

The cases in the books most like this where the survivor was held entitled to the whole are *Townley v. Bolton*, and *Tuckerman v. Jeffries*, and *Pearce v. Edmeads*, cited 2 Jarm. 165. It would seem sufficient to remark, as to these cases, that they were decided on the ground that the parties took as joint tenants, and he would not refer to them further were it not that Mr. Jarman seems to think that they might, perhaps, have been decided on the ground that the survivor took by implication. As to the case of *Townley v. Bolton*, it was immaterial what view was taken, for in any view the husband was entitled, he by the law of England being entitled to the administration, and as administrator to all his wife's personal estate for his own use and benefit. But that case differs from this in the two essential points he had already referred to. The same estate given to the tenants for life was there limited over in remainder, and there was in that case no appointment of trustees with direction to keep the estate together. The same remark applies to the other cases cited. In both of them the estate was limited over, and in neither was there an express direction to trustees to keep the estate together.

There are other features in this case which are utterly inconsistent with the idea that the testator intended the survivor to take the whole. The will directs the trustees "to divide the net proceeds annually between my said two brothers, share and share alike, subject nevertheless to the payment of fifty dollars per annum out of each share so divided" to the testator's sister during life. If the survivor takes the whole, how is this direction to be complied with? The direction is not only to divide the profits annually, but upon each share so divided an annuity of fifty dollars is charged; not an annuity of

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one hundred dollars upon the *whole, but an annuity of fifty dollars upon each separate share. Does not this show that the testator contemplated an annual division of the in-

come or net proceeds of his estate so long as both brothers lived, and that each share should be charged with an annuity to his sister of 50 dollars a year during her life? Such seemed to him to be the true construction.

The counsel for the complainant contends that there is no such thing known to the law as an estate *pur autre vie* in personality, and he founds his argument mainly, as he understood it, upon the provision of the statute of Chas. II. in relation to estates *pur autre vie*; but the cases of *Eales v. Earl Cardigan*, and *Jones v. Randal*, would seem to be conclusive on that point.

The opinion of the Court was delivered by

WARDLAW, J. This Court concurs in the decretal orders made by the Chancellor, and in the reasonings by which he has sustained them.

The thirteenth clause of the will of James B. Richardson, taken as a whole, makes plain the intention of the testator to give to the executors, as trustees, an estate in the residue until both of his brothers were dead. "During the joint lives of my two brothers" must be construed to mean during the two lives of my brothers, or during the lives of my two brothers joined together; that is, according to subsequent expositions in the same clause, until the time when, "at the death of my two brothers," the nephews shall take the remainder.

There is nothing in the cases mentioned in the decree, nor in other cases that have been cited here, nor in the learning applicable to joint tenants and tenants in common, nor in the scheme of the will, nor in the motives which have been attributed to the testator, that would warrant a decision, either that the estate of the trustees was determined

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by the *death of one brother, or that cross-remainders between the two brothers were raised by implication, so that the moieties of both are now united for the benefit of the survivor.

So much we say, in reference to the points considered by the Chancellor, and we deem it unnecessary to add any thing more to the observations he has made upon those points. But, for the appellant, views, opposed to the decree, have been drawn from the somewhat abstruse doctrines relative to estates *pur autre vie* in incorporeal hereditaments, and have been pressed upon the attention of this Court with so much earnestness that some answer to them is required.

A summary of the argument is this: the interests given by the will to the two brothers are estates *pur autre vie* in an incorporeal hereditament, and, therefore, are freehold; at common law an executor could not intermeddle with a freehold; the twelfth section of the Statute of Frauds (29 Chas. II., c. 3, A. D. 1672, 2 Stat. 527) relates only to

those estates *pur autre vie* of which there may be a special occupant; there can be no special occupant of an incorporeal hereditament; neither the statute 14 Geo. II., c. 20, A. D. 1728, nor the statute 1 Vict. c. 26, § 3, A. D. 1837, has been made of force here, nor any equivalent legislation adopted; therefore the interest which John Peter Richardson, the decedent of the two brothers, had under the will of James B. Richardson, cannot have been transmitted to the executors of the said John Peter.

The establishment of the conclusion aimed at by this argument would not transfer the interest of John Peter to the surviving brother, Thomas C., but would cause it to revert to the heirs of James B. as undevise realty. 2 Bac. Ab. 562; *Estates for Life and Occupancy*, B. 1; *Doe v. Robinson*, 8 Barn. & C. 296, A. D. 1828.

But some important propositions in the argument are inadmissible. Whether there could be a special occupant of an estate *pur autre vie* in an incorporeal hereditament, and

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*whether, under a grant to the grantee and his executors, his executor could be such special occupant, are questions that have been much contested in the English Courts; and the better opinion is, that both were there decided in the affirmative before the above-mentioned statute of 1 Vict. was passed. See *Ripley v. Waterworth*, 7 Ves. 424, A. D. 1802, and cases there cited by Lord Eldon; *Hodgson v. Gonthwaite*, Willis, 500, A. D. 1744. But these questions are not now directly before us: neither of them is here involved except so far as its decision may affect the construction of the twelfth section of the Statute of Frauds. The gift here made by the testator, James B. Richardson, to each of his brothers, was, as we have above decided, a grant for two lives—one being the life of the grantee; but was to each without addition of heir, executor, or administrator. There was then no special occupant in this case.

The gift was to each brother, of a trust in the balance of the net proceeds of real and personal estate, after payment of specified annuities. The trustees were to manage the estates, pay expenses and annuities, and divide the balance of net proceeds between the two brothers equally. The estates were not charged; no right of distress, not even of entry, passed to the brothers. The responsibility of the trustees, and the remedy against them, were merely personal; and the right of each brother was merely a right to receive annually from the trustees an uncertain sum of money. It would then be no departure from the general tendency of American law to hold that the interest given to each brother was not an incorporeal hereditament, subject to the rules which govern real estate, nor even what Lord Hardwicke called a personal inheritance, (*Stafford v. Buckley*, 1 Ves. Sen. 178; see also *Aubin v.*

Daly, 4 Barn. & Ald. 59; 1 Bro. P. C. 327,) where an incorporeal right, in most respects treated as a chattel, was granted to a man and his heirs; but that it was only an incorporeal right in personality, which is mere

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personal prop*erty, transmissible and distributable as such, like the right to receive dividends of stock or to receive money on an ordinary chose in action.

As, however, a portion of the net proceeds now in question must come from lands, and the whole may be said to savor of the realty, (Co. Litt. 20,) we will consider the case as it has been presented, and treat the interest of each brother as an incorporeal hereditament, and as subject, being a trust, to the same rules of descent and conveyance which would apply to it if it was a legal estate.

The twelfth section of the Statute of Frauds embraces every interest, *pur autre vie*, which is technically called an "estate." The first branch of the section makes "any" such estate devisable; the second branch, equally comprehensive and providing for all cases where no such devise thereof is made, constitutes such undevise estates assets in the hands of the heir, if it shall come to him as special occupant; and, if there is no special occupant, directs that "it shall go to the executors or administrators of the party that had the estate thereof by virtue of the grant, and shall be assets in their hands." It was an unreasonable cramping of this section, enacted "for the amendment of the law," to restrict its general words to cases where there could be a special occupant. Perhaps it was fair to say that the enactment contemplated no special occupant besides the heir, and the construction, adopted after much conflict, is now received as sound, which holds that, where there was neither devise nor special occupant, the estate in hereditaments, corporeal or incorporeal, went, under the section, to the executor or administrator. *Bearparke v. Hutchison*, 7 Bing. 178, A. D. 1830; *Doe v. Lewis*, 9 Mees. & Wels. 662, A. D. 1842; *Rawlinson v. Montague*, A. D. 1710, note D, 3 P. Wms. 262; *Campbell v. Sandys*, 1 Scho. & Lef. 289, A. D. 1803.

No other legislation is required for this case. The above-mentioned statute of 1 Vict.

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repealed all previous statutes *concerning wills, and presented a well-digested system on the subject. It specially mentions incorporeal hereditaments, as it does other matters upon which there had been diversity of opinion; but, before it was passed, the decision last cited had settled, beyond all reasonable doubt, that estates *pur autre vie* in incorporeal hereditaments were embraced by the twelfth section of the Statute of Frauds.

It is objected, however, that the Statute of Frauds makes an estate *pur autre vie*, in the hands of either heir or executor, "assets" only, and that, where such estate goes to an

executor, he may, after payment of debts, whosoever no such statute as that of 14 Geo. II. before cited is of force, appropriate to himself the surplus, without accountability to legatees or next of kin. If this is so, the executor's right to take is not thereby affected. Nothing in this appeal requires us to adjudicate matters between the executors of John Peter Richardson and persons who may claim an account from them. We presume that the decree in favor of those executors proceeded upon the ground, apparent to the Chancellor, that the estate *pur autre vie* which their testator had, was not devised by him and is included in a residue not disposed of by his will. It may not, however, be amiss to remove all impression, which our remarks might otherwise make, that any doubt is entertained in this Court about the accountability of John Peter Richardson's executors for all that they may receive from the estate *pur autre vie*.

The doubt raised by the case of *Oldham v. Pickering*, 2 Salk. 466, A. D. 1696, which gave occasion for the declaratory statute of Geo. II. before mentioned, probably never reached the Province of South Carolina. Later cases would, it seems, have removed the doubt in England, if that statute had never been passed. See *Ripley v. Waterworth*, 7 Ves. 424; *Devon v. Atkins*, 2 P. Wms. 381, A. D. 1726; *Devon v. Kinton*, 2 Vern. 719. Certainly, there, an executor, however he may have been privileged in the Ecclesiastical Courts,

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would, in **chancery*, have been held to make distribution of an estate *pur autre vie*, which, without devise, came to him under the Statute of Frauds. *Witter v. Witter*, 3 P. Wms. 100, A. D. 1730, and cases before cited. At some very early period in the colonial history of this State, in some way, there was an abrogation of the English law which permitted an executor to appropriate to his own use the surplus of the residue of his testator's goods, where no implication of a contrary intention on the part of the testator was discoverable. See *Taylor v. Taylor*, 1 Rich. 571; *Parris v. Cobb*, 5 Rich. Eq. 469; *Lindsay v. Say*, 1 Des. 150. How the change was made it is not easy now to ascertain. Perhaps it may have come from the Act of 1745, 3 Stat. 666, the allowance of commissions having probably been regarded as equivalent to an adequate legacy to the executor, which latter was in England considered a sufficient indication of the testator's intention to deprive the executor of the surplus. But of that Act (which is copied from Grimke's P. L., because the original was lost before the Statutes at Large were published) several sections are omitted, and the preamble refers to practice concerning returns to the office of the Secretary of State, about which no previous legislative provision is now extant. Of many older Acts we have had for the last century nothing but the titles, and

it is not unlikely that the Act of 1745 recognized, rather than established, the accountability of an executor, as of an administrator, for every portion of the testator's property which came to his hands. However this may be, and whatever may have been the origin of our rule which enforces an executor's accountability, the rule is general, and would no doubt apply here to the surplus of an estate *pur autre vie*, even had it been decided that, for that an executor would not in England be held accountable, if only the Statute of Frauds there modified the common law. Late statutes have there made an executor

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accountable for every surplus, as the **Stat.* of Geo. II. had before done in respect to the surplus of an estate *pur autre vie*.

The motion is dismissed.

DUNKIN, C. J., and INGLIS, J., concurred.

Appeal dismissed.

12 Rich. Eq. *487

*W. B. BOYD and Wife and Another v. JOHN SATTERWHITE, JAMES PAYNE, and Others.

(Columbia. May Term, 1866.)

[Wills \hookrightarrow 573.]

Bequest of female slaves "and their increase," held not to include descendants of the slaves born before the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1248; Dec. Dig. \hookrightarrow 573.]

[Wills \hookrightarrow 566.]

Bequest of "all my bank stock of money," held to carry a sum of money deposited by the testator, at different times, in a neighboring bank, and for which he held certificates entitling him to interest on the various sums at four per cent., or at five per cent. after six months; it not appearing that the testator owned any thing else to which the terms were applicable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1238½; Dec. Dig. \hookrightarrow 566.]

[This case is also cited in *Boyd v. Satterwhite*, 10 S. C. 53, as to facts.]

Before O'Neill, C. J., at Newberry, June, 1862.

The will of the testator in the cause, John W. Payne, bore date and was executed March 17th, 1857. Its material provisions are as follow:

"Third. I also give and bequeath to my wife Lucinda Payne a lot of negroes, namely, Allen, Milly, Hampton, Elmore, Margaret and her increase, Fanny and her increase, Mary and her increase, Susannah and her increase, and all the household and kitchen furniture, and one year's of provision, to have and to hold the above-named negroes, and dispose of as she pleases at her death.

"Fourth. I also give and bequeath to my wife Lucinda Payne one lot of negroes, namely, one girl, Big Sue, and her increase, one boy, Phil. Lewis, Nat. Tom, Jim, Ned, Harriet

and Isabel, and their increase, two teams of mules, two wagons, and plantation and blacksmith tools, to have and to hold during her natural life, and at her death to be sold, and one-half to go to my wife Lucinda Payne, to

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dispose of as *she pleases, and the other half to be equally divided between brother James Payne, David Payne, and Catharine Lark.

"Sixth. I give and bequeath to my wife Lucinda Payne all my bank stock of money, and a judgment I hold on Mildridge and Milton Grant, to dispose of as she pleases; and all my outstanding debts I give to my brother James Payne, and David Payne, and Catharine Lark, to be equally divided between them.

"Seventh. I give and bequeath to my nephews, John Satterwhite and Richard S. Satterwhite, all my interest in the plank-road, and a scholarship in the university at Greenville, and five hundred dollars to each of them, to be paid out of my estate.

"Eighth. I now desire that all the remainder part of my negroes be sold by families, and all the remainder part of my property be sold at my death, and one-half to go to my wife Lucinda Payne, to do as she pleases with at her death, and the other half to be equally divided between brother James Payne, David Payne, and Catharine Lark, except five hundred dollars to be paid to Catharine Boazman out of my estate last mentioned."

The testator died shortly after the execution of the will, which was proved before the Ordinary, and the defendants, John Satterwhite and Richard S. Satterwhite, qualified as executors. Of the negroes named in the third clause of the will Allen was the child of Fanny, and Mary and Susannah were the children of Margaret, and the females specifically bequeathed by the third and fourth clauses of the will had a considerable number of other descendants, born before the execution of the will. The testator had, within a year before he made his will, deposited in the Bank of Newberry various sums of money, amounting in all to about six thousand dollars, for which he held certificates of the bank declaring that he was entitled by agreement to interest thereon at the rate of four per cent., or five per cent., after six months.

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In *April, 1857, the executors sold all the negroes not named in the will on credit.

Lucinda, the widow of the testator, had intermarried with the plaintiff, William B. Boyd, and this bill was filed by Boyd and wife and the trustee of their marriage settlement against the executors of the will and others, for an account. The matters in dispute related to the increase of the female slaves and the money on deposit in the Bank of Newberry. The decree of his Honor, Chief Justice O'Neill, who presided at the hearing, is as follows:

O'Neill, C. J. The first question made in this case is as to the increase of the negroes. The third and fourth clauses of the will of John W. Payne, deceased, contain the following bequests: "I also give and bequeath to my wife Lucinda Payne a lot of negroes, namely, Allen, Milly, Hampton, Elmore, Margaret and her increase, Fanny and her increase, Mary and her increase, Susannah and her increase."

"I also give and bequeath to my wife Lucinda Payne one lot of negroes, namely, one girl, Big Sue, and her increase, one boy, Phil, Lewis, Nat, Tom, Jim, Ned, Harriet and Isabel, and their increase."

The term increase, by the case of Tidyman v. Rose, Rich. Eq. Cas. 294, was held to mean increase subsequent to the vesting of the estate in the mother. That case satisfactorily overruled Haynsworth v. Cox [Harp. Eq. 117], and Gayle v. Cunningham [Harp. Eq. 124], which had previously ruled, and held that the increase applied as well to the ante nati as well as the post nati. I think that the case of Tidyman v. Rose has fixed the meaning with my full assent. The only question now open to me is, whether this case is an exception. I think, where the bequest is of a female slave, who is past the age of breeding, with the super-added words, "and her increase," that such words would necessarily carry the ante nati. That would apply to Margaret and Fanny and their in-

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crease; and I think such increase as these women had, whether born before or after the vesting of the estate in Lucinda Payne, passed to her.

The bequest of Milly is without the words, "and her increase." She is therefore bequeathed as a barren stock. None of the other women were past the age of bearing children, and they are under the rule of Tidyman v. Rose, and their children born before the bequest in favor of Lucinda do not pass.

In the sixth clause the testator uses the words, "I give and bequeath to my wife Lucinda Payne all 'my bank stock of money.'" What did he mean? Generally parol is not allowed to alter or explain a will, but it is permissible to ascertain in what sense the testator spoke generally of the subject-matter of the devise. The testator had no bank stock, but he had a large sum on deposit in the Bank of Newberry, which he frequently spoke of as his "bank stock of money." I think that was what he meant in the sixth clause.

It is therefore ordered and decreed that the complainant, Lucinda, is entitled to all the increase of Margaret and Fanny, and the money on deposit in the Bank of Newberry.

It is therefore further ordered and decreed that it be referred to the Commissioner to ascertain and report the increase of Margaret and Fanny, and the sums for which they were sold by the defendants, (the executors,)

and the interest thereon; and also that he report the sum of money which the testator had on deposit in the Bank of Newberry, by whom it has been received, and the interest thereon.

The costs of this case to be paid out of the estate of John W. Payne, deceased, in the hands of the defendants.

The defendants, James Payne and others, appealed, and moved this Court to reverse the decree, upon the grounds:

1. Because his Honor erred in deciding that the term "increase" carried the ante

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nati issue of the negro women, *Margaret and Fanny, to the widow, and will insist that the true construction of the term "increase," according to our decisions, when applied to a negro woman, only carries the after-born issue; and that it makes no difference whether the woman to which the term is applied be child-bearing or not at the date of the will.

2. Because his Honor was mistaken in supposing that Margaret and Fanny were "past the age of breeding." It is not so alleged in the bill, nor shown by the evidence. It is alleged in the bill that Margaret was "fifty years old," and that "Fanny had not had a child for twenty-one years." Whereas, the truth is, that although Fanny had not had a child within twenty-one years before the filing of the bill, yet she was only at the date of the will thirty-six years old; and it does not appear from the bill or evidence why she was not child-bearing, whether for want of a husband or not, and Margaret had an infant child at her breast under a year old at the date of the will, which was sold and purchased by the widow at the price of one hundred dollars, as appears by the sale-bill, and cannot be denied by her; and it is said she has had another child since the sale.

3. That his Honor erred in deciding that the words, "my bank stock of money," carried to the widow a debt due testator by the Bank of Newberry, although the testator gave in express terms all his outstanding debts to his brothers and sister, defendants in this case.

4. Because his Honor erred in admitting parol evidence to explain an ambiguity apparent on the face of the will, and not raised by parol.

The complainants also appealed from so much of the decree as rejects their claim to the increase of the slaves bequeathed to the testator's widow, under the fourth clause of his will; and also from so much of said de-

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creed as omits in the order *of reference the said widow's rights under the eighth and residuary clause of said will, on the grounds:

1. Because, by a proper construction of the testator's will, with a view to the circumstances by which he was surrounded, he evidently intended and did bequeath the slaves,

with their increase, then in issue, mentioned in the fourth clause of his will, to Lucinda Boyd, his widow, and that parol testimony was competent to show in what sense he used the word "increase."

2. Because it is respectfully submitted that his Honor inadvertently omitted to include in his order of reference the claim of the testator's widow to an account from the executors of one-half of the residuary estate, under the eighth clause of his will, and about which there was no dispute.

Fair, Simpson, for defendants.

Sullivan, for plaintiffs.

The opinion of the Court was delivered by

WARDLAW, J. In *Seibels v. Whatley*, 2 Hill Eq. 607, there was no circumstance explanatory of the meaning of the testator in the bequest of "Nance and her increase," and, in analogy to the ruling in *Tidlyman v. Rose*, Rich. Eq. Cas. 294, it was held that only the after-born increase of Nance passed to the legatee. In *Donald v. McCord*, in the Equity Court of Appeals, Rice Eq. 330, two Chancellors, in opposition to a third who dissented, and to the decree of the Circuit Chancellor, who was absent, without special reference to the circumstance which had been supposed to explain the meaning of the testator, held that the case could not be distinguished in principle from *Seibels v. Whatley*, and that under the bequest of "Sary and all her in-

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crease" the children of Sary *born before the making of the will did not pass. In *Donald v. Dendy*, 2 McM. 124, involving the same will, which had been construed in *Donald v. McCord*, the Court of Errors, notwithstanding many considerations drawn from the will itself, and from the circumstances which surrounded the testator, which had been urged as indicative of a contrary meaning of increase there intended, adhered to the decision in *Seibels v. Whatley* as a general rule, and held the rule applicable to that case. After this current of decisions, an exception to the rule could be made only by very strong circumstances. Whether in a case where a female slave, contained in a bequest, was plainly beyond the age of child-bearing, and nothing else explanatory of the testator's meaning appeared, the addition of the words, "and her increase," would carry her children previously born, and, if her children, her grandchildren also, it is not necessary now to decide; for, upon examination of the testimony in this case, we find that, at the time when the will was executed, Margaret had at her breast an infant less than twelve months old, and that Fanny, then not forty years old, had but one child, Allen, and he is named in the bequest. Mary and Susannah, children of Margaret, are also named. Opposed to these circumstances, contradictory of the supposed exception, there is nothing but the expression of the testator's desire, in the

eight clause of his will, that the residue of his negroes should be sold "by families," from which it is well argued that it could not have been his intention to separate Margaret and her infant. This humane provision concerning the residue, accompanied by the direct evidence as to the testator's intention, which was taken *de bene esse*, may show what he would have directed if the case of Margaret and her infant had been suggested for his decision. But the direct evidence of intention, distinguished from evidence to show the meaning of the words in the will, cannot be admitted: directions concerning

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the residue affect *only by inference the question what enters into the residue; and neither the hard rule of *Tidman v. Rose*, nor the general rule as to increase, laid down in the cases above cited, can be controlled by an uncertain inference, which is itself counterbalanced by other stronger inferences. So much of the circuit decree as relates to the increase of Margaret and Fanny must then be reversed.

What is meant by "all my bank stock of money," in the sixth clause of the will? We must put out of view, as inadmissible evidence, the conversations between the testator and his neighbor, who drew the will, and all the other evidence, going to show what the testator intended to express, and not what his words do express; for here is not a description unambiguous in its application to each of several subjects, nor a description inapplicable with certainty to any subject, but a description inaccurate and capable of various interpretations, but, when interpreted, applicable to only one subject, and to that with the certainty which attends the interpretation adopted.

The case of *Richardson v. Watson*, 4 B. & Adol. 800, and illustrations used in the case of *Hissocks v. Hissocks*, 5 M. & W. 363, 1 Nev. & Man. 575, sustain the admissibility of parol evidence to show what subject was known to a testator by the name or description which he used. (Wig. on Wills, pl. 152.) The evidence in the case before us is, that the testator was accustomed to call his money deposited in the Bank of Newberry his bank stock, not his "bank stock of money," as seems to have been understood by the late Chief Justice presiding in the Circuit Court. This evidence is, then, of doubtful effect, and, looking only to the will and the circumstances which serve to put us in the situation of the testator, we will proceed to the interpretation of the words used.

The testator was an uneducated planter, little acquainted with legal or commercial

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terms, and he employed a like person to draw his will. He had no bank stock, nor special deposit of coin in any bank, nor store of money which had been drawn from a bank. But he had four or more certificates, express-

ing that, within a year preceding the execution of his will, he had deposited various sums of money in the Bank of Newberry, and was by agreement entitled to interest thereon at four per cent., or five per cent., after six months; and upon one of these he had received fifty dollars for interest after the expiration of six months from the first deposit. The money, which was thus subject to be drawn at his pleasure, would probably neither by him nor by a person better acquainted with the phraseology of trade have been spoken of as an "outstanding debt." It was the only money he owned which was in any way connected with a bank, further than this, that he had on hand about seventy-five dollars of money, some or all of which was in current bank bills. Bank money is, however, a very unusual phrase for bank bills, and would of itself be more properly applicable to money in bank, especially when we see that the will intimates no distinction between coin and bills. It is true that the will makes no mention of money on hand, but it contains directions for payment of money much exceeding the sum which was on hand, which directions, if the money in bank and the outstanding debts go to legatees, must in contemplation of the testator have required expenditures from the sales that were directed. "Bank stock of money" is stronger in its application to money in bank than bank money; for it seems to denote an accumulated store of money distinguished from other money by the circumstance that it is somehow associated with a bank—either in a bank, or drawn from a bank. As my iron safe store of money would carry a sum in the iron safe, so "bank stock of money," when there is no other subject to which it is applicable, must carry a sum of money in the bank.

It is, however, said that the testator's

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money was not in the bank, but was lent to the bank, and disbursed by the bank. No money lent is ever expected to be returned in kind, yet a bequest of money lent to A would certainly carry an equivalent sum, and the certificates, calling the testator's sums of money deposits, and securing to him the right to reclaim them at his pleasure, imply that equivalent sums were always in the bank, subject to his order.

Chapman v. Reynolds, 6 Jur. N. S. 440, is an authority for maintaining that even stock in the public funds may pass under the words, "all the money I may die possessed of," where there is no other property upon which the bequest might operate. The ordinary use of the word stock, to signify shares in the capital of a bank or other company, does not appear, from the will in the case before us, to have been known to the testator; for he gave his stock in the Plank-road Company by the words, "my interest in the plank-road." Our case of *McCall v. McCall*,

4 Rich. Eq. 447 [57 Am. Dec. 733], sustains the efficacy of evidence concerning the circumstances of the testator and his affairs, to explain the meaning of his words, and apply an imperfect description to a subject where there is no other subject to which it is applicable.

This Court is, then, not only constrained to believe, but feels an assured legal persuasion that the words, "all my bank stock of money," in John W. Payne's will, are applicable to the money secured by the certificates above mentioned, and to that only.

The inadvertent omission which is mentioned in the complainants' second ground of appeal must be supplied.

It is therefore ordered that it be referred to the Commissioner to take a full account of the actings and doings of the executors of

John W. Payne, deceased, embracing all sales made by them, and of all matters of account between the said executors and other parties to this suit, and between any two or more of

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those other parties touching the execution of the will of the said John W. Payne; and that the Commissioner do, in conformity with this opinion, ascertain the sum due to each party and from whom, and report the same, distinguishing between the various bequests made to the complainant Lucinda, some absolutely, some for life with power of disposition in the whole, and some for life with power of disposition in part.

DUNKIN, C. J., and INGLIS, J., concurred.

Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS AND COURT OF ERRORS OF SOUTH CAROLINA

FROM NOVEMBER AND DECEMBER TERM, 1866, TO NOVEMBER AND
DECEMBER TERM, 1867, INCLUSIVE

By J. S. G. RICHARDSON

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JUDGES AND CHANCELLORS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUDGES OF COURT OF APPEALS

HON. BENJAMIN F. DUNKIN, CHIEF JUSTICE.
“ DAVID L. WARDLAW, ASSOCIATE JUSTICE.
“ JOHN A. INGLIS, ASSOCIATE JUSTICE.

CHANCELLORS

HON. JAMES P. CARROLL,
“ HENRY D. LESESNE,
“ WILLIAM D. JOHNSON.

CIRCUIT JUDGES

HON. ROBERT MUNRO,
“ THOMAS W. GLOVER,
“ FRANKLIN J. MOSES,
“ THOMAS N. DAWKINS,
“ ALFRED P. ALDRICH.

CLERK OF COURT OF APPEALS

JOHN WATIES, Esq.

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CASES IN EQUITY

ARBITRATED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER TERM, 1866

JUSTICES PRESENT

Hon. BENJAMIN F. DUNKIN, *Chief Justice*,
Hon. DAVID L. WARDLAW, *Associate Justice*,
Hon. JOHN A. INGLIS, *Associate Justice*.

13 Rich. Eq. *9

*BENJAMIN MITCHELL v. WILLIAM F. DE SCHAMPS.

(Columbia, Nov. and Dec. Term, 1866.)

[*Arbitration and Award* §§63.]

Where there was no dispute about the facts, but only as to the legal consequences of those facts, and the parties, by a general submission "of all matters in dispute in relation," &c., referred the matter to arbitration:—*Held*, that the losing party was bound by the award, even though the arbitrators had plainly mistaken the law of the case.

[*Ed. Note.*—Cited in *Bollmann v. Bollmann*, 6 S. C. 43; *State ex rel. Myers v. Appleby*, 25 S. C. 104; *Boards & Hagler v. Aiken Mfg. Co.*, 58 S. C. 326, 334, 36 S. E. 714.

For other cases, see *Arbitration and Award*, Cent. Dig. § 314; Dec. Dig. §§63.]

Before Carroll, Ch., at Sumter, June, 1866.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. Near the close of December, 1864, the plaintiff, Mitchell, sold to defendant, De Schamps, a negro wench, Amelia, and her two children, at the price of \$11,000, "to be paid in cotton at one dollar and thirty-

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five *cents per pound." At the same time Mitchell executed to the defendant a bill of sale in the usual compendious form, whereby he warranted said negroes "sound in body, mind and title," and on the same day De Schamps subscribed and delivered to Mitchell a written paper, acknowledging to have received from him the sum of \$11,000, to be paid in cotton at the price stipulated, and the cotton to be delivered when "called for."

During the month of January, 1865, other transactions occurred between the parties. De Schamps was owner of twenty-nine bales of cotton, weighing in the whole 14,390 lbs., and worth, at \$1.35 cents per pound, \$19,426.50. After some negotiation between the par-

ties, the defendant, on the 1st February, 1865, sold the twenty-nine bales of cotton to the plaintiff at that price. Payment was made to the extent of \$11,000, in the three negroes previously sold to De Schamps, as has been stated. \$8,000 more were paid by Mitchell's executing to De Schamps a bill of sale, with like warranty, for another negro, a girl named Mary, and the remainder of the purchase-money of the cotton, \$426.50, was paid in the treasury notes of the Confederate States of America. On the day last mentioned, 1st February, 1865, De Schamps also subscribed and delivered to Mitchell a paper of that date, in which he acknowledges the receipt of \$19,426.50, in payment of twenty-nine bales of cotton, weighing 14,390 lbs., the said cotton to be "delivered when called for at Mayesville Depot." The four negroes purchased by De Schamps were delivered, and passed respectively into his possession at the dates of the bills of sale referred to.

The cotton remained in the custody and charge of the defendant until after the 27th September, 1865, when he refused to deliver it to the plaintiff, contending that he was discharged from all obligation to do so by the abolition of slavery in this State. On the

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4th January, 1866, the *parties covenanted and agreed in writing, under their hands and seals, to refer all matters in dispute between them in relation to the purchase and sale of the negroes and the bales of cotton before mentioned "to the arbitrament and award of four arbitrators, two to be chosen by each party, and an umpire, to be selected jointly." Accordingly, the persons to act as arbitrators and umpire were duly appointed. The parties, represented by legal counsel, appeared before the four arbitrators thus chosen. Their proofs were adduced, and an

argument on each side was submitted. The arbitrators disagreeing, the umpire was called in to decide, and the result was an award without more, "that William F. De Schamps do keep the cotton in dispute between himself and Benjamin Mitchell."

The purposes of the bill are the impeachment of the award and the specific delivery of the cotton, or else an account for its value.

At the hearing the award was assailed chiefly upon the ground that it was founded upon a plain and palpable mistake of law, and no objection was taken by the defence to such course on the part of the plaintiff, as involving a variance from the case presented by the bill.

The general rule, as announced by Lord Eldon, is, that if questions of right and fact are referred to arbitration, the arbitrator is bound to decide according to law. But if a dry and naked question of law be submitted, then, however erroneous may be the decision of the arbitrator, the Court will not interfere. *Young v. Walter*, 9 Ves. 367. "I am of opinion," says Wilson, one of the Lord Commissioners, "that when any thing is submitted to arbitration, the arbitrators cannot award contrary to law, as that is beyond their power; for the parties intend to submit to them only the legal consequences of their transactions and engagements." *Morgan v. Mather*, 2 Ves. Jr. 18. Perhaps the doctrine of the Court upon this subject will be found stated

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*with more precision in 2 Story Eq. § 1455. It is there said that if arbitrators mean to decide strictly according to law, and they mistake it, although the mistake is made out by extrinsic evidence, that will be sufficient to set it aside. But their decision upon a doubtful point of law, or in case where the question of law itself is designedly left to their judgment and decision, will generally be held conclusive. The decisions in our own Courts are not in conflict with the cases cited by the learned commentator, and seem to recognize the general rule as laid down by Lord Cowper, and approved by Lord Hardwicke, that if arbitrators go upon a plain mistake either in law or fact, equity will relieve against the award. *Alwyn v. Perkins*, 3 Des. 305; *The Exors. of Radcliff v. Wightman*, 1 McC. Eq. 408; *Shinnie v. Coil*, 1 McC. Eq. 483.

At the hearing before the arbitrators it was argued for the defendant, that the slaves in South Carolina were de jure emancipated from and after President Lincoln's proclamation of January, 1863; that the conquest and occupation of this State by the military authorities of the United States, and their subsequent liberation of the slaves, in fact were but the enforcement and execution of that proclamation, and that the 11th section of the 9th Article of the State Constitution, by recognizing the slaves in South Carolina as having been emancipated

by the action of the United States authorities, recognized also, in effect, the legal force and obligation of the proclamation referred to. The question presented is of great practical consequence, and it is to be regretted that, at the hearing, but slight argument was made, and no authority cited to aid the Court in its solution. The want of access to books has, however, been largely compensated by two decisions recently made: the one by Judge Clayton, of Mississippi, in the case of *Duke & Cord v. Perkins*; the other by Judge

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Sheffey, of Virginia, *in the case of *Walker v. Loring*, copies of which I have had the good fortune to obtain.

It is said that a new State springing into existence does not require the recognition of other States to confirm its internal sovereignty. "The existence of the State de facto is sufficient in this respect to establish its sovereignty de jure." Wheat. 29. In the Prize cases, 2 Black R. 666 [17 L. Ed. 459], it was adjudged by the Supreme Court of the United States, that the recent war between that power and the Confederate States of America was, in the full sense of the term, as employed by writers upon international law, a civil war. "It is not necessary, to constitute war," says Mr. Justice Grier, as the organ of the Court, "that both parties should be recognized as independent nations, or sovereign States." "A civil war," he proceeds, quoting from Vattel, "produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. Having no common superior to judge between them, they stand precisely in the same predicament as two nations who engage in a contest, and have recourse to arms." In conformity to the principles announced, it was adjudged, that the contending parties in the recent war, with their respective citizens, or subjects, while the contest continued, were entitled to all the rights, and subject to all the liabilities, which belong to belligerent and independent sovereignties, under the law of nations.

To the same effect is the case of *Mrs. Alexander's cotton*, 2 Wal. R. 419 [17 L. Ed. 915]. She attempted to show that she was a loyal citizen of the United States, and claimed protection to her right of property "under the constitution and laws thereof." Her claim to such protection was rejected, and it was adjudged that her cotton was subject to seizure and capture as enemies' property. "We must be governed," says the Chief Justice, "by the principles of public law, so often announced, as applicable to civil and

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international wars, that *all the people of each State or district, in insurrection against the United States, must be regarded as enemies, until by the action of the Legislature and the executive, or otherwise, that relation is thoroughly and permanently chang-

ed." "Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any Court of the United States, so long as that relation shall exist." There could be no stronger recognition of the fact, that the Constitution of the United States was, for the time, wholly banished and excluded from the territory under the rule and sway of the government of the Confederate States. The mere residence of the claimant within the hostile territory, it is held, placed her without the pale of the Constitution and laws of the United States, and denied to her even a standing in their Courts. The principles and rules of international law are altogether in the interest of humanity, and are designed to mitigate the evils incident to a state of war. No rule or principle of that code promulgates or countenances the barbarous doctrine, that during a civil war the citizens or subjects of the party opposed to the established government shall be condemned to the evils and horrors involved in a state of anarchy. While the contest continues, the laws of the former government are suspended, and their place is taken by the government de facto set up by the opposing party, and by the laws which such government may choose to recognize or enact. "We cannot hold," says Judge Clayton, "that the suspension of the Federal Constitution and laws left the Confederate States in perfect anarchy, with no law controlling contracts, or rights of property. The common and municipal laws of the State, regulating transactions and contracts between citizens, were not affected by the war, but remained intact within the jurisdiction of the Confederate States."

According to the principles and authorities recognized by the Federal Courts, the Con-

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federate States, during the *existence of their de facto government, must be regarded (in respect of the Constitution and laws of the United States) as being in the same condition as if they had been conquered, and their people and territory held in subjection for the same period of time, by an independent foreign power at war with the United States. In Phillimore on International Law, page 502, reference is made approvingly to the judgment of Mr. Justice Story, in the *United States v. Haywood*, 2 Gallison's Rep. 500-2 [Fed. Cas. No. 15,336]. The purpose of that suit seems to have been the recovery of the tax or penalty denounced against the introduction of British goods into the United States by their non-importation Acts, then of force. The port of Castine is the port of entry for the District of Penobscot, and is within the acknowledged territory of the United States. But at the time referred to in the bill of exceptions it had been captured, and was in the open and exclusive possession of the British forces. One of the objections taken to the charge of the Judge was, that the bringing of the goods from

Halifax to Castine was sufficient to all purposes to entitle the United States to a verdict, whereas the Court had directed the jury to the contrary. "The objection," says Judge Story, "rests altogether upon the assumption that Castine was to be deemed a port of the United States, in which the laws had their full operation, notwithstanding it was, at the time of the supposed importation, in the actual possession of Great Britain. This position, however, is utterly inadmissible upon every principle of the law of nations. By the conquest and occupation, the laws of the United States were necessarily suspended in Castine, and by their surrender the inhabitants became subject to such laws, and to such laws only, as the conquerors chose to impose. No other laws could, in the nature of things, be obligatory upon them, for, where there is no protection or sovereignty, there can be no claims to obedience."

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*This doctrine appears to be fully recognized by the law of England, which declares that when an usurper is in possession, the subject is excused and justified in obeying and giving him assistance. It is held that a "king de facto, and not de jure, or in other words a usurper that hath got possession of the throne, is a king within the meaning of the statute, (of treasons,) as there is a temporary allegiance due to him for his administration of the government, and temporary protection of the public, and, therefore, treasons committed against Henry VI. were punished under Edward IV., though all the line of Lancaster had been previously declared usurpers by Act of Parliament." 4 Black. Com. 77. But if neither the Constitution nor the laws of the United States were operative or obligatory within the territory of the Confederate States during the existence of their de facto government, it is preposterous to attribute such effect to the mere proclamation of President Lincoln. The consequences of such a doctrine would be fraught with ruin and disaster to the southern people. Proceedings in the Courts would at once spring up, and in fearful profusion, at the suit of the freedman against the white, to recover wages for labor since 1st January, 1863, and damages for false imprisonments, assaults and batteries, trespasses and other injuries to the person and property of the freedman. The result would be, that all transactions affecting slaves, since 1st January, 1863, all contracts for their hire, purchase or sale, and all partitions and divisions of estates, wherein slaves were given or received in lieu of money or other property, would be at once annulled, and, in the language of Judge Sheffey, "be swept pell-mell into chaos."

It results from the principles and adjudications referred to, that the slaves within the State cannot be considered as having been emancipated de jure until after the surren-

der of the Confederate armies, under Generals Lee and Johnston, in the month of April, 1865. Thenceforth, all hopes of

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*achieving their independence seems to have been abandoned by the people of the Confederate States. No further resistance was offered to the invading Federal forces. The government of the Confederate States was dissolved. The territory of this State was occupied by the forces of the United States, and, by the direct interference and action of their military authorities, slavery in South Carolina was de facto abolished. This, it is conceived, is the emancipation of slaves recognized by the Constitution of this State, and no other, or earlier, emancipation. The case referred to -Walker v. Loring—considers and adjudges the very point that is here presented, and determines it adversely to the defendant.

One of the arbitrators, an intelligent gentleman, who was examined before the Commissioner as a witness in the cause, testified as follows: "The award or decision of arbitrators in the case was made for the reasons or upon the considerations following: that in consequence of the previous proclamation of the President of the United States, the negroes referred to in the bill were free; that, therefore, the plaintiff had no title to convey—the consideration of defendant's agreement thus failing. The arbitrators differed in their opinions—two being in favor of the plaintiff's claim and two for the defendant. The umpire decided in favor of the defendant." After what has been said, it is manifest that, in the judgment of the Court, the ground upon which the arbitrators have rested their award is a plain, palpable, and mischievous mistake of the law. There is nothing in the Constitution or municipal law of the State to sustain their assumption that the proclamation of President Lincoln, of 1st January, 1863, carried with it the force and effect of law, from and after its date; and, in the language of Judge Story, the "position is utterly inadmissible upon every principle of the law of nations." The proof as to the

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ground upon which the arbitrators proceeded appears to be full and satisfactory. It comes from two of the arbitrators themselves, and has not been controverted, or impugned by any opposing evidence. Nor is it necessary that proof of the mistake imputed should appear upon the face of the award. *Knox v. Symonds*, Ves. J. 270, (Sumn. Edit.) 2 Story Eq. J. § 1445; *Kent v. Elstob*, 3 East. 18; *Chase v. Westmore*, 13 East, 158. In note 5 to case cited of *Knox v. Symonds*, it is said by the learned annotator "that Courts both of law and equity will interpose where an award has been made under a mistake, provided there be clear and distinct evidence of mistake, and of the precise nature of such mistake, as to which, however, Lord Thurlow

insisted upon having the affidavits of the arbitrators themselves; *Anderson v. Dancy*, 18 Ves. 449; but this should seem to be hardly necessary when the mistake can, by other means, be unequivocally established. 3 East, 18." The requisition of the rule seems to be fully satisfied by the proof. Not only is mistake shown, but also the precise nature of the mistake—a mistake not resulting from a mere erroneous judgment in the application of an admitted rule of law to the facts involved, but mistake in rejecting the recognized and subsisting law, and substituting what was at the most but the mere military order of the commander-in-chief of the Federal armies, which, at the time, he was wholly without the power to enforce.

That the arbitrators meant to decide strictly according to law cannot be doubted. It is shown not only by the testimony referred to, but by the very nature of their award. There is nothing in it which resembles compromise, or the recognition of a hard claim with an abatement, or an adjustment of conflicting demands upon equitable principles, on the basis of mutual concession. But the award is, without qualification or reserve, for the defendant and against the plaintiff, thorough-

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ly and inflexibly throughout. The *twenty-nine bales of cotton fairly bought and paid for by the plaintiff, and belonging to him as his specific property in law, the award takes from him and assigns to the defendant; and for the four negro slaves, the lawful property of the plaintiff, sold and delivered to the defendant, not one dollar of compensation is allowed. It is due to the arbitrators themselves, to declare, that they intended to decide strictly according to law, but misconceived it; for otherwise the shocking injustice of the award would admit of no apology. As the award was intended to be strictly according to law, but has wholly failed in being so, the result is that it is not what the arbitrators intended it to be; and must, therefore, be set aside.

Upon their own grounds, it is difficult to perceive why the arbitrators made no compensation to the plaintiff for the \$426.50 paid to the defendant. The only explanation given is to be found in the testimony: "that the arbitrators admitted that the plaintiff was entitled to something upon that account, but that, when they came to make their award, it was either forgotten, or informally passed over, being regarded as a small matter as to the amount of money involved." The money was paid in part purchase of the cotton, valued at \$1.35 cents per pound. The plaintiff was in any event entitled to three hundred and fifteen pounds of cotton, worth, in our markets, at one period since the sale, more than one hundred and forty dollars; and this claim cannot be said to be so petty as to be unworthy of consideration. If the arbitrators failed to consider and determine this

claim, their award is defective, because not final. If they did decide upon it, but through forgetfulness omitted to dispose of it by their award, it but furnishes another proof that their award does not, in fact, express what was intended to be adjudged, and only suggests another and additional reason why it should be set aside.

In the judgment of the Court, the plaintiff

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is not entitled in this proceeding to more than the vacating of the award. He has plain and adequate remedy at law. The strict enforcement of his rights will be attended, in some sense, with a certain degree of hardship towards the defendant; and the parties have agreed to submit their differences to arbitrators. In the first effort so to adjust their disputes they have miscarried, but a second attempt may be attended with more fortunate results.

I am fully aware of the extreme reluctance with which the Court interferes with the decisions of arbitrators, but if the jurisdiction to relieve against their mistakes is not to be exercised in a case like the present, it may well be said that it exists in theory only.

It is ordered and adjudged that the award herein above referred to be set aside and avoided, and that the parties respectively pay their own costs.

The defendant appealed, and now moved this Court to reverse the decree, on the following grounds:

1. That in consequence of the proclamation of President Lincoln, and the Constitution of this State accepting "the action of the United States authorities" on the subject of slavery, there was, in December, 1864, and January, 1865, no legal title as slaves to the negroes sold by complainant to defendant.

2. That if there was any such title, it was in theory only, and not such an actual and tenable title as could be enforced in law, or such as to support a contract of warranty of title, or be a sufficient consideration for the transfer of valuable property.

3. Because the matters in dispute between the parties, including this question of title, were referred by the parties to a tribunal of their own selection; they are bound by the award, made by judges of their own choice,

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and clothed by them with the power to decide, and their decision is binding, and should not be set aside by the Court.

4. That the failure of the arbitrators to award Mitchell the amount of the cotton paid for in Confederate money is not a sufficient ground to set aside the award, because this was not one of the matters of dispute, and in so far as the award exceeds the terms of submission and to that extent can this Court set it aside, and no further.

5. Because, under the circumstances of this case, this award is just and fair, and will "effect substantial justice" between the

parties, and should not be set aside by the Court.

Fraser, for appellant.

J. S. G. Richardson, Dinkins, contra.

The opinion of the Court was delivered by

DINKIN, C. J. In the view which the Court takes of this case, it is not necessary to consider or determine some of the important principles so ably discussed in the decree of the Chancellor.

The parties occupied the relation of father-in-law and son-in-law. The matter in difference between them was solely the right of property in twenty-nine bales of cotton, at that time in possession of the defendant. Nor about the facts, can it be said, there was any dispute whatever. They were few and simple, and all reduced to writing. The only subject of disagreement was the consequence resulting from admitted facts. The Courts were open to them, and they had legal advisers at their elbow. But closely connected as they were, they did not choose to appeal to the public tribunals of the country. They preferred rather to incur the hazard of "suffering wrong than to go to law."

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*Accordingly, on 4th January, 1866, under their hands and seals, and in the presence of a subscribing witness, they entered into a written agreement to "refer all matters in dispute in relation to certain paper writings (describing them) to the arbitrament and award of four arbitrators, two to be chosen by each party, and an umpire selected by us jointly, the said papers about cotton signed by W. F. De Schamps." (the defendant.) The arbitrators and the umpire were thereupon selected, and, on the same day, made their award under their hands and seals, as follows: "We, the undersigned, arbitrators and umpire in this case, on consideration of the matters referred to us, do award that William F. De Schamps do keep the cotton in dispute between himself and Benjamin Mitchell."

The principal ground alleged by the plaintiff for impeaching the award was, that the arbitrators, intending to decide according to law, had plainly and palpably mistaken the law. This allegation depended on the testimony of one of the arbitrators. The consideration for the cotton was the sale and delivery of certain slaves by the plaintiff to the defendant, in December, 1864, and February, 1865. The witness testified that "the award or decision of the arbitrators was made for the reasons, or upon the consideration, that in consequence of the previous proclamation of the President of the United States, the negroes referred to were free; that therefore the seller had no title to convey—the consideration of the contract or agreement thus failing."

The inquiry is, whether, assuming that

the arbitrators had misapprehended the law, this be a sufficient ground for setting aside their award. Upon this subject Mr. Justice Story says: The difficulty is two-fold; "Whether the mistake of fact or of law is to be made out by extrinsic evidence; and whether a mistake of law, upon a general submission, involving the decision both of law and of fact, constitutes a valid objec-

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tion." 2 Story Eq. J. § 1453. "Arbitrators," says he, "being the chosen judges of the parties, are, in general, to be deemed judges of the law, as well as of the facts, applicable to the case upon them. If no reservation is made in the submission, the parties are presumed to agree that every question, both as to law and fact, necessary for the decision, is to be included in the arbitration. Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and the fact. And, under such a submission, they are not bound to award on mere dry principles of law; but may make their award according to the principles of equity and good conscience." § 1454. And in a note is cited the authority of Lord Thurlow, in *Knox v. Symonds*, (1 Ves. J. 369,) who says: "Upon a general reference to arbitration of all matters in dispute between the parties, the arbitrator has a greater latitude than the Court, in order to do complete justice between the parties; for instance, he may relieve against a right which bears hard upon one party, but which, having been acquired legally, and without fraud, could not be resisted in a Court of justice." It is finally said by Judge Story: "But the decision of the arbitrators upon a doubtful point of law, or in a case where the question of law itself is designedly left to their judgment and decision, will generally be held conclusive."

There was no doubt about the sale and delivery of the slaves. The legal consequence of extraneous events was the only matter of disagreement. This they referred to judges of their own choice, instead of the judges appointed by law, and they have decided in favor of the defendant. We see nothing in the testimony of the witness which would justify the Court in impeaching that judgment. As between these parties, the award of the arbitrators is the law of the case, and must be regarded as final and conclusive.

In the adjustment of the transaction be-

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tween the parties *in January, 1865, the plaintiff, in addition to the price of the slaves, had paid the defendant in cash, or in the then currency of the country, Confederate money, four hundred and twenty-six dollars and fifty cents. This, as the witnesses say, was inadvertently overlooked by the arbitrators in rendering their award.

It is ordered and decreed, that the decree

of the Chancellor, setting aside the award, be reversed. It is further ordered that it be referred to the Commissioner, to ascertain and report to the Circuit Court, the value of the four hundred and twenty-six dollars and fifty cents on the 4th January, 1865. It is finally ordered, that the decree of the Chancellor, on the subject of the costs, be affirmed.

WARDLAW and INGLIS, JJ., concurred.
Decree modified.

13 Rich. Eq. *25

*JAMES FARROW and T. STOBO FARROW, Exors., and Others, v. DR. JAMES BIVINGS and Others.

(Columbia. Nov. and Dec. Term, 1866.)

[Corporations *↔*237.]

A corporation, whose members, by the terms of their charter, were liable as general partners, filed a bill for injunction against B, a member of the corporation, who had a claim against it, and gave an injunction bond, with several other members and A, who was a stranger, as sureties. After a long litigation, (pending which other creditors, whose debts had been contracted after B's, recovered judgments against the corporation,) B obtained a decree against the corporation for a large amount. The property of the corporation was sold by the Sheriff, and the proceeds, after satisfying the older judgments, paid only about one-third of B's decree, and he then recovered judgment at law on the injunction bond against all the sureties:—*Held*, that B, as a member of the corporation when his debt was contracted, was liable to contribute with the other members towards payment of the balance due him after the effects of the corporation had been exhausted:—*Held*, further, that he and other solvent members were bound to indemnify A, against his liability as surety.

[Ed. Note.—Cited in *Hall & Co. v. Klinck*, 25 S. C. 357, 60 Am. Rep. 505.

For other cases, see *Corporations*, Cent. Dig. § 931; Dec. Dig. *↔*237.]

Before Carroll, Ch., at Spartanburg, June, 1864.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. At the hearing three questions were discussed, and the whole argument, on both sides, was directed to them exclusively. They will be considered in the order in which they were proposed by the plaintiff's counsel.

Pursuant to an order from this Court, in the suit of the Bivingsville Cotton Manufacturing Company v. James Bivings, a bond had been executed by the Company, as principal, with J. E. Henry and others, as sureties, for securing to James Bivings whatever should be found due to him upon the balance

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of a note held by him against that *Company as maker. It was contended that, under that bond, no more was recoverable, at the uttermost, than the balance at that date ostensibly due upon the note, with the credits endorsed. The terms, it was said, as

well of the bond itself as of the order requiring it, authorized and sustained that construction. What degree of plausibility or force there may be in this argument, or what countenance it may find in the decree of Chancellor Johnstone, in that case, we need not now inquire.

The question is deemed concluded by the decreed order, in the cause pronounced by Chancellor Wardlaw, in June, 1855, which it is understood stands unreversed and in full force. If there be any doubt as to the operation of that order, there can be none as to effect of the judgments recovered in the actions at law upon the bond. In the latter cases the precise question seems to have been made before the Circuit Court, and it is distinctly presented in the sixth of the grounds of appeal for a new trial, all of which were considered and overruled by the Court of last resort. In the case already mentioned—of the Bivingsville Cotton Manufacturing Company v. James Bivings—the sum adjudged by the decree to be due by the former to the latter exceeded considerably the penalty of the bond referred to. During the years 1855 and 1856, the entire visible property of that Company was sold by the Sheriff, under judgments and executions versus them; and of the proceeds, some \$13,000 seem applicable towards payment of James Bivings' execution, founded upon the decree in his favor. This fund the plaintiffs contend should be regarded as having been received by James Bivings, towards payment of the portion of the debt secured by the bond to which they are sureties; and it is urged that, to that extent, the bond should be held to have been satisfied. When the property of the Company was sold by the Sheriff, no judgment had been recovered upon the bond. That was

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not accomplished until *more than three years afterwards, and more than four years after the entry of Dr. Bivings' execution in the office of the Sheriff. No conceivable lien upon the proceeds of the sales in the hands of the Sheriff can be referred to the bond in question, or to the judgment and execution upon it afterwards recovered. After applying the credit from that fund to Dr. Bivings' execution, there still remained unpaid a residue of nearly \$20,000. That the Court should transfer that credit from the execution upon the decree to the bond itself, or the execution founded upon it, and to that extent render nugatory a security executed under its own order, and at the very moment when the necessity for it was made manifest would be a proceeding wholly unwarranted by justice or reason. If, upon any imaginable ground cognizable by a Court of law, the plaintiffs were entitled to claim a payment upon their bond out of the proceeds of the sale of the Sheriff, they should have asserted it in their defence to the actions

upon the bond. If they did not do so, the opportunity at least was allowed them, and it cannot be recalled; and if they did, the defence was actually made and was overruled. If, in support of this claim of the plaintiffs, anything can be advanced having the faintest hue of plausibility, it remains yet to be discovered.

In December, 1838, the members of the Bivingsville Cotton Manufacturing Company obtained a charter of incorporation, conferring upon them every right and privilege incident to corporate bodies, but subjecting them also to all the liabilities pertaining to general partners. The Company has proved insolvent, and some of the sureties upon the bond to Dr. Bivings have been constrained to pay considerable sums in consequence of that liability. The sureties referred to, except one of them, John T. Kirby, were members and stockholders of the Company when its debt to Dr. Bivings was contracted.

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They claim that the other *members at that date are bound to contribute in proportion to the amounts of stock held by them respectively, in order to reimburse them for any excess they have had to pay above their ratable proportion of the debt, as also to relieve them of their liability under the bond for the residue of that debt.

This claim of the bill is earnestly and stoutly resisted by the defendant, Dr. Bivings, at least in respect of himself. On his behalf it is urged that he was deposed from his office of agent and manager as early as the spring of 1844, and that he afterwards had no control or influence over the operations of the Company; that he sold and transferred all his interest in the stock as far back as February, 1846; that when he was removed from his post as agent, the assets of the Company were ample to pay all its debts, and were so up to 1847; that from and after that date all the business and operations of the Company were permitted to pass into the control of E. C. Leitner, under whose gross misconduct and mismanagement heavy debts were contracted, which finally brought about the insolvency of the Company; that he had been harassed by the other stockholders since April, 1844, by a series of groundless and vexatious proceedings in this Court, which had resulted in the utter disproof of all their complaints against him, and in establishing that the Company was indebted to him largely beyond the sum ascertained by the prior accounting which they had sought to impeach; that during this period, when he could have made his debt out of the corporate property, but was prevented by the interposition of this Court, judgments were recovered against the Company upon debts of dates long posterior to his own, which judgments had been fully paid and satisfied out of the corporate property, leaving only a remnant, sufficient to

pay but little more than one-third of what was due to him; and that, under such circumstances, there should be no abatement of

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his *debt, because of any supposed liability upon him to contribute to its discharge. There is nothing to show that the proceedings in the Court, at the suit of the Company, were instituted or prosecuted against Dr. Bivings with the intention to harass or annoy him. On the contrary, we must presume that they were set on foot and conducted by the Company in good faith, though, as it turned out, in utter misconception of the facts. The Company also appears to have acted at the outset with due deliberation and caution. Before appealing to the Court, they appointed a committee of their own members to examine the accounts between Dr. Bivings and the Company. It was not until that committee had made such a report as to leave them no other alternative, that the Company determined to proceed by suit against him. That there were gross errors, and they adverse to Dr. Bivings, in the accountings between himself and the Company, in 1842, is indisputable—a circumstance difficult to be explained, except upon the supposition that Dr. Bivings' books of account were confusedly and unskilfully kept. By concession on all sides, the mismanagement of the affairs of the Company, terminating in its insolvency, is to be imputed to E. C. Leitner. It is not perceived with what show of justice or reason Dr. Bivings can claim that the other corporators shall be held responsible for the misdeeds of Leitner, while he himself is to be wholly exonerated. If they transferred their stock to E. C. Leitner, in the course of the year 1846, so did he, and they would seem to have but followed his example—his sale to Leitner having occurred as early as the 9th day of February, in that year. They respectively did no more than he in placing Leitner in the control of the corporate property. As to the corporators who were sureties upon the bond to Dr. Bivings, they in reality had even less agency than he in producing that

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unfortunate result, as the *amount of his stock transferred to Leitner seems to have exceeded the aggregate of theirs by more than \$5,000.

The property and effects of the Company having been exhausted, the individual members at the time the debt to Dr. Bivings was incurred are, under the charter, personally liable as general partners for the corporate debts. There is no rule in law or equity which forbids a member of a corporation or partnership from contracting with it, and when the contract is made, such member is entitled to its full benefit. *Railroad v. Claghorn, Speer's Equity*, 562. 3 Kent, 32, and note 1. "A partner cannot exonerate himself from personal liability for the existing

engagements of the partnership, by assigning or selling out his interest in the concern." 3 Kent, 32, note A. Had the debt to Dr. Bivings been due to one not a member of the Company, in the absence of all property and effects of the Company to satisfy the debt, Dr. Bivings must undoubtedly have contributed towards payment, ratably with the other members, and in proportion to the amount of his stock. That he himself is the creditor cannot exonerate him, as we have seen, from such liability.

His debt undoubtedly was, in its inception, and still is, a debt against the Company. In truth, it is because of its being a debt of the Company that a personal liability has attached to the members of the Company. But if Dr. Bivings be no longer bound to contribute ratably to the discharge of the debt, or (what is substantially the same thing, he being the creditor) to submit to a corresponding abatement of his debt, then it has lost its distinctive character as a debt against the Company, and the very foundation of the personal liability of the members in regard to it is taken away.

The sum which Dr. Bivings is entitled to demand from the other members of the Company in satisfaction of his debt (the corporate property being exhausted) is the nom-

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*inal amount of his debt, with interest, reduced by the amount of his own ratable contribution as a stockholder. This assuredly was all that he could claim at the beginning of his controversy with the Company. It would be difficult to point out at what stage of the subsequent proceedings it was that he became entitled to more, nor would it be easier to show that Dr. Bivings has been in anywise prejudiced by the proceedings against him at the suit of the Company, when it appears that they resulted in an adjudication in June, 1855, that the Company was indebted to him in a sum exceeding what he supposed to be due him by more than \$8,000.

So much has been said upon this branch of the case in deference to the earnest argument on behalf of Dr. Bivings, and not because the question discussed is regarded as difficult or doubtful.

John T. Kirby, one of the sureties upon the bond to Dr. Bivings, is dead, and his administrators are among the parties plaintiffs. He was at no time a member or stockholder of the Company. No sufficient reason is suggested for excluding him from the indemnity which a surety is entitled to demand of his principal.

It is ordered and adjudged that this opinion stand for the decree of the Court.

And it is further ordered that the Commissioner inquire and report what was the amount of the debt decreed to be due to the defendant, James Bivings, by the Bivingsville Cotton Manufacturing Company, and what

payments thereon have been made, and at what dates, and how and by whom made, and what is the residue of the said debt still due and unpaid, and how much thereof is secured and how much not secured by the aforesaid bond executed to the said James Bivings, and whether any and what payments upon said bond, and at what dates respectively, were made by the surety, J. T. Kirby, in his life-

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time, or his *administrators after his death, and whether any and what sums of money were paid upon the said bond, and at what dates, by any and which of the other sureties, (being members of said Company,) during their lifetime, or by their representatives after their death, in excess of their ratable contributions to the same.

It is further ordered that the Commissioner inquire and report what persons were members of the Bivingsville Cotton Manufacturing Company when their debt to the defendant, James Bivings, was incurred, and what were the amounts of the capital stock of said Company held by them respectively, and whether any and which of the said members are insolvent, or have removed from this State, and what sums should be contributed by the survivors respectively of the said members, and by the representatives of such of them as have died, ratably and in proportion to the amount of their stock, for indemnifying the administrators of the said John T. Kirby, on account of such sums as he or they may have paid upon said bond, and what sums for reimbursing the other sureties upon said bond, or their representatives, on account of such payments as they may have made thereon in excess of their ratable contributions to said debt, and what sums for satisfaction of the residue of the said debt to James Bivings is still due and unpaid.

The question of costs, and all other questions in the cause not hereby adjudged, are reserved until the coming in of the report.

The defendant, Dr. Bivings, appealed from so much of the decree of his Honor as relates to an abatement of the debt to himself, to the extent of his interest as a stockholder in the Bivingsville Manufacturing Company, and also the right of the administrators of J. T. Kirby to relief, as one of the sureties on the injunction bond.

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*1. Because the defendant, Dr. James Bivings, was prevented from recovering his entire debt of the Company, by the act of the sureties on the bond, and if he had been permitted to proceed with his action at law, the Company then had, and long afterwards had, abundant means from which his debt could have been realized.

2. Because the property of the Company was applied to the payment of debts contracted after he ceased to have any interest in the Company, and pending the litigation. The

creditors on debts thus contracted obtained prior judgments when he was enjoined, thereby appropriating the funds to which he was equitably entitled, and to that extent prejudicing the defendant Bivings.

3. Because the obligors to the injunction bond are not entitled to contribution from Dr. James Bivings, or any of the other corporations, on account of loss sustained by reason of their suretyship.

4. Because the administrators of J. T. Kirby are not entitled to any relief or abatement as against Dr. Bivings, for any amount they have or may be liable to pay on the recovery.

5. Because the decree in the particulars specified is erroneous, and against law and equity.

Williams, for appellant.
Sullivan, contra.

Curia, per DUNKIN, Ch. J. The several points presented by the grounds of appeal appear to have been considered by the Chancellor. This Court concurs in the decree, and the appeal is dismissed.

WARDLAW and INGLIS, J. J., concurred.
Appeal dismissed.

13 Rich. Eq. *34

*JAMES C. MEGGETT v. SAMUEL C. BLACK.

(Columbia. Nov. and Dec. Term, 1866.)

[*United States* ⇨ 119.]

By an Act of Congress passed in 1857, a claim on the government by a number of persons, many of whom were dead, and which had existed for many years, was allowed, and payment directed to be made to those "who are living, and the heirs of those deceased." In 1858 the Act was amended, and payment directed to be made to the executors or administrators of those deceased. *Held*, that under the Act of 1857, the heirs then living of the deceased parties were the persons entitled; that the Act of 1858 only changed the mode of payment, and not the rights of the beneficiaries; and that an administrator of J. M., one of the original parties, who had received payment under the Act of 1858, held the fund in trust for the only heir of J. M. who was living in 1857, and was not liable to account to the representative of another heir of J. M., who had died before that time.

[*Ed. Note*.—For other cases, see *United States*, Cent. Dig. § 108; Dec. Dig. ⇨ 119.]

Before Carroll, Ch., at Charleston, 1866.

The bill was filed by James C. Meggett, administrator of J. J. Mikell, against Samuel C. Black, administrator of Josiah Mikell.

It stated that a certain claim of a large amount had recently been recovered from the Government of the United States through the action of Congress, by which the officers and privates of the Edisto Company, raised for the defence of the coast during the war of 1812, became entitled to certain shares of said claim proportionate to their respective positions in the said company. That it was

also provided by the Act of Congress, that in case any of the said officers or privates had died, that the share or shares of such so dying should be distributed among their heirs and next of kin, and paid to the executors and administrators of the deceased parties. That the said Josiah Mikell, deceased, was one of those who served their country during the war of 1812 in the Edisto Company afore-

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said, and by such *service became entitled to a portion of the fund set apart as above stated for the benefit of the said soldiers, or their legal distributees. That the said Josiah Mikell had been dead for many years, dying intestate, leaving surviving him at the time of his death his widow, — Mikell, and his son, J. J. Mikell. That the said J. J. Mikell had also died intestate, leaving surviving him his daughter, — Mikell, who had intermarried on the — day of —, 18—, with Samuel C. Black, of the said district.

That your orator is informed that, upon the death of the said Josiah Mikell, one-third of his said claim vested in his widow, — Mikell, and two-thirds thereof descended to his son, J. J. Mikell; and that upon the death of the latter his said interest descended to his daughter, the wife of the said Samuel C. Black as aforesaid. That the said — Mikell, widow of Josiah, who was entitled, upon his death, to one-third of his portion under said claim, had also died; and that the said one-third had vested in his granddaughter, the wife of Samuel C. Black as aforesaid. That the above-mentioned Samuel C. Black, upon the — day of —, in the year 18—, took out letters of administration on the estate of the said Josiah Mikell, deceased, and, under the provisions made in the said Acts of Congress, applied to the department at Washington, as administrator of Josiah Mikell, deceased, for the portion under the said claim due the said Josiah Mikell, and that the same was paid to him in accordance with the special provision in said Act contained, and that the said Black had received the portion of Josiah Mikell, amounting to one thousand and seventy-two dollars and ninety-three cents, (\$1,072.93.)

The prayer of the bill was, that the said Samuel C. Black, as administrator, might be ordered to pay over to the complainant, as administrator of J. J. Mikell, deceased, two-thirds of the money received by him from the United States Government.

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*The defendant, Samuel C. Black, demurred to so much of the bill as sought to compel him to pay over to the complainant, as administrator of J. J. Mikell, any part of the money mentioned in complainant's bill, upon the ground that the funds received by him from the United States Government were not distributable as assets of the estate of Josiah Mikell, but were held by him as trustee

for such of the heirs of Josiah Mikell as were living at the time of the passage of the Act.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. The question to be determined will be readily apprehended by an inspection of the pleadings.

By the Act of Congress of March 2, 1857, the Secretary of War is "authorized and directed to examine and settle, upon the principles of equity and justice, the claim upon the Federal Government of the officers, musicians, and privates of the Edisto Island Company of the militia of the war of 1812." He is further directed "to allow to those who are living, and the heirs of those deceased, the amount of pay and allowance to which each of them would have been entitled, according to their respective positions, under the regulations of the service at that time, for such a length of time as they shall each be proved to have served in defence of said island during the war;" and also "reasonable compensation for the material and labor which shall be proved to have been expended by them in the erection of two fortifications on that island for the purpose of defence in said war."

By the Act of Congress of February 4, 1858, the payments which the former Act authorized to be made to the "heirs" are directed to be made to the administrators or executors of deceased members of the company.

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*It appears to the Court that there is nothing ambiguous in the terms of the Act referred to. Of the moneys receivable by virtue of those Acts, a portion is to satisfy "the amount of pay and allowance" to which "the officers, musicians, and privates of the company would have been entitled" had they been formally mustered into the service of the United States. The amounts upon that account to be "allowed" to them are not to be fixed arbitrarily, but are to be ascertained by reference to their "position," their military rank and grade, and their "length of service." The residue of the moneys which they are entitled to claim they receive as "just and reasonable compensation for material and labor expended" in the erection of fortifications on the island for the purpose of defence.

It is not a claim upon the bounty of the Government that is recognized by the Acts in question, but a demand upon its justice; not a mere gratuity, but a debt. The transfers of money authorized by these Acts are in terms designated as "payments;" and the irregularity of the first Act in directing them to be made to the "heirs" is rectified by the subsequent Act, in its direction that such payments shall be made to the personal representatives of such of the claimants as are dead.

It results that the money received by Samuel C. Black, the defendant, as administrator of Josiah Mikell, deceased, under the Acts of Congress referred to, are to be disposed of by him as part of his estate, in a due course of administration; and that the plaintiff is entitled to receive the distributive portion of the same that belonged to his intestate, J. J. Mikell, deceased.

It is ordered that the defendant account with the plaintiff before one of the Masters upon the principles of this decree, and that the costs be paid out of the estate of Josiah Mikell, deceased.

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*The defendant, Samuel C. Black, administrator of Josiah Mikell, appealed, on the following ground:

Because the Act of the 2d of March, 1857, having granted to the "heirs" of a deceased member of the Edisto Island Company the amount of pay and allowance to which such member would have been entitled if living, the defendant, to whom payment was made under the provisions of the Act of 4th of February, 1858, received the same in trust for the heirs of the said Josiah Mikell living at the time of the passage of the Act, and not as assets of the estate of his intestate, to be administered in due course of law.

Act of Congress.

That the Secretary of War be and he is hereby authorized and directed to examine and settle, upon the principles of equity and justice, the claim of Josiah Mikell, and others, (naming them,) they being the officers, musicians, and privates composing the Edisto Island Company of militia in the State of South Carolina in the war of 1812; and that he allow to those named who are living, and the heirs of those deceased, the amount of pay and allowances to which each of them would have been entitled, according to their respective positions, under the regulations of the service at that time, for such length of time as they shall each of them be proved to have served in defence of said island during the said war, and that he allow them just and reasonable compensation for the material and labor which shall be proved to have been expended in the erection of two fortifications on that island for the purpose of defence on said island.

Lord, for appellant.

Whaley, contra.

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*The opinion of the Court was delivered by

DUNKIN, C. J. The Act of Congress, 2 March, 1857, authorized and directed the Secretary of War to examine and settle, upon the principles of equity and justice, the claims of seventy-eight individuals, by name, constituting the Edisto Island Company of militia, who, in the war of 1812, had rendered important services to the country.

The Secretary was directed to allow to those named who are living, and the heirs of those deceased, the amount of pay and allowances to which each of them would have been entitled, according to their respective positions, under the regulations of the service at that time, and also to allow for the materials and labor in erecting fortifications. The Secretary of the Treasury was directed to pay the amount adjudicated to be due the said parties by the Secretary of War.

By the Act 27 February, 1858, the preceding Act was so amended as that the payments therein authorized to be made to "the heirs of those deceased" shall be made to administrators and executors of those deceased.

At the time when the Act of 1857 was passed, and also at the time of instituting these proceedings, the wife of the defendant, Samuel C. Black, was the sole heir of her grandfather, Josiah Mikell, deceased, who had been one of the members of the Edisto Island Company, and the defendant is himself the administrator of Josiah Mikell, deceased, and has received from the treasurer the amount awarded by the Secretary of War under the Act of 1857.

The complainant is the administrator of J. J. Mikell, deceased, the father of Mrs. Black, and who was the son of Josiah Mikell, deceased, but had been some time dead when the Act of 1857 was passed.

After a careful examination of the Acts, it does not appear to the Court that any difference or change was intended to be made in

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the beneficiaries under the Act of 1857 by the amendment of 1858. By the former Act the allowance was to be made by the Secretary of War, on equitable and just principles, to those of the company who were living, "and the heirs of those deceased." By the second section the amount adjudicated to the said parties, by the Secretary of War, was to be paid by the Secretary of the Treasury. After an interval of nearly half a century, it would impose on the Secretary of the Treasury great difficulty and embarrassment to ascertain the heirs of seventy-eight individuals, or rather of such as were not living in 1857. To avoid this, by the Act of 1858, so much of the Act of 1857 as directed payment by the Secretary of the Treasury, of the sums adjudicated by the Secretary of War, "to those living and the heirs of those deceased," under the previous provision was amended, and payment was thereby directed to be made to "the administrators and executors of those deceased." The grant or allowance or donation, (by whatever name it may be characterized,) in the first section of the Act of 1857, to the "heirs of those deceased," was not repealed or withdrawn by the subsequent Act, which changed the mode in which payment or adjudication of such allowance was to be made. Several Acts of Congress have been brought to our notice in

which grants are made directly to the heirs or children of persons who have rendered meritorious services, rather than to their legal representatives, which might afford no advantage to the children or heirs. An Act entitled "An Act for the relief of the heirs of Samuel R. Thurston, late delegate from Oregon," was passed 2 March, 1857, (11 Stat. 505.) The Secretary of the Treasury was directed "to allow and pay to the legal representatives of Samuel R. Thurston, late delegate from Oregon, for the benefit of his heirs," certain arrears of pay, &c. Taking together the Acts of 1857 and 1858, in regard to the Edisto Island Company, a similar construction should be given. By the former

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Act the sums *were allowed and awarded by the Secretary of War to those who were living, and the heirs of those deceased. By the latter Act the payment of the sums thus adjudicated was to be made by the Secretary of the Treasury to the legal representatives of those deceased, in trust for those in whose favor the award had been made, to wit, the heirs of those deceased. Such seems to the Court the true interpretation.

The defendant, as administrator of Josiah Mikell, deceased, was entitled to receive the money under the Act of 1858, and in right of his wife, as sole heir of the intestate in 1857, he was entitled to retain it. It is therefore ordered and decreed that the decree of the Circuit Court overruling the defendant's demurrer be reversed, and that the bill be dismissed.

WARDLAW and INGLIS, JJ., concurred.
Decree reversed.

13 Rich. Eq. *42

*JOHN JOHNSON and Wife and WM. K. JOHNSON v. WM. HAYS GILBERT and Others.

(Columbia. Nov. and Dec. Term, 1866.)

[*Deeds* ⇨ 124.]

Intestate, in his lifetime, conveyed by deed to one of his sons, for valuable consideration, a tract of land. The fee simple was intended to be conveyed, but the effect of the deed was to pass only a life-estate:—*Held*, that the son, who was in possession, had, in equity, an absolute estate; and on bill for partition of the intestate's estate, partition of this tract of land between the son and the other heirs was refused.

[*Ed. Note*.—Cited in *Brown v. Cave*, 23 S. C. 257; *Young v. Young*, 27 S. C. 206, 3 S. E. 202.

For other cases, see *Deeds*, Cent. Dig. § 346; *Dec. Dig.* ⇨ 124.]

Before Dunkin, Ch., at Darlington, February, 1860.

The parties are the heirs at law of Jesse Gilbert, Sr., late of Darlington District, who died intestate; and the chief purpose of the proceeding is to have partition of his estate.

The bill states that a tract of land, on

which the intestate was residing at his death, is part of his estate, and, as such, liable to partition. Jesse Gilbert, Jr., one of the sons of the intestate, sets up, in his answer, a several title in himself to this tract of land, under a conveyance by deed from his father, bearing date on the 18th day of January, 1838. The father died about the 20th of July, 1852, and the deed was recorded on the 10th of September afterwards. The consideration expressed in the deed is \$350 in money, but defendant says that it was, in fact, paid by personal services rendered subsequently to the date of the deed and after he had attained his majority. The issue of title thus made was, by an order of this Court, directed to be tried in the Common Pleas. On the trial several objections were raised to this deed on the part of the heirs at large.

1. That it had never been completely executed for want of delivery.

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*2. That, if delivered, it was inoperative and void, because, 1. It was an attempt to create a freehold to begin in futuro. 2. It was, in its own terms, revocable.

The questions of fact only were submitted to the jury, the legal points, as to the validity of the deed, being expressly reserved. The verdict, finally, upon a second trial returned into this Court, was that the deed had been duly delivered and made upon a valuable consideration. The Judge presiding at law, and certifying this verdict, left the legal questions which had been made to be decided by the Chancellor. Upon the circuit trial of the cause, the questions as to the complete execution and validity of the deed were renewed at the bar for the judgment of his Honor. And it was there further objected that, even if good and effectual, the deed could only create an estate in Jesse Gilbert, Jr., for the term of his own life, inasmuch as there were no words of inheritance in the description of the estate, and the reversion in fee was in the intestate, and was distributable under the statute.

The bill further states that the several distributees, but particularly the sons, had been advanced by the intestate in his lifetime; that to each of the sons, as he grew to manhood and married, the intestate had given a valuable tract of land, putting him in possession, and permitting him to retain such possession and to exercise exclusive dominion over it as his own; that one of the sons, Uriah, had bargained and sold the tract of which he had been put in possession, and received the purchase-money, his father making the title, and then had been, by the intestate, settled upon another tract of land; that after the sons had severally been for many years thus in possession, the intestate, in consequence of their thriftless habits, had, in order to secure the lands and the use of them to them and their families, made the titles to

their respective children, and that he had made other advancements to them, and prays

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that the distributees severally may discover and account for their respective advancements. The answers of the sons admit their receipt of the lands, but deny their liability to account for them as advancements. Much testimony was taken as to the fact and value of these advancements, including the several tracts of land of which the sons had respectively been put in possession by the intestate, and also as to the intestate's intention that they should be accounted for as advancements. It was further claimed that if these lands were not to be accounted for as advancements, inasmuch as the several deeds to the respective families of grandchildren, for want of words of inheritance, created only estates for life, the reversions are liable to partition as the estate of Jesse Gilbert, Sr., the intestate.

Deed of Jesse Gilbert, Sr., to Jesse Gilbert, Jr. State of South Carolina, Darlington District:

Know all men by these presents, that I, Jesse Gilbert, Senior, bargains, sells, and delivers unto Jesse Gilbert, Junior, a certain tract of land or plantation, containing three hundred and fifty acres, more or less, for the sum of three hundred and fifty dollars, and bounded as follows: beginning on a pine corner at the lower corner of my cotton field, then by a straight line into the graveyard old field to a lightwood stake corner, thence up through the field close to the graves, and on close to the Isaiah Skinner well, leaving the well on Uriah's ten acres, ten or fifteen yards on up to the Freeman line to a lightwood stake corner; that is, the line between my son Abram, and my son Uriah, and my son Jesse. All the land that I now hold on the east side of the above-named line, I, said Jesse Gilbert, Senior, warrants and defends unto Jesse Gilbert, Junior, forever, against myself, my heirs and assigns forever, or any other person claiming or to claim any part thereof.

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But I, *the said Jesse Gilbert, Senior, excepts all the above-named land my lifetime, and to act and do with it as I see proper; also my wife to have it during her lifetime or her widowhood. And if I, the said Jesse Gilbert, Sr., never alters the above deed, after my death then to remain in full force and virtue in law.

Given under my hand and seal, this 18th January, 1838. Jesse Gilbert. [L. S.]

William A. Clibern,
Thomas Hooten.

The decree of his Honor, the Circuit Chancellor, is as follows:

Dunkin, Ch. The plaintiffs, John Johnson and William K. Johnson, are administrators of Jesse Gilbert, Sr., deceased, and their respective wives are daughters of the said intestate. The bill is filed against the other

heirs at law and distributees, and prays, among other things, a partition of the real estate of the intestate.

On the part of the sons of the intestate, it is denied by their answers that he died seized of any lands subject to partition. None of the answers appear to be controverted in this respect, except the answer of Jesse Gilbert, Jr. Upon the adverse title, set up by this defendant, an issue at law was directed, which was ultimately tried before Mr. Justice Withers, at Fall Term, 1858, of the Court of Common Pleas for Darlington District; from whose certificate it appears that a verdict was rendered for the defendant, Jesse Gilbert, Jr.; nor has any motion been submitted, on the part of the plaintiffs, for a new trial. Under any view that can be taken, the Court is unable to perceive that the plaintiffs entitle themselves to an order for a writ of partition.

Thomas B. Haynsworth, Esq., having been a party in the cause before he became a Com-

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missioner of this Court, the *matters of account were referred by a special order to E. A. Law, Esq. To his report, which was presented at the hearing, no exceptions were taken by either party in the cause. It is therefore ordered and decreed that the same be confirmed.

In reference to the costs of the issue at law between the plaintiffs and the defendant, Jesse Gilbert, Jr., the Court is of opinion that each of the parties to the issue should pay their own costs, and it is so decreed. The residue of the costs in the cause to be paid by the plaintiffs out of the assets of the estate prior to a final distribution of the same.

The plaintiffs appealed, and now moved this Court to reverse the decree of his Honor, the Circuit Chancellor, on the grounds:

1. That the deed, under which Jesse Gilbert, Jr., claims the tract of land on which the intestate resided, was never, in fact, completely executed.

2. That, if executed, the said deed was void and inoperative, because it was an attempt to create a freehold to commence in futuro; and because it is, in its terms, revocable.

3. That, if valid, the said deed, for want of words of inheritance, created only an estate for life in Jesse Gilbert, Jr., leaving the reversion in the intestate.

4. That the sons of the intestate ought to account for the several tracts of land of which they had respectively received the possession from the intestate, including those for which titles had been made to their children, or at least for such quantity of estate therein as the deeds respectively created.

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*5. That the reversions in the said several tracts of land wherein the deeds made by the intestate were effectual to pass life-estates only are liable to partition, as the estate of the intestate.

6. That his Honor ought to have ordered a writ of partition to distribute among the heirs at law of the intestate the tract of land claimed by Jesse Gilbert, Jr., or, at least, the reversion thereof, and also the reversions of the other tracts of land given to the sons or their families.

7. That his Honor ought to have ordered the sons of the intestate, severally, to account for the tracts of land so received by them, respectively, or for such estates as they or their children took therein, as advancements.

8. That his Honor ought to have ordered that, in ascertaining the shares of the several distributees in the estate of the intestate, each should be charged with the value of the advancements received, as admitted in the answers or proved by the evidence, his decree ascertaining therefrom what were properly chargeable as advancements.

Prince, for appellants.

J. S. G. Richardson, contra.

The opinion of the Court was delivered by

CARROLL, Ch. (a) In the issue at law as to the land claimed by Jesse Gilbert, Jr., the verdict rendered was "that the deed had been duly delivered and made, upon a valuable consideration." No motion was submitted on the part of the plaintiffs for a new trial.

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Nor does the Chancellor appear to be dissatisfied with the verdict. The deed to Jesse Gilbert, Jr., furnishes satisfactory evidence, at the least, of an executory contract for the sale of the land in fee. With a contract thus manifested, and with actual possession by the vendee under it, his claim to a specific execution of the agreement could not be resisted. In this jurisdiction the vendee, under such circumstances, is treated as the equitable owner. He may transfer his interest in the land, may devise it as land, and as land it passes by descent to his heir. Story, Eq., §§ 783, 790. It is not deemed necessary to say more as to such of the grounds of appeal as assert the claim of the plaintiffs to a partition of the land referred to.

Whether the conveyances of lands alleged to have been made by the intestate, Jesse Gilbert, Sr., to his other sons or their children passed absolute or life-estates only, the Court has not been provided with the means of determining. No copy of those instruments, or other competent evidence of their contents, appears in the brief of the appellants. It is to be inferred, however, that as to those deeds, or the lands conveyed by them, no serious controversy arose at the hearing. The sons of the intestate, in their answers, denied that he died seized of any lands subject to partition; and it is stated in the circuit decree that "none of the answers ap-

pear to be controverted in this respect, except the answer of Jesse Gilbert, Jr."

All the questions as to advancements, suggested by the appellants, seem to be concluded by previous proceedings in the cause. The matters of account were directed to be audited by a special referee. His report was presented at the hearing. No exceptions to it were taken by any of the parties, and the report was confirmed. The objections to the decree, in respect of the alleged advancements, should have been presented as exceptions to the report. It has not been shown or suggested that the plaintiffs were prevented from taking such exceptions by accident,

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mistake, or surprise, and they cannot now be considered or entertained. It is ordered that the Circuit decree be affirmed, and the motion dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Decree affirmed.

13 Rich. Eq. *50

*WILLIAM E. MARTIN v. THE CITY COUNCIL OF CHARLESTON.

(Columbia. Nov. and Dec. Term, 1866.)

[Taxation ⇨246.]

Landed estate in the City of Charleston which had been in possession of the Freedmen's Bureau during the greater part of the year 1865—*Held*, not exempt from city taxation, because the General Assembly, in the annual Tax Act of December, 1865, had excepted such lands as during the year had been in possession of the Freedmen's Bureau from State taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 324; Dec. Dig. ⇨246.]

[Taxation ⇨246.]

Taxable property is not exempt from city taxation, merely because the State forbears to tax it, or, in enumerating the objects of taxation in the annual Tax Act, expressly excepts it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 324; Dec. Dig. ⇨246.]

Before Lesesne, Ch., at Chambers, Charleston, April, 1866.

The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. The City Council of Charleston, by an ordinance ratified on the sixteenth day of January, 1866, laid a tax of one dollar and seventy-five cents on every hundred dollars of the value of all landed estate in the city.

The plaintiff is the owner of landed estate in the city, assessed at the value of six thousand dollars, upon which the tax under the foregoing ordinance amounts to one hundred and five dollars. The object of the bill is to restrain the collection of this tax, as being unlawful for the reasons which will be hereinafter considered.

By the city charter, granted in 1783, the City Council are empowered to "make such assessments on the inhabitants of Charleston,

(a) Sitting for Inglis, A. J., who had been of counsel in the case.

or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the city, as shall appear to them expedient." But the Tax Act, passed by the Legislature of the State on the twenty-first day of December, 1865, excepts from its operation such landed estate as during the year had been in possession of the Freedmen's Bureau.

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*The plaintiff's property, above mentioned, was in the possession of the Freedmen's Bureau during the greater part of the year 1865, say "from a very short time after the troops of the United States entered Charleston" until the seventh day of November in that year; and it is contended that the effect of the exception is to exempt it from taxation by the City Council as well as to exonerate it from the State tax.

The only limitation to the authority of the city to tax property within its limits is that which is implied in the word "taxable." Its power embraces all "taxable" property; and the question under consideration, therefore, depends on the meaning of that word as used in the charter.

Is the plaintiff's house, under the circumstances, taxable property?

The word has, to some extent, received judicial interpretation in two cases. The first is that of *The State Bank v. The City Council of Charleston*, 3 Rich. 342. In that case it was held that the property of the Bank was not "taxable," because the Legislature had declared it to be exempt from taxation in consideration of a bonus paid to the State by the bank for its charter. The amount of the decision is, that property exempted from taxation by the same supreme authority from which the city derived its power to tax is not taxable in the sense of the charter. It does not, therefore, cover the present case. The Legislature, if it had thought proper, might have declared all property in the possession of the Freedmen's Bureau to be exempt from taxation, as it did in regard to property owned by the bank. But it has not done so. It has in terms only excepted such property from the tax imposed by itself on all other property in the State of the same description. And it must be considered presently whether this exception, under the circumstances, is equivalent to exemption.

The other case is that of *The Vestry of St.*

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Philip's Church *v. *The City Council of Charleston*, McM. Eq. 139. In that it was decided that the lands belonging to the Church are not "taxable," because an Act of the Legislature has forbidden the imposition of any tax on the property of any religious society. That is clearly tantamount to a declaration of exemption of such property from all taxation, as in the case of the bank. This interpretation, too, is furnished by a proviso in the Act itself, in these words: "But no houses owned

or erected on such land by any private individual or individuals shall be exempted from paying taxes thereon, according to their full value." That is, while the land of a religious society is exempt from all taxation, a house thereon owned by an individual is not. Chancellor Harper, in delivering the opinion of the Court, gives, by way of illustration, various instances in which certain property would not be taxable by the city, and in all of them he supposes that the property had been exempted from taxation by the State. And his definition of the words "taxable property" in the city charter is, "all property not exempted by law from taxation."

This case, like the other, is not a conclusive authority in the present case. The Legislature has not, in terms, declared property in the possession of the Freedmen's Bureau exempt from taxation. I will, however, adopt Chancellor Harper's definition, and that brings me to the question whether, under a proper construction of the Act of 1865, the Legislature intended to exempt such property from taxation; in other words, to declare it not "taxable." If it was not taxable when the city ordinance was passed, the City Council exceeded their authority in imposing a tax upon it.

The words of the Act are as follows: "A tax for the sums, and in the manner hereinafter provided, shall be raised, and paid into the public treasury of the State for the use and service thereof; that is to say, fifteen

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cents ad valorem on every hundred dollars of all lands granted in this State, except such lands as during the year have been in the possession of the Freedmen's Bureau, and on all lots, lands and buildings, within any city, town, village or borough in this State, except such as during the year have been in possession of the Freedmen's Bureau." From what tax is this property thus excepted? Clearly from the tax just mentioned. No other meaning can be given to the words without straining them in a manner uncalled for. If it had been intended to exempt the property from all taxation, we must suppose that appropriate language would have been employed, as was done in the case of the banks, and the property of religious societies, and as was also done in the Tax Act of 1864, in regard to property in the hands of the enemy. Thus the words used in that Act are, "Provided that all lands in this State now in possession or under the control of the enemy shall be exempted from taxation." Such property, we see, is not simply excepted from the State tax just imposed on all other property in the State of that description, but it is expressly exempted from taxation. Excepting a certain class of property from a particular State tax is, by the force of the term, forbearing to tax it, not exempting it from taxation by another power on which the right to tax had been conferred by the State.

It is contended that, by expressly excepting this class of property from its tax, the State indicated a policy of exemption which must not be counteracted by the city. But if such a policy had been intended, we must suppose, as before remarked, that appropriate language would have been used. Nor can this policy be inferred, as was urged, from the fact that the State herself declines to tax this property, although the tax on land is so much the more fruitful source of her revenue. The State land tax, though light, produces a large

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amount, because it applies to the *lands throughout the State. But that amount is not very materially diminished by the exclusion of those lands which are or have been in the possession of the Freedmen's Bureau. The State may therefore very well afford to exercise this degree of liberality. On the contrary, if the city of Charleston is forbidden to tax those houses and lots within her limits which were in the possession of the Bureau during the past year, her revenue would thereby be seriously curtailed. In most of the former subjects of city taxation, slaves, securities for money, shipping, carriages, horses, income from professions and employments, and others, have entirely disappeared, or been greatly reduced. She therefore depends mainly on her land tax for success in the effort, in which her Council are now earnestly engaged, to re-establish her credit by paying her indebtedness, and to bring her again under the reign of good government by providing for the necessary expenses.

The conclusion to which I have come renders it unnecessary to consider a question which was discussed by counsel, whether, in any view, property in the possession of the Bureau, during any part of the year 1865, would be entitled to exception from a city tax ordinance passed in 1866, to raise supplies for that year.

It is ordered and decreed that the bill be dismissed.

The plaintiff appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because the policy pursued by the State in its scheme of taxation, when clearly shown, must be followed by the City Council. 3 Rich. 342; *St. Philip's Church v. City Council*, McM. Eq. 139.

2. That while it is conceded that the omission by the State to tax any specific article of property does not restrain the City Council

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from taxing it, yet the exclusion of *such property specifically from the list of property taxed by the State is such an expression of policy as renders a tax by the city illegal. *City Council v. Condry*, 4 Rich. 257.

3. That there is no technical meaning to be attached to the word "exempt," as claimed by the Chancellor, and such words as "relieve" and "except" are continually used by the Legislature and Courts to convey a sim-

ilar meaning. Annual Tax Acts; *State v. City Council*, 5 Rich. 566; 8 Stat. 4.

4. That it makes no difference whether the intention of the General Assembly is expressed by a positive affirmation that a certain description of property shall be exempted—or a negative expression that it is not to be taxed—and the intention must control.

Martin, for appellant.

Porter, city attorney, contra.

The opinion of the Court was delivered by

INGLIS, J. The appellant's claim for the exemption of his property in Charleston from city taxation is rested exclusively on that clause in the General Tax Act of December, 1865, which excepts from the class of property therein taxed, under the description, "lots, lands, and buildings," such as during the year had been in the possession of the Freedmen's Bureau. The clause can have the operation which is thus attributed to it only by virtue of a legislative intention to this effect appearing therein. The policy of the State on any subject to which those under its authority are obliged to conform, can be known only from the laws of the State on that subject, and these ascertain as well the persons upon whom the obligation is imposed, as the nature and extent of the obligation it-

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self. Whether the *General Assembly intended, in this clause of the Tax Act, to restrain the power of taxation which had been delegated to the city, is not to be determined by any technical import of the particular terms or form of phraseology used. Unquestionably, the General Assembly being its own interpreter, the force of an absolute and permanent exemption has been given to words, in form of exception only. The case of *The City Council v. Condry*, 4 Rich. 254, furnishes an illustration of this. But when the nature and purpose of the Act in which this clause occurs, and the terms in which the clause itself is expressed, are considered, it is manifest that it imports no more than that, for the particular occasion to which the operation of the Act is limited, the State will not subject to the tax which it is therein imposing on "lots, lands, and buildings," generally, those described in the words of exception. It is difficult to distinguish between such an instance of expressed forbearance to tax, and a tacit forbearance, such as occurs in the common case of omission from an enumeration of the subjects of taxation. The necessity, in the one case, of expression, in order to take the particular class intended to be omitted out of a general class which is taxed, and in the terms of description of which it would otherwise be included, makes the only difference. When no general class in the enumeration embraces in its terms the favored particulars, a silent omission accomplishes the purpose. By a clause in the Tax Act of 1788, 5 Stat. 58, there is imposed a tax

on "carriages, (wagons, carts, and drays excepted.)" It cannot be supposed that, by this exception, the General Assembly meant not merely to express its own forbearance to tax, but also to prohibit all taxation of these articles by inferior jurisdictions. But having included in the enumeration of the subjects of taxation a class of articles under the general description, "carriages," and intending not to tax "wagons, carts, and drays," it was

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necessary, by words of exception, *to withdraw these articles from the general class in which they would otherwise be embraced. Further effect than this will not be attributed to the exception in that instance. So far as the intention of the General Assembly is to be gathered from the form of words used, and the connection in which they occur, the present is in all respects like it. It is not perceived how such a mere exclusion by the State of any class of property from its own scheme of taxation, on a particular occasion, can indicate an intention that it shall not be taxed at all. Reasons which induce the State's forbearance might not, in the judgment of the General Assembly, be at all applicable to the city, or might, as is suggested in this case, be there wholly overborne by contrary reasons. It may even be supposed that the General Assembly, foreseeing the necessity in the present instance of city taxation, may have, for this very reason, and because unwilling to increase the burden, excepted the property described from the operation of the State tax. Every Tax Act may be said to be a declaration of the policy of the State for the time being, but it is in the matter of its own taxation only, unless the intention that any of its provisions shall have a larger application is made manifest.

The cases cited at the bar are all widely distinguished from the present in this respect, that the claim to exemption is, in each instance, based upon statute law general in its terms and permanent in its nature, furnishing no internal evidence of a legislative intention to restrict its application. Such general rules of law must necessarily impose an obligation on all to whom they can apply. In the case of the banks, (3 Rich. 342,) the charters had declared them "relieved" or "exempt" from all taxes during the period for which they were incorporated. In the case of the glebe lands, (McMull. Eq. 139,) by a long course of legislation, the general rule of the non-liability of the "property of religious societies," &c., to taxation, had been

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established, *recognized, and expressly affirmed. And in the case of the tax on auction sales, (4 Rich. 257,) it is quite evident from the statutes on the subject, that the State intended to transfer, and therefore did transfer, to the city, the power to impose the tax only to the extent to which it was itself

accustomed to exercise it at the time of transfer.

This Court does not discover any error in the judgment of the Court below on the issue made, and it is therefore affirmed, and the appeal dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Appeal dismissed.

13 Rich. Eq. *59

*W. H. B. RICHARDSON and Others v. JOSEPH S. INGLESBY and Others, (a)
(Columbia, Nov. and Dec. Term, 1865.)

[Execution \hookrightarrow 348.]

Under fi. fa. against an administratrix, slaves were levied on and sold by the Sheriff for a sum sufficient to satisfy the debt. The creditor, without the knowledge or consent of the administratrix, made a private arrangement with the bidder, who was one of the distributees, by which the latter was allowed to take off the slaves without paying his bid, made a promise that he would pay the debt or restore the slaves to the Sheriff to be resold on the next sale day. He failed to comply with his promise; further time was given him by the creditor, and he remained in possession of the slaves, ostensibly as his own property and subject to the claims of his own creditors, for over four years, when they were resold by the Sheriff, and the sale being forbidden by various persons, they brought only a nominal sum. The bidder was insolvent at the time of the first sale, and remained so until the resale. *Held*, that, as against the administratrix and the sureties on her administration bond, the execution must be regarded as satisfied.

[Ed. Note.—Cited in Guggenheimer & Adelsdorf v. Groeschel, 25 S. C. 281, 35 Am. Rep. 20.]

For other cases, see Execution, Cent. Dig. § 1061; Dec. Dig. \hookrightarrow 348.]

[Execution \hookrightarrow 353.]

A private arrangement by an execution creditor with a bidder at Sheriff's sale by which the bidder obtains possession of the chattels sold without payment, will of itself satisfy the execution to the amount of the bid; and if there be a contract that the bidder will pay the bid or restore the chattels to the Sheriff to be resold, the creditor must look to that for reimbursement. The effect, it seems, would be the same if the Sheriff of his own head were to make such an arrangement with a bidder.

[Ed. Note.—Cited in Strong v. Weir, 47 S. C. 323, 25 S. E. 157.]

For other cases, see Execution, Cent. Dig. §§ 1074½-1076, 1079; Dec. Dig. \hookrightarrow 353.]

[Execution \hookrightarrow 245.]

The formalities to be observed in the conduct of a Sheriff's sale are intended for the benefit of all parties interested, and can be waived only by their common consent.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 681; Dec. Dig. \hookrightarrow 245.]

[Descent and Distribution \hookrightarrow 130.]

In 1837, three years after an intestate's death, a writ of partition was issued by the Court of Equity to divide the estate between his distributees, and in the return the ready

(a) This case was argued and decided at May Term, 1866, but owing to the protracted illness of his Honor, Judge Ingalls, the opinion was not filed until the present term.

was appraised at \$17,000, and the personalty at \$61,000. There were some debts of the intestate then unpaid, amounting to less than

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*\$4,000. The order confirming the return provided that the property should be subject, in the hands of the distributees, to the liens of any judgments or executions, which might thereafter be recovered against the administratrix, and be liable to be sold by virtue thereof:—*Held*, that as the personal estate was more than sufficient for the payment of the debts, the administratrix had no right to insist that any liens for the benefit of creditors, affecting the lands partitioned, should be provided for; and therefore that the order, as it did not in terms include the lands, should not be construed as having been intended to make provision for liens upon them.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 472, 478–487; Dec. Dig. ☞130.]

[*Principal and Surety* ☞185½.]

Whatever may be the rule at law, in equity the personal estate is the primary fund for the payment of an intestate's debts, and where the personal estate was more than sufficient for that purpose, sureties, on the administration bond, who have been compelled to pay a debt after judgment in an action on the bond suggesting a devastavit, have no equity to follow the real estate, especially where the title has passed out of the heirs.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. ☞185½.]

[*Trusts* ☞25.]

No particular form of words is essential to the creation of an express trust, but where one is alleged to have been created it is essential that an intention to create it should appear. Where the intention does not appear, no form of words will be sufficient.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 34; Dec. Dig. ☞25.]

Before Carroll, Ch., at Sumter, June, 1860.

The bill in this case was exhibited by W. H. B. Richardson, administrator de bonis non of John R. Spann, Sr., deceased, Henry L. Pinckney, Jr., who had succeeded to the whole beneficial interest in the estate of the said John R. Spann, Sr., and Richard Russel Spann, plaintiffs, against Joseph S. Inglesby, John R. Spann, Jr., Hastin Jennings, S. Porcher Gaillard and Henry Spann, defendants. The principal objects of the bill were to obtain a decree perpetually restraining the defendant, Inglesby, from the further prosecution of a writ of scire facias which he had sued out of the Court of Common Pleas for Sumter District against the plaintiff, Richardson, administrator as aforesaid; declaring that a certain contract made on the 30th December, 1842, between the defendants, John R. Spann, Jr., Jennings and Gaillard, created a trust-fund for the benefit of the creditors, then existing, of Charles Spann, Jr., deceased; and that the lands of which the said Charles Spann, Jr., had died seized, especially a plan-

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tation known as Buzzard *Roost, which had become the property of the defendant, Henry Spann, were subject, under and by virtue of a decree in equity of June Term, 1837, to the liens of two judgments against Eleanor Spann,

administratrix of the said Charles Spann, Jr.—one in favor of the defendant, Inglesby, and the other in favor of the Bank of Charleston; subrogating the plaintiffs, Pinckney and Spann, who had paid the judgment of the Bank of Charleston, to the rights of the creditor in said judgment, as against said supposed trust-fund, and to enforce the said supposed lien; and, further, if the defendant, Inglesby, should not be altogether restrained from the further prosecution of his said writ of scire facias, requiring him, in the first place, to exhaust his supposed remedies as against said trust-fund, and under his said lien upon Buzzard Roost.

The pleadings, with the exhibits and the evidence, were very voluminous, but the following statement contains, it is believed, all the facts bearing upon the questions considered and decided by the Court of Appeals.

Charles Spann, Jr., died in the year 1834, intestate, leaving a large real and personal estate. The real estate consisted, besides some other parcels of land not necessary to be here mentioned, of two plantations lying in Sumter District, one known as Buzzard Roost, and the other as Orange Grove—the last named having two adjoining tracts attached to it, one called the Britton Hair tract, and the other the Fullerton tract; and the personal estate consisted principally of slaves. His heirs at law and distributees were his widow, Eleanor Spann, and his six children, Michael C. Spann, Charles C. Spann, James T. Spann, John R. Spann, Jr., Caroline M. Spann, who afterwards intermarried with William Rice, and Mary E. Spann. Administration of the personal estate was granted to the widow, and John R. Spann, Sr., and the plaintiff, Richard Russel Spann, became the sureties on her administration bond.

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*Some two or three years after the death of the intestate, a bill was filed in the Court of Equity for Sumter District by Michael C. Spann, Charles C. Spann, and James T. Spann against Eleanor Spann, John R. Spann, Jr., Caroline M. Spann, and Mary E. Spann—the three last named being minors—for partition of the estate and account. John R. Spann, Sr., was appointed guardian ad litem of the minors, and a writ of partition was issued to divide the whole estate, real and personal. The Commissioners made a return, in which they stated, amongst other things, that they had allotted Buzzard Roost to John R. Spann, Jr., Caroline M. Spann, and Mary E. Spann, as tenants in common, and Orange Grove, with the Britton Hair and Fullerton tracts, to Eleanor Spann; and that they had appraised the whole real estate at \$17,000, and the whole personal estate divided by them at \$61,000. At June Term, 1837, an order confirming the return was made, as follows:

"On motion of De Saussure & Garden for

complainants, and by consent of defendants, it is ordered that the report of the Commissioners in Partition in the above case be confirmed.

"It is further ordered that, as there are outstanding debts against the estate of Charles Spann, Jr., deceased, that the property of the said Charles Spann, Jr., divided, shall be subject, in the hands of the distributees, to any judgments or executions which may be obtained against the administratrix of Charles Spann, Jr., deceased, for debts due by the estate.

"That the complainants and guardians of the children shall give bond and security to the administratrix for the production of the property allotted to them, to satisfy any such judgment or execution which should be recovered.

"That the negroes and other property allotted to the complainants be delivered to them.

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"*That the slaves and the other property allotted to the minors be retained by the said administratrix for the said minors, until they shall respectively attain the age of twenty-one years or marry, or until a legally appointed guardian shall give bond and security according to law, when the same shall be delivered to such guardian; and it is further ordered and decreed that in case any suits, judgments, or executions, either in law or equity, be obtained against the said administratrix for debts due by the estate, that the same shall have a lien upon the slaves or other property of the estate of Charles Spann, Jr., deceased, allotted and delivered to each, and shall be subject to be sold under and by virtue thereof."

So far as it appeared in this case, the only outstanding debts of the intestate which then existed were the two debts, due the Inglesbys and the Bank of Charleston, hereinafter mentioned, amounting, at that time, to less than \$4,000.

Under the above order, the distributees went into possession of their respective shares of the estate, the adults immediately, and the infants as they respectively came of age. The forthcoming bonds, directed to be given to the administratrix, were never exacted by her.

In 1849, under proceedings in equity, to which John R. Spann, Jr., William Rice, and Caroline M., his wife, Mary E. Spann, Richard Russel Spann, and others, were parties, Buzzard Roost was conveyed by the Commissioner of the Court to Leonard White, after whose death it was sold for partition as part of his estate and purchased by J. L. Bartlett, who, in 1856, conveyed it to the defendant, Henry Spann.

On the 12th June, 1841, two judgments were recovered in the Court of Common Pleas for Charleston District against Eleanor Spann, administratrix of Charles Spann, Jr.

one by the Bank of Charleston for \$1,117.

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14, and the other by *Mary Inglesby, since deceased, and Joseph S. Inglesby, executrix and executor of William Inglesby, deceased, for \$2,422.41; and, on the 21st day of the same month and year, writs of fieri facias on said judgments, as well for the amounts aforesaid as for interest to accrue and costs, were lodged with the Sheriff of Sumter District. The Sheriff returned each of said writs nulla bona, and they were then withdrawn from his office, but were returned to it before the sale of the 6th February, 1843, hereinafter mentioned.

Before the 30th day of December, 1842, the title of Eleanor Spann to Orange Grove and the Britton Hair and Fullerton tracts had been vested in the defendant, Hastin Jennings, who held the same, as he stated in his answer, for the benefit of John R. Spann, Jr. On that day, the defendant, S. Porcher Gaillard, desiring to have certain funds, held by trustees for the separate use of his wife, invested in Orange Grove and the said tracts of land, entered into a written contract to that end with the said Hastin Jennings and John R. Spann, Jr., a copy of which is as follows:

"Heads of an agreement between S. Porcher Gaillard of the one part, and John R. Spann and Hastin Jennings of the other part.

"The said John R. Spann and Hastin Jennings agree to sell a tract of land, containing in the whole eight hundred and fifty acres, made up of a tract of eighty-one acres conveyed by C. Spann, Sr., to C. Spann, Jr., on which he settled the place called Orange Grove, a tract of eighteen acres purchased by C. Spann, Jr., from Britton Hair, and a tract of seven hundred and fifty acres called the Fullerton tract; and as there are encumbrances on the said land, for the purpose of clearing them off they agree that the whole shall be levied on by the Sheriff under the case of Inglesby and others v. Eleanor Spann, administratrix of C. Spann, Jr., and sold under that execution; that whatever sum it may sell for be paid by the said S. Porcher Gaillard out of the cash payment to

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be paid by him as stated below—the *said executions to be satisfied; that four hundred acres, part of the said tract mortgaged by M. C. Spann to E. Spann and assigned to the bank be sold by the Sheriff under some execution against the said M. C. Spann, and that the said mortgage be settled with the said bank, and transferred, together with the title from the Sheriff on the sale by him, to the said S. Porcher Gaillard; that all judgments against the said John R. Spann older than the title to the said land of the said Hastin Jennings shall be paid and satisfied; and upon clearing away of the encumbrances aforesaid, as above stated, the said Has-

tin Jennings is to make a title to the said tract of eight hundred and fifty acres, with a warranty thereof, to the said S. Porcher Gaillard, and also a mortgage to him, for the purpose of securing that warranty, of a tract of land called the Potts tract, and also a tract called the Haynsworth tract, with the exception of such parts of the last-mentioned tract as have been sold to Bowen and Redford; which two tracts, so to be mortgaged, contain about six hundred acres.

"And the said S. Porcher Gaillard, on his part, upon the performance as aforesaid of their agreement by the said other parties, agrees to pay in cash for the said land the sum of four thousand dollars, and to give his bond for the payment of two thousand dollars, with interest, on the first day of January, 1844, provided all debts against the estate of C. Spann, Jr., deceased, shall have been then settled; and if not, that he is to hold in his hands the said two thousand dollars and the interest thereon till all such debts shall be settled.

"Mr. Gaillard to have possession on the 15th January next."

In order to relieve Orange Grove and the Britton Hair and Fullerton tracts of the liens upon them of the judgments aforesaid, supposed to have been created by virtue of the order in equity of June Term, 1837, they

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were *levied on by the Sheriff under the writ of fieri facias of the Inglesbys aforesaid, and advertised to be sold on sale-day in February, 1843. On that day John R. Spann, Jr., Charles C. Spann, Richard Russel Spann, and an agent of the Inglesbys attended at the place of sale. Before the lands were offered by the Sheriff, John R. Spann, Jr., and Charles C. Spann gave the Sheriff a written levy, under the executions of the Inglesbys and the Bank of Charleston, of fourteen slaves which had been allotted to some of the distributees in the partition of the estate of Charles Spann, Jr., in 1837. This was done in pursuance of an arrangement which John R. Spann, Jr., with the consent of the Sheriff, had made with the agent of the Inglesbys, by which it was agreed that a sale of slaves sufficient to satisfy Inglesby's execution, should be made by the Sheriff; that John R. Spann, Jr., should become the purchaser, and, without paying his bid, should be allowed to take the slaves home with him, and that he, Spann, should within one month pay the debt due to the Inglesbys, or, failing to do so, restore the slaves to the Sheriff to be resold on the next sale-day.

The witness who testified to the facts just stated, and who was the Sheriff's agent, and managed all his official business, further testified in substance as follows: I was the agent of the Sheriff, and conducted the sales made on the 6th February, 1843. Before they commenced, Richard Russel Spann stat-

ed that he was interested in the executions being paid, and ascertained from me how much they amounted to. The slaves were put up first; John R. Spann, Jr., and Richard Russel Spann were the only bidders. They were sold, some separately and some in lots. John R. Spann, Jr., was the purchaser, and took the slaves home with him. The bids amounted in the aggregate to \$3,965, which nearly covered both executions. John R. Spann, Jr., and Richard Russel Spann were both regarded by me as insolvent. The

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latter, with the assistance of the representatives of John R. Spann, Sr., whose estate was a very large one, could have raised any reasonable amount of money. If the slaves had been resold on the next sale-day, I do not think any loss on the resale could have been collected; but I believe they would have sold for more. Within a few days after the sale I received a letter, which I cannot find, from an agent of the Inglesbys, instructing me to stay proceedings. I did not advertise for sale-day in March, which I would have done if I had not received that letter. On the 22d April, 1843, I received another letter from the same agent, which stated [letter produced] that negotiations for a settlement of the debt due the Inglesbys were still pending with John R. Spann, Jr., and that he, the agent, "understood that no action was to take place in the matter until Mr. Spann's final reply to his proposition." I was first ordered to proceed for a resale in October, 1845. A letter dated October 27, 1845, was received by me from the agent who attended the sale in February, 1843, [letter produced,] which instructed me as follows: "You will forthwith cause the negroes sold to Mr. John R. Spann by you in February, 1843, as the agent of the then Sheriff, under the executions of the Bank of Charleston and Inglesby and Inglesby against administratrix of Charles Spann, and not paid for by the purchaser, to be resold at the risk of the former purchaser." John R. Spann, Jr., at first refused to deliver up the slaves, and an action of trover was commenced against him, and Charles C. Spann, (I think) and the slaves secured by a trover bond. Two other letters [both produced] were received by me from the same agents—one dated December 16, 1845, and the other January 28, 1846, urging me to seize the negroes. John R. Spann, Jr., afterwards delivered up all the negroes, except perhaps, four, the amount of his bids for which with interest he paid. Those delivered up were turned over by me to the

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then Sheriff, who *resold them on the 1st November, 1847. They sold very low. The resales were forbidden by Hastin Jennings and C. C. Jackson. The property of the distributees of Charles Spann, Jr., except the daughters, had become much encumbered.

At various sales made of the property there was much forbidding, and many persons distrusted the title. Much of it sold very low.

Another witness testified that in February, 1843, Richard Russel Spann had in his possession a considerable amount of property in which he had a life-estate; that he was embarrassed, but had credit, and could have raised four thousand dollars.

It further appeared that after the negroes had been bid off by John R. Spann, Jr., in February, 1843, Orange Grove and the Britten Hair and Fullerton tracts of land were put up by the Sheriff, and bid off by Hastin Jennings, at the price of \$10, who, having paid his bid and received a Sheriff's conveyance, shortly afterwards conveyed the same to the trustees of Mrs. Gaillard; and that S. Porcher Gaillard, thereupon paid \$4,000, the cash portion of the purchase-money, under the agreement of the 30th December, 1842, and some short time thereafter the credit portion, but that no part of either payment was applied to the debts of Charles Spann, Jr.

Of the fourteen negroes purchased by John R. Spann, Jr., in February, 1843, he delivered ten to the Sheriff on the 1st November, 1847, and they were resold at the nominal price of \$150. On the same day he paid his bid, with interest thereon, on the other four, and the two amounts, in the aggregate about \$2,100, were applied to the executions of the Inglesbys and the Bank of Charleston, leaving a large balance on each of them still unpaid.

After the resale, the Bank of Charleston brought an action on the administration bond, in the name of William Lewis, ordinary, against W. H. B. Richardson, admin-

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istrator de bonis non of John R. Spann, Sr., who had been dead several years, alleging a devastavit by the administratrix of Charles Spann, Jr., and in 1853 recovered judgment for the penalty, and obtained an assessment by a jury of its damages, to the amount of \$1,058.64, the balance then due on its execution against the administratrix, (see the case reported, 6 Rich. 382). The amount thus assessed was paid in equal parts, by Henry L. Pinckney, Jr., and Richard Russel Spann.

Eleanor Spann, John R. Spann, Jr., and the other distributees of Charles Spann, Jr., had all removed from the State, taking with them all the personal property they owned. It was not denied that John R. Spann, Jr., had become irresponsible before February, 1843, and that he remained so until he left the State.

In 1857, Joseph S. Inglesby, survivor of Mary Inglesby, sued out of the Court of Common Pleas for Sumter District a writ of scire facias on the judgment of William Lewis, Ordinary, against W. H. B. Richardson administrator de bonis non of John R. Spann,

Jr., requiring the defendant, Richardson, to show cause why the said Joseph S. Inglesby should not have the balance due him on his judgment assessed as damages on the condition of the administration bond, and why execution should not issue for the damages to be so assessed; and thereupon this bill was filed.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. Of the facts involved, the great bulk will be found in the pleadings and testimony taken before the Commissioner, and the remainder in the notes of evidence taken at the hearing and accompanying this decree.

The question first to be considered is, whether the execution in favor of the executors of William Inglesby, deceased, should be credited with its ratable share of the aggre-

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gate *price of the negro slaves sold under it by the Sheriff in February, 1843. If such credit be admitted, then the balance of the debt was undoubtedly discharged by the subsequent sales by the Sheriff in 1847, and that execution is fully satisfied. Had the Sheriff delivered the negroes to the purchaser, J. R. Spann, Jr., without condition or reservation, the title would have vested in him, and the Sheriff would have been chargeable with the price at which they were struck off, though no portion of it in fact had been ever received. *Cochran v. Roundtree*, 3 Strob. 219. But the delivery was not unconditional. On the contrary, it was with the express stipulation, originally, that if the price bid was not previously paid, the negroes should be resold by the Sheriff on the succeeding sale-day. By paying a portion of his bid, and by delusive promises from time to time, John R. Spann, Jr., induced the attorney of Inglesby's executors to forbear extending any order to the Sheriff to resell, until October, 1845. There is no semblance of variation or modification of the original contract of sale, except to that extent.

If in the sale of a chattel it is agreed by parol that, notwithstanding its delivery to the vendee, the title shall continue in the vendor till payment of the price, such contract is not invalid in law. *Dupree v. Harrington*, Harp. 391. The Act of 1843 avoids verbal agreements of this kind, "as to subsequent creditors, and purchasers for valuable consideration without notice," but leaves them in unimpaired force inter partes. The giving time for payment of the bid until the first Monday of the month succeeding the Sheriff's sale, and its subsequent extension to October, 1845, were in effect no more than to postpone the resale of the negroes, which, under the Act of 1839, the plaintiffs in execution had the right to do. *State v. Yongue*, 10 Rich. 451. Certainly, as between the Sheriff, the executors of Inglesby, and the purchaser, Spann, the contract of sale was valid

and effectual. In respect of any interest in
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the slaves he *had bid off, it is manifest that J. R. Spann, Jr., until payment of the price, could claim neither title under the sale nor credit upon the execution. It is equally clear that the executors of Inglesby could not have held the Sheriff answerable for the price of the negroes, because of his permitting them afterwards to return into the possession of John R. Spann, Jr.

Inglesby's executors were not only cognizant of this stipulation in the contract of sale and assenting to it, but in truth through their agent they had agreed to it in advance with J. R. Spann, Jr., and it was at their special instance and request that the Sheriff had acceded to it.

But it is urged that the Sheriff was in default for not bringing suit against the purchaser, Spann, to compel payment of the price. Up to October, 1845, the Sheriff, in refraining from any proceeding to exact payment from J. R. Spann, Jr., appears to have acted under express instructions from the attorney of Inglesby's executors. As early as the sale in February, 1843, Spann, the purchaser, was reputed to be, and probably was, insolvent. He had paid, however, shortly after the sale, a part of the price. After October, 1845, when Inglesby's executors seem to have despaired of procuring further payment from him, they forbore having suit instituted against him, as may be inferred, partly from their confidence that a resale of the negroes would satisfy the balance of his bid, and partly from apprehension that such suit would be wholly unprofitable. Whether a suit upon his contract against the purchaser, Spann, would have availed any thing, may well be doubted. It does appear that some \$6,000, the purchase-money of a tract of land of which Hastin Jennings held the legal title, were received by John R. Spann, Jr., or by him and Jennings, from the trustees of Mrs. Gaillard, wife of the defendant, Samuel Porcher Gaillard, \$4,000, in February, 1843, and \$2,000 in January, 1844. What became of this fund after passing into the

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hands of the vendors, *does not appear. Whether, considering the pecuniary condition of John R. Spann, Jr., it was within his control in October, 1845, or could have been reached by legal proceedings against him, if then instituted upon his contract of sale with the Sheriff, is matter of mere conjecture. It has not been suggested that the Sheriff was ever required by Inglesby's executors to bring an action at law upon the contract of sale against Spann, the purchaser. It is certain that they never instituted any legal proceedings against the Sheriff, to render him personally liable upon that account. The conclusion of the Court is, that for what remains due upon the execution of Inglesby's executors, after admitting the credits for actual payments, the execution must be treated as

still subsisting and unsatisfied, at least as between the plaintiffs therein and J. R. Spann, Jr.

The plaintiffs, as sureties for Eleanor Spann, upon her administration bond, have been constrained to pay a part of the execution debt due to the Bank of Charleston, and they maintain, that in order to be reimbursed, they are entitled to all the rights and remedies of the bank under that execution. This claim is in conflict with the assumption that the execution of Inglesby's executors was satisfied by the Sheriff's sales referred to. Their execution bore even date with that of the Bank of Charleston. If the one was satisfied by the Sheriff's sale of negroes in February, 1843, and the subsequent sales in November, 1847, so also was the other, and in that event it will result that payment of the execution in favor of the bank was made in truth by John R. Spann, Jr., and Charles C. Spann, and not by the plaintiffs.

It may be assumed that the result would have been the same, if the executions referred to had imposed a personal liability upon John R. Spann, Jr. If so, then for what remains of the debt to Inglesby's executors after deducting actual payments, this execution

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would be regarded as still *open and unsatisfied, as against J. R. Spann, Jr., had he been sole defendant therein.

But if an execution be unsatisfied as between the parties, it must be so treated in respect of all other persons, save only those to whom some injury would result from so regarding it. Whether the sureties to the administration bond of Eleanor Spann were injured in legal contemplation by the Sheriff's sale in February, 1843, and the transactions of the parties connected with it, may be more conveniently considered in the sequel.

The plaintiffs, by their bill, contend, that by the agreement of December, 1842, between S. Porcher Gaillard and J. R. Spann, Jr., and Hastin Jennings, respecting the sale of the tract of land of eight hundred and fifty acres, those parties constituted themselves trustees with a sufficient fund, being the purchase-money of said land, "to pay the several executions of the Bank of Charleston and of Inglesby—and that for the residue of their debt (if there be any thing due) the executors of Inglesby should be constrained to seek payment out of the fund in the hands of the parties to that agreement, and that the plaintiffs should be reimbursed, in the same mode, the payments made by them on the execution of the Bank of Charleston." It is indisputably clear that the sole purpose and meaning of the stipulations in the contract referred to, respecting the satisfaction of the debts against the estate of Charles Spann, Jr., the mortgage of the land made by M. C. Spann, and certain judgment debts against John R. Spann, Jr., were to discharge the land of all encumbrances and liens, whether present or prospective, and

thereby assure to the purchasers, the trustees of Mrs. Gaillard, a good and valid title. There was no rational motive to induce the purchasers, or their agent, Gaillard, to assume the office of mere "volunteers to take care of the interest of strangers, with whom they had no connection or understanding in relation thereto."

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The stipulations in question were intended for the benefit and protection of the purchasers exclusively, and not as security for the debts referred to, though such might be their effect incidentally. It was, therefore, entirely competent for the purchasers, when the purpose of such stipulations had been otherwise attained, to waive their performance. The executors of Inglesby could have no conceivable interest in the purchase-money, while in the hands of Gaillard, except by virtue of the stipulation in the agreement, that when the land should be sold by the Sheriff under their execution, the price at the Sheriff's sale should be paid out of the cash portion of the purchase-money, and that price has accordingly been paid. After "the encumbrances on said land had been cleared off," by sale under that execution, and other liens removed, and a title with certain safeguards executed, the residue of the cash portion of the purchase-money was to be paid; the remainder of the purchase-money, secured by bond was to remain in the hands of Gaillard, the agent, till all the debts against the estate of Charles Spann, Jr., should be satisfied. Such are the terms of the agreement referred to. Surely they do not import that the debts in question were to be paid out of the purchase-money in the hands either of vendors or vendees, as a specific fund set apart for that purpose. The very reverse, indeed, seems to be implied, if not expressed, except as to so much as would suffice to pay the price of the land at the Sheriff's sale proposed under the execution of Inglesby's executors. It does not appear to the Court that there was, by the agreement, any appropriation or disposition made of the purchase-money, except to the extent indicated, upon which a trust in the same can be established, in favor either of the Bank of Charleston or the executors of Inglesby.

It is further urged that though the transactions of Inglesby's executors in connection

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with the Sheriff's sale of February, 1843, may not have amounted to a satisfaction of their execution, yet they operated to enable J. R. Spann, Jr., to retain possession of the negroes sold, for a period of more than four years, and thereby to cast so much of doubt and suspicion upon the title, that the negroes, although amply sufficient in value to pay their execution, brought at their resale a grossly inadequate price; and that these irregular proceedings on the part of Inglesby's executors which prevented the debt being sat-

isfied out of that property, and their great delay in enforcing their execution against the other property of the estate of Charles Spann, Jr., deceased, will have brought serious injury upon the plaintiffs if they be held responsible for that debt, and ought to avail to relieve them of all liability for the same.

To estimate justly the force of this argument, it is necessary to consider in what relation Mrs. Eleanor Spann stood towards the debt due to the executors of Inglesby. The suit of Michael C. Spann and others v. Eleanor Spann, administratrix, and others, referred to in the bill, was for an account of her administration, and for partition of the lands and negroes of her intestate, Charles Spann, Jr., deceased. All the other assets of her intestate, it is to be inferred, were accounted for in the course of that proceeding.

No equities springing out of her unadjusted accounts have been referred to as varying the liabilities of the parties in this behalf. By the order in that cause of June 6th, 1837, it was directed that the partition proposed by the return of the Commissioners should have effect, and that the negroes and other property allotted to the parties should be delivered to them, and be subject in their hands to the liens of any judgments or executions that should be recovered against the administratrix for debts due by her intestate, and that the other distributees should give bond and security to the administratrix for the production of the property allotted

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to them respectively, to satisfy such judgments and executions. The distributees of Charles Spann, Jr., thus became ultimately and of right responsible for the judgments of the Bank of Charleston and the executors of Inglesby, in proportions corresponding with their shares in his estate. As between the distributees themselves, the said widow, Mrs. Eleanor Spann, was responsible to the extent of one-third of those judgment debts as if for her own proper debt, and beyond that proportion as if a surety for her co-distributees respectively. In like manner each one of her six children (assuming such to have been their number) became chargeable with one equal ninth part of those judgment debts as if for his or her proper debt, and with the residue as if a surety for the other distributees respectively. But the whole estate had been committed to the charge of the widow, in her character of administratrix, and the primary trust imposed upon her was for the payment of the debts of her intestate. Outstanding debts appearing, the order adverted to of June 6th, 1837, could never have been obtained, except with her consent, and such consent is accordingly manifested in writing, over her own proper signature, appended to the order. By assuming the office of administratrix, and by the execution of her administration bond, she stood primarily liable to the creditors

of her intestate. She was not authorized by the order in question to part with the property therein referred to, except upon the precedent condition that bonds with adequate surety should be executed for its forthcoming to satisfy the judgments and executions that might be recovered against her for debts of her intestate. Those bonds were required to be executed to her as indemnity against such debts. Had she exacted those bonds, or, in default of their being executed, held fast to the estate, the judgments subsequently recovered by the Bank of Charleston and the executors of Inglesby would have been paid by contribu-

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tions in just proportions from the *shares of the respective distributees. But she rejected the indemnity provided by the order, and delivered to her co-distributees their respective portions of the estate without exacting the required bonds. According to the statement of the bill, all the distributees of the intestate, Charles Spann, Jr., have "removed themselves and all their personal property beyond the limits of this State." The payments made upon the execution of Inglesby's executors by Charles C., and John R. Spann, Jr., largely exceeded the just proportion of that debt properly chargeable upon their respective portions of their father's estate. The complaint of the plaintiffs is, that the whole residue of the judgment debt due to the executors of Inglesby could have been made with due diligence out of the negro slaves allotted to Charles C., and John R. Spann, Jr.

Let this be conceded, and how have the plaintiffs been injured thereby? They stand in no better position than would their principal, Mrs. Eleanor Spann, were she a party in their stead. If Charles C., and John R. Spann, Jr., were within the jurisdiction of the Court, and of ability to pay the balance of the judgment debt of Inglesby's executors, could Mrs. Eleanor Spann maintain her suit in this Court, to compel them to pay that balance in exoneration of herself? The answer would be irresistible. The one-third part of that judgment debt is in truth your own proper debt. We have paid the full proportion justly chargeable to us. The remainder is of right due, and would have been paid by the other distributees, but for your own laches and dereliction of duty. By your own voluntary act in surrendering the property of your intestate, and declining to take bonds for its production, you have occasioned the loss to be incurred, and as between us and yourself it ought, therefore, justly to be borne by you alone. In the view of the Court, as between Mrs. Eleanor Spann, and her sons, Charles C., and John R. Spann, Jr.,

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*the primary liability in respect of the residue of the judgment debt to Inglesby's executors rested upon her, and she cannot be regarded as having been injured because such

residue was not exacted from them. Charles C., and John R. Spann, Jr., may properly be regarded, in relation to the balance due upon that judgment, as standing towards Mrs. Eleanor Spann in the position of sureties who have been discharged from liability by the creditor's abandonment and rejection of the counter securities for the debt. *Lang v. Brevard*, 3 Stro. Eq. 64.

The delay on the part of Inglesby's executors in prosecuting their legal remedies, of which complaint is made, cannot avail the plaintiffs. It is not pretended that more than partial payment was actually made; and the interval between the rendition of the judgment in favor of Inglesby's executors, and the commencement of the proceeding which is sought to be enjoined, is too brief to raise such presumption. Nor has any sufficient ground been suggested upon which the plaintiffs are entitled to relief in their character of sureties. Acts of mere passive sufferance, omission, or delay "on the part of the creditor, will not discharge the surety. As between the creditor and the surety, the former is under no obligation of active diligence against the principal debtor"—at least not until the surety requires that the creditor collect his debt. *Wright v. Simpson*, 6 Ves. 734; *Lang v. Brevard*, 3 Stro. Eq. 64.

On behalf of the plaintiffs, it is further urged that, as by virtue of the decretal order of 6th June, 1837, the execution of Inglesby's executors imposed a lien upon the entire visible estate of the intestate, Charles Spann, Jr., satisfaction of that execution should be had from the real estate of which the intestate died seized. By the Sheriff's sale in February, 1843, the lien of the executions of the Bank of Charleston and the executors of Inglesby was undoubtedly extinguished, as to

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the land purchased by the trustees of *Mrs. Gaillard. Under these executions it was duly levied upon, advertised, sold, and conveyed to Hastin Jennings. The validity of the sale is not impeached or questioned in the bill. The purchaser, Jennings, afterwards conveyed the land by deed to the trustees of Mrs. Gaillard, and thereupon she, with her husband, passed into its possession, and held the same openly, continuously, and adversely for a period of more than fourteen years prior to the filing of this bill. Had the Sheriff's sale been invalid, still the title of the trustees would have become perfect by means of such possession and the operation of the Statute of Limitations.

The parcel of land known as the "Buzzard Roost plantation," and now in the possession of the defendant, Henry Spann, stands upon a different footing.

In the partition of 1837, that tract of land was assigned in common to John R. Spann, Jr., and his sisters, Caroline M. and Mary E. Spann. In their hands it stood bound undoubtedly by the lien of the judgment of In-

glesby's executors. The portion of that judgment debt ratably chargeable upon the share of J. R. Spann, Jr. in his father's estate has been paid, and for the residue of the debt it has been shown that, as between J. R. Spann, Jr., and the plaintiffs as sureties of the administratrix, Eleanor, the primary liability rests upon them. For like reasons, as between the plaintiffs and the daughters of Charles Spann, Jr., the former are primarily answerable for so much of the judgment debt due Inglesby's executors as exceeds the portion chargeable ratably upon the shares of the latter in their father's estate. But in regard to so much of the debt as would, if apportioned among the distributees of their father's estate, fall upon the shares of the daughters, Caroline M. and Mary E. Spann, their interests in the "Buzzard Roost plantation," it is apprehended, are still bound by the lien of the execution of Inglesby's execu-

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tors. *The lien in question to that extent has been in no wise discharged or impaired. The daughters Caroline and Mary never parted with their interest in that plantation until September, 1849.

Even though the possession of Henry Spann could be referred to the entry of Leonard White, the interval is too short to divest the lien and confer title under the Statute of Limitations. *McRae v. Smith*, 2 Bay, 339; *King v. Smith*, Rice, 13; *Blake v. Heyward*, Laid. Eq. 208.

Whether the plea of purchase for valuable consideration without notice would have availed the defendant, Henry Spann, might well be doubted, after the decision in the case last cited. But the point does not require to be adjudged. Henry Spann has not entitled himself to the benefit of such plea. In his answer he avers neither payment of the purchase-money nor the want of previous notice; both which averments are essential elements in this defence. *Sugd. Vends*, 1069. By assuming the administration of her husband's estate, Mrs. Eleanor Spann became his representative in respect of his debts, and answerable for them as far as she had assets. The sureties to her administration bond became thereby responsible for her due administration of such assets. For payment of the judgment debt to the Bank of Charleston, the assets that came to her hands were most ample. When therefore she, as administratrix, became liable for the debt to the Bank of Charleston, her sureties upon the administration bond became to all intents and purposes her sureties for that debt. It results that upon payment of the execution of the Bank of Charleston, the sureties of Mrs. Eleanor Spann, upon her administration bond, became entitled to succeed to all the rights and remedies of the bank existing under that execution at the date of its payment.

Such is the familiar doctrine of the Court.

The lien of that execution thus set up cannot,

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for the reasons already indicated, be entered at all as against the land purchased by the trustees of Mrs. Gaffard, nor as against the "Buzzard Roost plantation" except as to the interests therein of the daughters Caroline and Mary, and as against those interests only to the extent of the portion of that debt ratably chargeable upon the shares of the daughters in their father's estate. Substitution or cession of remedies is the creature of equity, is administered so as to secure real, essential justice, and will never be enforced against superior equities. *Dearing v. Earl of Winchester*, 1 W. & T. Laid. Cas. 409; 87 37.

But it is contended that the payment of the execution in favor of the Bank of Charleston, as to which the plaintiffs ask to be substituted to the rights of the bank, occurred more than four years before the filing of their bill, and that the claim of the plaintiffs in that regard is therefore barred in analogy the Statute of Limitations.

This ground of defence is regarded as untenable. It is said that, in general, where any one is compelled to pay a debt for which another is primarily liable, subrogation takes place by operation of law. The payment by the surety of a bond or judgment debt is regarded in this Court not as an extinguishment but as a purchase. *Cheesborough v. Millard*, 1 John. Ch. 413; *Hays v. Ward*, 4 John. Ch. 123; *Adams Eq*, 299, n. 15. The decision in *Smith v. Swain*, 7 Rich. Eq. 112, seems to proceed upon that ground. Such also appears to be the plain import and effect of the Act of 1849, 11 Stat. 556. That statute is not restricted to the case of a joint judgment recovered against principal and surety, and paid by the latter. Its terms are sufficiently comprehensive to embrace all sureties. *Wilson v. Wright*, 7 Rich. 406.

The defendant, Henry Spann, claims to be entitled to the benefit of the agreement made by J. R. Spann, Jr., Hastin Jennings, and J. W. Brownfield, with Leonard White and

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*Thomas M. Dick, as also to the benefit of the bond executed by the former parties to the latter, of which a copy is exhibited with his answer. In the view of the Court, these matters should be made the subject of separate suit. If at all proper to be here considered, they should have been brought before the Court by a cross-bill. Although a conflict of interests among the defendants is no objection to a bill, yet the Court will not adjudicate between them unless the necessity to do so arises out of the plaintiff's claim. *Adams Eq*, 313.

The defendant, Hastin Jennings, claims a portion of the debt due upon the execution of Inglesby's executors under their assignment to him exhibited with his answer. As to this claim nothing is here determined.

Whether the sum of \$600, which the executors of Inglesby acknowledge by that paper to have been received from Jennings, should be regarded as payment on their execution, may be more conveniently considered when the Commissioner submits his report respecting the unpaid balance due upon that execution.

At the hearing it was objected that the widow, Mrs. Eleanor Spann, and all the other distributees of her intestate, should have been impleaded in this suit. This objection is not taken in any of the pleadings by any of the defendants, and, had it been, would not have prevailed. *McKenna v. George*, 2 Rich. Eq. 22.

In the course of the argument it was also urged, on behalf of some of the defendants, that the estate of Hastin Jennings, because of his complicity with J. R. Spann, Jr., in certain alleged frauds, should be charged with the debts as to which the plaintiffs seek relief. The bill is framed with no such aspect, and the matter suggested is, therefore, not proper to be here considered.

1. It is ordered and adjudged that this opinion stand for the decree of the Court.

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*2. It is further ordered that the Commissioner take an account of what is due to the plaintiffs, H. L. Pinckney and Richard R. Spann respectively, for payments made towards satisfaction of the execution of the Bank of Charleston against Eleanor Spann, administratrix, and that he report how much of the same, if apportioned among the distributees of the estate of Charles Spann, Jr., deceased, according to their respective interests therein, would be chargeable upon the shares respectively of his daughters, the said Caroline M. and Mary E.

3. It is further ordered that an account be also taken of what remains due and unpaid, upon the execution herein above mentioned at the suit of the executors of William Inglesby, deceased, and that he report how much thereof, if apportioned among the distributees of the estate of Charles Spann, Jr., deceased, according to their respective interest in the same, would be chargeable upon the shares respectively of his daughters, the said Caroline M. and Mary E.

4. It is further ordered and decreed that, as to so much of the balance due upon the said execution of Inglesby's executors as shall be ascertained, when apportioned as aforesaid, to be chargeable upon the portions of the said Caroline M. and Mary E., in their father's estate, the injunction heretofore granted be continued against the surviving executor, Joseph S. Inglesby, until he shall have pursued and exhausted his remedies under said execution against the portions that were assigned to said Caroline M. and Mary E. in the "Buzzard Roost Plantation," at the partition of the lands of the said Charles Spann, Jr., deceased, and, as to the residue of what shall be ascertained to

be due on said execution, that the said injunction be dissolved.

5. It is also ordered that the parties, upon the coming in of the report, have leave to move for such further orders as may be proper and necessary.

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*6. And it is further ordered that the costs of the defendant, Gaillard, be paid by the plaintiffs; that the other defendants pay their own costs respectively; that plaintiffs pay also their own costs, as between them and all the defendants, except James M. Jennings, administrator of Hastin Jennings, deceased; and that, as between the plaintiffs and the last-mentioned defendant, the consideration of the plaintiffs' costs be reserved until the coming in of the report.

The complainants and the defendants, Inglesby and Henry Spann, appealed on various grounds, which it is deemed unnecessary to state, as the points upon which the case was decided are fully stated in the opinion of the Court.

T. B. Fraser, James Simons, for complainants.

S. Mayrant, for Inglesby.

W. G. De Saussure, for Gaillard.

J. D. Blanding, for Henry Spann.

J. S. G. Richardson, for Jennings.

The opinion of the Court was delivered by

INGLIS, A. J. Charles Spann, Jr., died in 1834, intestate, leaving a widow, Eleanor, and six children. Administration of the personal estate was granted to the widow, and R. Russel Spann and John R. Spann, Sr., became the sureties on her bond. In June, 1837, under proceedings for the purpose in the Court of Equity, partition was made of the whole property then remaining, consisting of realty valued at seventeen thousand dollars, and personalty valued at sixty-one thousand dollars. But, as there were still outstanding debts of the intestate, the order

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of confirmation *directed "that the property should continue subject in the hands of the distributees to any judgment or execution which should be obtained against the administratrix for debts due by the estate; that the adult distributees, and the guardians of the infants, should give bond, with sureties, to the administratrix for the production of the property allotted to them, to satisfy any such judgments or executions; that the negroes and other property allotted to the adults should be delivered to them, and the slaves and other property allotted to the minors should be retained for them by the administratrix, until they should respectively attain the age of twenty-one years, or marry, or until a legally appointed guardian should give bond and security according to law, when the property should be delivered to such guardian; and that in case any suits, judgments or executions, either in law or

equity, should be obtained against the administratrix for debts due by the estate, the same should have a lien upon the slaves and other property of the estate of Charles Spann, Jr., deceased, allotted and delivered to each, which should be subject to be sold under and by virtue thereof." Under this order, the distributees went into possession of their respective shares, the adults at once, and the infants as they severally successively came of age. The forthcoming bonds directed to be given to the administratrix were not exacted by her.

In the partition of the realty, a tract of land called "Buzzard Roost" was assigned to the three then infant children, John R. Spann, Jr., Caroline M., and Mary E., and through several mesne conveyances had, at the institution of these proceedings, become and now is vested in Henry Spann.

Another portion of the intestate's lands, consisting of three tracts, known as the Orange Grove, Britton Hair, and Fullerton tracts, was assigned to the widow, and by subsequent conveyances was vested in Hastin Jennings, holding in some unexplained way

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for the benefit of John R. Spann, *Jr. S. Porcher Gaillard, desiring to have certain funds, held by trustees for the separate use of his wife, invested in this land, on the 30th December, 1842, entered into a written contract to this end with Jennings and Spann, for the particular terms of which reference must be had to plaintiffs' exhibit B, copied in the brief. In order to relieve this parcel of land of the liens upon it, supposed to have been created by virtue of the order in equity of June, 1837, by certain judgments, &c., presently to be more particularly mentioned, it was seized, and, after due advertisement, sold on sale-day in February, 1843, under execution against the administratrix of Charles Spann, Jr., bid off by Hastin Jennings, at the nominal sum of ten dollars, and conveyed by him to the trustees of Mrs. Gaillard, who now hold it. Gaillard thereupon paid the cash portion of the purchase-money, and, at some early day afterwards, the credit portion; but no part of either payment was applied towards the satisfaction of the debts of Charles Spann, Jr., except, perhaps, the amount of the bid.

On 12th June, 1841, the Bank of Charleston, and the executors of Inglesby, severally recovered judgments in the Common Pleas, against Eleanor Spann, administratrix, for the execution of which judgments writs of fieri facias were duly lodged. On sale-day in February, 1843, fourteen negro slaves, part of the distributed estate of Charles Spann, Jr., were produced by certain of the distributees, a levy thereof given to the Sheriff, advertisement dispensed with by the consent of the creditor and the distributees producing them, and a sale of them made for a sum about sufficient to satisfy both judgments.

John R. Spann, Jr., was the purchaser, and the negroes were delivered to him. R. Russell Spann, one of the sureties on the administration bond, probably induced by the advertisement of the land above mentioned, was present at the sale to protect the sureties, and, having previously ascertained the

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amount of the judgments, ran up the bidding on each lot, until an aggregate had been reached about sufficient to cover the amount so ascertained. If the property had been knocked down to him, payment of the purchase-money, or of any deficiency on a resale in case of non-compliance, could not, perhaps, have been enforced by legal process. But he had the command of considerable means, the income of property belonging to his family, and, with the aid of the other surety, equally interested and a man of large resources, could readily have paid his bids. The negroes having thus brought a sum nearly or quite sufficient to satisfy the judgments, the tract of land which had been bargained to Gaillard was sold without competition.

John R. Spann, Jr., did not pay for the negroes at the time of delivery to him, and had not paid for them before the next sale-day. The delivery, without payment, was made by the Sheriff, at the instance of the creditor, Inglesby, between whom and the purchaser there was some understanding, according to which the purchaser, during the course of the ensuing month, was to satisfy the creditors for the amount of his bid by a private arrangement, or, failing that, the negroes were to be resold on the next sale-day. By reason of instructions received in the interval from Inglesby, the Sheriff did not resell on sale-day in March, as he says he would otherwise have done. The negroes, if resold in March, would have brought larger prices than on the original sale. Negotiations between Inglesby and the purchaser, John R. Spann, Jr., seem to have continued without results satisfactory to the former until October, 1845, a period of two years and eight months, when, for the first time, the Sheriff was instructed to reseize and resell. John R. Spann, Jr., refused to deliver, and an action of trover was commenced by the Sheriff. In consequence of this obstruction to the Sheriff's proceedings, no resale took place till November, 1847, four years and

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nine months from the date of the first sale. The original bids for four of the negroes were then paid, and those not paid for were surrendered to the Sheriff and resold. In the meantime, by the long possession of the purchaser, under an apparent title acquired at Sheriff's sale, and intervening encumbrances on his estate therein, the liability of the property to the claims of the intestate's creditors had come into great doubt, if it had not, as against the creditors of the purchaser, been entirely defeated. The sale was

forbid by various persons, among whom was Hastin Jennings; and the ten negroes brought, in all, only one hundred and fifty dollars. So far as appears to the Court, these negotiations between the creditor, Inglesby, and the purchaser, John R. Spann, Jr., the conditions attached, as it is said, to the delivery of the negroes to the latter, and all that followed, were not only without the concurrence but even without the knowledge of the defendant in execution, Eleanor Spann, administratrix, or her sureties. In the meantime, other personal assets of Charles Spann, Jr., which had been allotted and delivered to the distributees, had been removed from the jurisdiction or otherwise scattered.

The sale to John R. Spann, Jr., having thus failed to result in actual satisfaction in money, the Bank of Charleston instituted suit upon the administration bond against the sureties thereto, suggesting a devastavit, and, after much delay and litigation, recovered judgment for the penalty, and had their damages assessed for the balance of their debt, which recovery has been paid by the sureties in equal parts.

In 1857 Inglesby's executors sued out a scire facias to revive this judgment against the sureties, and to recover the balance claimed to be due on his debt, by a further assignment of breaches and a new assessment. Thereupon the sureties filed their present bill, wherein they set forth various supposed equities as against the creditor,

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*Inglesby, wherefore he should not have the recovery sought at law against them, particularly his interference with the sale of February, 1843, whereby the real value of the property of their principal then sold, which was entirely sufficient to satisfy the debts of her intestate, as at that time existing, was prevented from being made available in fact for this purpose; and pray that he may be restrained by injunction from proceeding further in his suit at law "touching the matter in question." The bill also insists that, by virtue of the contract of December 30, 1842, between Hastin Jennings and John R. Spann, Jr., and S. Porcher Gaillard, a trust was created in the money agreed to be paid for the land therein bargained, for the judgment creditors of Charles Spann, Jr., and the satisfaction of their demands, and that therefore if, notwithstanding the supposed equity to the contrary, the creditor, Inglesby, shall be permitted to enforce his demand, satisfaction thereof shall be decreed primarily out of the trust fund thus created; that the real property of the intestate, Charles Spann, Jr., partitioned in June, 1837, is, under the order of that date, still liable to levy and sale under the creditors' execution at law, and the trust fund created as above failing or proving insufficient, the creditor shall be required to resort to his legal remedy against this realty; and that the

sureties shall be subrogated as against these several funds to the rights which the Bank of Charleston, as a creditor of Charles Spann, Jr., had to be satisfied thereof, and so be reimbursed the amounts paid by them respectively for the satisfaction of that debt.

On the hearing below, the Chancellor held that the plaintiffs are entitled to no relief as against the creditor, Inglesby, by reason of the interference of the latter in the matter of the Sheriff's sale of February, 1843, or otherwise; that no trust was created for the creditors of Charles Spann, Jr., by the agree-

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ment of December 30, 1842, between S. *Porcher Gaillard and Hastin Jennings and John R. Spann, Jr.; that any lien which, under the order in equity of June, 1837, attached upon the land bargained to Gaillard in that agreement in favor of the creditors of Charles Spann, Jr., upon the recovery of their judgments, was discharged by the sale under execution to Jennings; but that "Buz-zard Roost," part of the real estate of Charles Spann, Jr., in the hands of Henry Spann, a purchaser from several of the distributees, is liable for the relief of the sureties against the Inglesby debt, and for the reimbursement of the amount paid by them in satisfaction of the debt to the Bank of Charleston, to the extent of the proportions which Caroline M. and Mary E., two of the distributees from whom Henry Spann derived title, ought to have contributed of their portions towards the satisfaction of the debts, and he ordered accordingly.

The plaintiffs, being the sureties of the administratrix, the defendant, Henry Spann, and the creditor, Inglesby, have all appealed, and in their grounds of objection to the circuit decree have raised several questions, the judgment of this Court on three of which will dispose of the whole case:

1. Have the plaintiffs shown an equity to have the defendant, Inglesby, restrained from proceeding in his action at law? The correct answer to this inquiry depends on the effect proper to be given to the facts which have been recited touching the Sheriff's sale of February, 1843, and this defendant's conduct therein.

On that occasion negro slaves, which, under the order in equity of June, 1837, must, for the purposes of such sale, and as among all the parties connected therewith, be considered as still, at that time, the property of the defendant in execution, to wit, Eleanor Spann, in her capacity of administratrix, were sold for an aggregate sum sufficient to

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*satisfy the debt, a recovery of which against these plaintiffs is sought in the action to be restrained. And the slaves so sold were delivered to the purchaser. Certainly, if nothing more than this had occurred, satisfaction in fact must have resulted, and the Sheriff have been responsible, for the amount

of the bid, to the persons entitled. The additional fact, that the bidder did not pay his bid, could not, of itself, change the result. (*Towles v. Turner*, 3 IHH, 178; *Cochran v. Roundtree*, 3 Stroh, 217.) The Sheriff has no authority to deal with the property of a defendant in execution, except such as is conferred by positive law, and this must be pursued if he would avoid personal responsibility. Sheriffs' sales are directed to be made for cash, (A. A., 1839, sec. 58, 11 Stat. 37,) and a summary and effective method of insuring compliance by purchasers with their bids is furnished in the power of resale. But this involves the retention by the Sheriff of the possession in the interval. He cannot always prevent irresponsible persons from bidding, and if from such cause loss result upon the strict execution by him of his power of resale, it is the misfortune of those interested in the property and its proceeds; the law imputes no fault to him. But by delivery of possession to the purchaser, though without payment, the sale is consummated beyond his power to recall, and he has made himself responsible for the amount of the purchaser's bid. His remedy by resale is gone, and though, for his own indemnity, he may resort to his action upon the contract of sale, if the purchaser is irresponsible, and he fail to make the money, the loss is his own. It is said, however, that the delivery here was upon a secret condition, whereby the title was not to vest in the purchaser until payment of his bid. It may be well doubted whether the Sheriff can prevent the effect of delivery by annexing thereto any secret or private conditions or qualifications, verbal or otherwise, by arrangement with the purchaser, so as to

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affect the rights or inter*ests of third persons. (Vide remarks of Wardlaw, J., in *Cochran v. Roundtree*.) If he chooses to assume the bid, and make himself the creditor of the bidder, he may, doubtless, stipulate for any efficient and prompt means of enforcing payment of the debt, and the stipulation will be good against the purchaser. But, in doing this, the Sheriff has put off the character of the officer, and acts in his individual capacity. If the condition which the Sheriff as such annexed to his delivery of the negro slaves to John R. Spann, Jr., was void as against all persons other than Spann himself, because not within the Sheriff's official competency, the sale was completed by that delivery, and satisfaction of the execution debt resulted. It is not, however, necessary, for the purposes of the present case, to resolve this doubt, and rest the judgment upon a denial of the validity of that condition. The delivery without payment was really the act of the creditor, under whose execution the property had been seized and sold. The Sheriff acted by his instructions. Without the privity of the defendant in execution, the creditor had privately agreed with the bidder, that the latter might buy the

property, and have time for the settlement of the bid to his satisfaction, by payment, or otherwise, until the next sale-day. As security for the bidder's fulfilment of his part of this agreement, the creditor stipulated that, if such settlement were not made, the property might then be resold and resold under the execution. It may be conceded that, by the consent of all parties interested, a sale by the Sheriff may be made on credit. But when the execution creditor singly, and without the concurrence of the debtor, undertakes to dispense with the payment in cash, and direct the property to be delivered upon the bidder's promise to pay subsequently, he is to be understood as thereby accepting the bidder's promise in payment of his execution. In such case a stipulation for resale and resale is merely the security

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*which he takes for the bidder's performance. And the resale by the Sheriff in pursuance thereof is not under the authority of the original execution, but as the agent of the creditor, and by virtue of the agreement, as in the sale of a mortgaged chattel. This is, at least, so far the case as to render it inequitable to throw upon the debtor any loss resulting from the giving of such credit to the bidder.

But let it be assumed that the delivery upon this secret reservation was the act of the Sheriff, and that the condition was valid, except as against the subsequent creditors of, and purchasers for, valuable consideration from John R. Spann, Jr., without notice, and prevented the effect which would otherwise have been wrought by such delivery. The bid of the purchaser not having been paid, and the bidder being known to be irresponsible, the course prescribed by the law, and most proper for the interests of all concerned, was a prompt resale. The evidence gives the assurance that a resale on the next succeeding sale-day, or, it may be inferred, at any early day thereafter, would have resulted in actual satisfaction. But no such resale was effected until after the lapse of nearly five years. And upon this resale ten negro slaves, which at the first sale brought, and were certainly worth, two thousand five hundred and twenty dollars, were sold for the trifling sum of one hundred and fifty dollars. How is this difference to be accounted for? Property is often sold under execution at very inadequate prices, and if responsibility for the depreciation cannot be fixed upon any one, it must be regarded as the result of untoward circumstances in the condition of the community, or of some mere casualty, and is the debtor's misfortune. Is this the case here? It does not appear, nor is there any reason to believe, that, at the date of the second sale, there was any unusual scarcity of money, still less that property of this kind had so fallen in the market, that a fair lot of ten negroes would

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only average fifteen dollars per head. But

facts are proved which fully explain this remarkable difference in prices at the two sales. The condition verbally attached to the delivery of these negroes to John R. Spann, Jr., at the first sale, which, it has been assumed, prevented the title from vesting in him as between himself and the Sheriff, could not avail against his subsequent creditors, or subsequent purchasers from him for value, without notice. That there were such creditors, at least, seems almost certain from the evidence. That there were even liens by execution, which, in the interval, had attached upon his title, in behalf of such creditors, appears in the highest degree probable. The liability of this property to a resale under execution against Eleanor Spann, administratrix, after nearly five years possession of John R. Spann, Jr., in the face of his creditors, under a title derived through an open, public, judicial sale, consummated by immediate delivery, might well be disputed and brought into a degree of doubt, abundantly sufficient to deter bidding. The right of the Sheriff to re seize and resell had, for the two years next preceding the resale, been questioned and resisted even by Spann himself, so that resort to an action at law for its vindication became necessary, and at the resale various persons are found interposing claims in divers rights, and forbidding the Sheriff's proceeding. At the first sale there was no such interference; the liability of the property for the satisfaction of the executions under which it was sold was not then questioned. It cannot be doubted that the gross inadequacy of the price at the resale, and the consequent loss, are to be attributed to the operation of these causes, and the obscurity in which the liability of the property had thereby become involved. Who is responsible for the existence of these causes, and for an opportunity for their operation? The sale originally to an irresponsible bidder; the delivery, without payment of the bid, upon a

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promise *of payment before the next sale-day or a return of the property for resale; the waiver of that promise by the extension of further credit, and the consequent failure to resell when satisfaction in fact would have resulted; the undisturbed and unquestioned possession of the bidder during the long period of three years, while the hostile rights of his private creditors were accruing—were all due, not to the passive neglect merely, but to the direct and active agency of the creditor, Inglesby. These were all the result of his private negotiations with the purchaser. If this were merely the ordinary case of a failure of the bidder to pay his bid, the creditor might have dispensed with a resale on the same or next succeeding sale-day, so far as to relieve the Sheriff from responsibility, but it does not hence result that the debtor would be without remedy for any injury to him wrought by such interference. The law surely does not design to make the interests

of the debtor the helpless sport of the caprices, the mistakes, the credulity, or mismanagement of the creditor.

The formalities required to be observed in the conduct of sheriffs' sales are designed for the protection and benefit of those interested in the property and its proceeds, and may be waived by their common consent, (*Lewis v. Brown*, 4 Strob. 293; *O'Bannon v. Kirkland*, 2 Strob. 29.) In the present case the execution debtor not only did not consent to any of these departures from the usual course of proceedings, but, so far as appears, was not even informed of them. For any thing that is known to the Court, so far as the defendant in the execution at law knew, the debts of her intestate were all satisfied by the sale in February, 1843, and the negroes and other property remaining in the hands of the several distributees were thereby thenceforth discharged from the liability retained for the protection of the creditors, herself and her sureties, by the order in equity of June, 1837. She may well have considered

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her*self now relieved from all further obligation of vigilance over this property, and the absolute title of each distributee to his or her share perfected. It is not surprising if, after this time, they were severally permitted to remove their respective property out of the jurisdiction, or otherwise dissipate it, or deal with it according to their pleasure, without question by her. And such seems to have been the fact. So also it does not appear, and there is even less reason to conjecture, that these plaintiffs, who were the sureties for her administration, assented to or even knew any thing of these qualifications and private arrangements, whereby a sheriff's sale, consummated in the ordinary way, and operating seemingly to terminate their liability, was converted into a mere delusive show. One of them, for the specific purpose of their protection, advised by the advertisement of the land, of the opportunity therefor, attended the sale, and bid on the negroes until an aggregate had been reached sufficient for their relief, and then retired, so confident that his design was accomplished that he permitted a tract of land, which would on that day have yielded at least four thousand dollars in cash, to be bought off and discharged of whatever liability attached to it, for a merely nominal sum. Under such circumstances, it is not equitable that the creditor should pursue the debtor further. It is still less equitable that he should pursue the sureties of the debtor, and compel them to make good the loss which has resulted from his unwarrantable and injurious dealing with their principal's property.

II. For the purposes of the question which has thus been disposed of it has been assumed that the special provisions of the order in equity of June, 1837, continued, after and notwithstanding the partition, the liability of

the distributed personality for the satisfaction of the intestate's debts, as it had previously existed, and its subjection to the same methods of enforcing that liability. This is

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the utmost effect that can fairly be claimed for them, since neither the language in which those provisions are expressed, nor the avowed occasion for the qualification thereby of the order of confirmation, requires more. The first clause of the order is a simple confirmation of the partition recommended by the Commissioners in their return. The only reason assigned for any qualification to this confirmation is, that "there are outstanding debts of the intestate." To protect these unsatisfied creditors against any prejudice or embarrassment that would result from an absolute confirmation is the end proposed. The event made patent, what was probably known to the parties and disclosed to the Court at the time, that these outstanding debts did not amount in the aggregate to four thousand dollars. The personality of the intestate to be distributed was estimated at sixty-one thousand dollars. To retain in all particulars the liability of this large personality, insured the protection designed, to the farthest bounds of reasonable demand. To understand the Court as having by its order imposed upon the titles in severalty which the parties were asking more onerous fetters than resulted from this retention, would be an imputation of disregard of the rights and interests of those parties which nothing short of the absolute necessity of language could justify. Three years had elapsed since, by the death of the intestate, the lands of which he had died seized had descended to his heirs. If the bill had sought a partition of these lands only, would a call by creditors of the intestate, claiming four thousand dollars, to have the shares after partition encumbered with a continued liability for the satisfaction of their demands, have been listened to, after the Court had been informed that there was still in the hands of the personal representative for administration personality worth sixty-one thousand dollars? Is it any more reasonable that the Court should have done so in a proceeding for the partition of both

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realty and person*alty, where this personality is by the order, as now construed, virtually continued in the hands of the administratrix, so far as the creditors' rights are involved? Does the language of the Court necessarily import that as well the land as the personality is to be subjected to this continued liability? The terms used to describe what it is which is to be so subjected occur twice—once, certainly, they are very general, "the property divided," but afterwards more restrained, "slaves and other property allotted." The realty partitioned constituted about one-fourth part of the whole estate, and yet, although it must be regarded as a "thing of

superior rank," it is nowhere expressly named in these terms of description. The more specific terms, "slaves and other property allotted," may be fairly understood as explaining and limiting the other more general words, "property divided," and will not be so extended as to embrace "lands," which are nowhere specified. Subordinate to and involved within the controlling purpose of protection to the creditor, as a means the more to insure and facilitate its accomplishment, is the provision for the protection of the administratrix, by enabling her, upon the creditors' demand on her, the more effectively to call in the assets with the administration of which she is charged. To this end the several distributees are to give bond with surety for the forthcoming of "the property allotted to them." Here the same general terms are used, yet no one will understand them as importing that the forthcoming of their allotments of land was to be thereby secured. It must mean only that property for the due application of which the administratrix was responsible to the creditors. The terms of the order are satisfied by the construction which has now been put upon them, and any larger sense would have imposed fetters upon the titles of the parties to their respective portions of land which the Court ought not to have imposed, and therefore will not readily be held to have intended.

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*If the continued liability of the land under the operation of this order were conceded, although the creditor might in that case have resorted to it for the satisfaction of his judgment, it will not follow that, when, without such resort, he has compelled the sureties of the administratrix, upon a devastavit of the personal assets established against her to pay his debt, these can turn round upon the heir, and compel him to reimburse them out of the land which has descended to him. It may be that under the operation of the statute, 5 Geo. II. c. 7, sec. 4, (2 Stat. S. C. 570,) lands of an intestate are equally and indifferently with his personality, liable under process against the administrator at law, for the satisfaction of the intestate's debts, and that the one or the other may, at the option of the creditor, be taken in execution. (*DT Emory v. Nelson*, 4 McC. 130, note; *Martin v. Latta*, 4 McC. 128; see *Jones v. Wightman*, 2 Hill, 579.) Yet certainly a distinction is firmly established in equity as to the order of their liability, as between those upon whom the title of the intestate has been cast, (*Hull v. Hull*, 3 Rich. Eq. 65; *Henry v. Graham*, 9 Rich. Eq. 100; *Lloyd v. Lloyd*, 10 Rich. Eq. 409; *Goodhue v. Barnwell*, Rice Eq. 198.) It is here well ascertained that the personality is the primary fund for the payment of the debts, and the land comes in only to its aid, and for the supply of its deficiency. This distinction was not abolished in the particular case under

consideration by the order of June, 1837. It is not so in terms, and the purpose to be attained by that order did not require that it should be. If, then, the liability of the land continued for the benefit of the creditor, yet the order of its liability, as against the personality and those claiming it or responsible for it, was not disturbed. But with the due administration of the personality Eleanor Spann was charged. The first duty of such administration was the payment of the debts, and for this purpose the assets in her hands, and by the order retained in them notwithstanding partition, was sufficient, fifteen

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times over. *These plaintiffs were sureties for her fidelity in this very application of the personality which her office of administratrix exacted of her. They undertook expressly that with these personal assets she would pay the debts of her intestate. It may be that under certain circumstances an administrator might himself have an equity to be reimbursed out of the realty, as, for a balance due him on his administration accounts from an excess of payments over receipts. But it is difficult to conceive of any circumstances in which the sureties of an administrator who are only bound for the faithful application of the personality, and whose responsibility, therefore, must cease upon its exhaustion by such application, can have such equity. Certainly, sureties responsible for the due administration of sixty-one thousand dollars of personal assets can have no claim to be reimbursed out of the realty the comparatively insignificant sum of twelve hundred dollars, which they have been compelled to pay in satisfaction of a debt of their principal's intestate.

It may be that the sureties are entitled, in equity, to call upon the distributees severally to contribute ratably for their reimbursement, to the extent of the share which each accepted, under the terms of liability prescribed in the order. These terms of liability, it has been seen, do not touch the lands partitioned specifically. If the liability to contribution is to be regarded as originally a personal liability of each distributee, to the extent of the value of the share of personality received by him, or as, by the non-production of such share, converted into such personal liability, the land of the distributee in the lands of a purchaser from him cannot be subjected to the satisfaction thereof, by proceedings instituted after the purchase. This would be to make the property of a vendor, affected by no lien at the time of the sale, liable for the satisfaction of any debt afterwards established against him as pre-existing. Moreover, to the administration of

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such a form of relief by *enforced contribution, the inflexible rule of the Court would require, that all those bound to contribute should be parties to the proceedings, that their mutual equities might be adjusted, and

complete right in the particular matter be attained. The Court, for the purpose of administering such relief, cannot assume that other debts of the intestate have not been paid by one or other of the distributees, or that other facts do not exist which would affect the proportions which the particular distributees before the Court ought to be required to contribute to this reimbursement. And in the evidence produced in this particular case there is furnished very strong reason to believe that in the negro slaves, Viney and child, and Dick and Aleck, part of the levy sold in February, 1843, and resold in November, 1847, and thereby lost to them, whoever was the gainer, Caroline M. Rice and Mary E. Spann, the distributees under whom Henry Spann holds "Buzzard Roost," have already contributed more than their share or ratable proportion of the whole outstanding debts of the intestate of which the Court has information, embracing the particular debt for the payment of which reimbursement is here sought. It is the opinion of this Court that the plaintiffs have no equity to be reimbursed the amount paid by them in satisfaction of the intestate's debt to the Bank of Charleston, out of the lands of the intestate in the hands of those holding under the heirs by purchase.

III. Certainly no particular form of words is essential to the creation of an express trust, but unquestionably an intention so to do, on the part of the person to whom such creation is imputed, is essential. Where such intention does not competently appear, no form of words will create a trust. Whether, therefore, the agreement of December 30, 1842, between Hastin Jennings and John R. Spann, Jr., of the one part, and S. Porcher Gaillard of the other part, created a trust in the purchase-money therein agreed to be paid by Gaillard, or any part of it, for the

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execution cred*itors of Eleanor Spann, in her capacity of administratrix, including the Bank of Charleston, to which the plaintiffs, having paid the Bank, can resort for reimbursement, is a question as to the intention of the parties to that agreement. What conceivable motive had S. Porcher Gaillard to take care of the interests of the creditors of Charles Spann, Jr.? There were no special relations existing between him and them. They were strangers to each other. Why should he concern himself to provide for their security or satisfaction? But this supposed volunteer concern is not confined to these creditors: it embraces also the mortgage creditor of M. C. Spann, and the judgment creditors of John R. Spann, Jr., whose claims created liens on the land. So far as his participation in the transaction is involved, it is too clear to admit of dispute that his sole intention and aim in the terms he exacted from the other contracting parties was to assure to his wife's trustees a clear, unencumbered title to the land in which he was

asking them to invest her separate funds. And in conceding these terms, it is equally manifest that the single purpose of the other parties was to satisfy this, his reasonable demand, by removing every encumbrance. This is expressly avowed, on each side, to be the purpose of all these special stipulations. It is, in no one of these, required or promised, that this particular fund shall be applied to the satisfaction of these debts, except to the extent of whatever should prove necessary to pay the bid at Sheriff's sale, in order that the effect of that sale may inure to the strength of the title which Hastin Jennings was to transfer, and thus to relieve Jennings, who must be the bidder, from the liability to pay his bid from his own means. The Chancellor below has not erred in his judgment upon the construction of this agreement. It created no trust.

It is ordered that the decree of the Chancellor, in so far as it subjects the tract of

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land called "Buzzard Roost," *now held by the defendant, Henry Spann, to contribution towards the satisfaction of the judgments recovered by the Bank of Charleston and the executors of Wm. H. Inglesby, severally, against Eleanor Spann, as administratrix of the estate of Charles Spann, Jr., or towards the reimbursement of the sum paid by the sureties on the administration bond of the said Eleanor, in satisfaction of the former of these judgments, and in so far as it dissolves the injunction ordered heretofore in the cause, restraining the defendant, Joseph S. Inglesby, as surviving executor of the will of William H. Inglesby, from further pursuing his proceedings at law against the plaintiff, William H. B. Richardson, as administrator de bonis non of John R. Spann, the elder, on his liability as one of the sureties on the administration bond aforesaid, be reversed, and that the said injunction be made perpetual, and the said Joseph S. Inglesby, as such surviving executor, and all claiming under him, or in the same right, be perpetually restrained from proceeding at law against the said sureties on the said administration bond of the said Eleanor Spann, or either of them, or their or either of their representatives, to enforce payment of any balance claimed to be due on the judgment aforesaid, in favor of the executors of William H. Inglesby.

It is further ordered that the bill be dismissed as against Henry Spann, S. Porcher Gaillard, John R. Spann, the younger, and James M. Jennings, as administrator of the estate of Hastin Jennings; that the costs of Henry Spann and S. Porcher Gaillard be paid by the plaintiffs; and that the plaintiffs, the defendant, Joseph S. Inglesby, as surviving executor, and the defendant, James M. Jennings, as administrator of the estate of Hastin Jennings, severally, pay their respective costs, including, under the last nam-

ed, the costs of Hastin Jennings, as a party to the original bill.

DUNKIN, C. J., and WARDELOW, A. J., concurred.

Decree reversed.

13 Rich. Eq. *104

*WILLIAM J. CURETON and Others v. BENJAMIN H. MASSEY and Others.

(Columbia. Nov. and Dec. Term, 1896.)
[Reported and annotated in 94 Am. Dec. 152.]
[Wills \hookrightarrow 555.]

Legacies to two of testator's nieces by name, who both died before testator, leaving children. *Held*, that the legal consequences of the lapse were not prevented by certain declarations of testator, that the great purpose of his making a will was "to include some of his grand nephews and nieces in the distribution of his estate," who would be excluded if he should die intestate, and that "the children of a deceased nephew and niece herein named will count one, and take among them the shares of their deceased parents if they had been living."

[Ed. Note.—Cited in *Johnson v. Hartelston*, 6 S. C. 342; *Rivers v. Rivers*, 36 S. C. 308, 15 S. E. 137.

For other cases, see Wills, Cent. Dig. § 1209; Dec. Dig. \hookrightarrow 555.]

Before Inglis, Ch., at Lancaster, June, 1860

Thomas Cureton, the testator in the cause, died in November, 1858. His will is as follows:

State of South Carolina—Lancaster District.

In the name of God, Amen. I, Thomas Cureton, senior, of the district and State aforesaid, being advanced in life, and somewhat afflicted with disease, and believing that there is a great propriety in my making a will, do herein and hereby make this my last will and testament, to pass and dispose of all the estate, real and personal, I now own or may possess at my death.

First. I give to the children of my brother, William Cureton, late of Alabama, deceased, the sum of five hundred dollars, to be equally divided among them.

Second. I give to my nephew, James C. Massey, the notes and accounts I now or may hold and have against him at my death.

Thirdly. I have no brother or sister alive; they are all dead, and have left children, and

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some of their children have *died; and if I was to die intestate, some of my grandnephews and nieces that I desire to take part of my estate would not be entitled, under the Statute of Distributions; and this is the great purpose of my making a will, to include some of my grandnephews and nieces in the distribution of my estate; and I now and herein state how, and in what manner, and to whom and what persons will receive my whole real and personal estate, situate in this State and also in North Carolina; that is to say, all my negroes, now about forty-six, all my stock of cattle, hogs, horses, mules, all my lands, composed of many tracts, both

in this State and the State of North Carolina, my cotton crop, plantation tools and implements, my notes, cash, and all choses in action, (after the payment of my debts and the legacies herein stated,) and also all and every species of property and estate which I may own at my death, shall be divided among the following persons, and in the following proportions, that is to say: to my nephew, William Jackson Cureton, one share; to my niece, Sarah Kimbrell, one share; the children of my deceased nephew, Thomas K. Cureton, one share; the children of my deceased nephew, Jere Cureton, Jr., one share; the children of my deceased niece, Ann Potts, one share; the children of my deceased nephew, John Cureton, one share. These are of the family of my brother, Jeremiah Cureton, Sr. Also, to the descendants of my sister, Elizabeth Massey, as follows: that is, to Benjamin H. Massey, son of Everard, one share; to Henry Reese Massey and Mary Massey, children of Henry, one share; to the children of William Massey, deceased, viz., Rebecca, Jane E., Sarah A., and William H., among them, one share; to the children of Charlotte Massey, deceased, to wit, L. H. Massey, Charlotte Cureton, the children of H. T. Massey, deceased, and of Dr. G. L. Massey, deceased, among them, one share; also, to the children and descendants of my deceased sister, Mary Haile, as follows: that

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is, *to Col. James C. Haile, one share; to Mrs. Matheson, wife of C. Matheson, one share; to Elizabeth Knox, one share; to the children of Benjamin Haile, Jr., deceased, among them, (names not known,) one share; to the children of Susan Lanier, (names not known,) among them, one share; also, to the children of my deceased brother, Everard Cureton, as follows: to James B. Cureton, one share—there are several other children of my said brother Everard, but I do not now recollect their names, but each and every one of the children of my said brother Everard is to have one share in the distribution of my estate. These are the persons who will receive my whole estate. Each nephew and niece will count one, and the children of a deceased nephew and niece herein named will, among them, count one, and take among them the shares of their deceased parents if they had been living.

In the division I desire that my faithful slaves, Cupid and his wife, and Charlotte, shall choose their master, and be allotted to whoever they may desire to live with.

I nominate, constitute, and appoint William Jackson Cureton and Dr. Thomas K. Cureton executors of this my last will and testament, and I revoke all former wills, and declare this to be my last will and testament. In witness whereof, I have hereunto set my hand and seal this sixth day of October, 1857.

Catherine Matheson, wife of C. Matheson, and Elizabeth Knox, two of the legatees nam-

ed in the will, died after the will was made and before the testator, each leaving children who survived the testator, and the only question made on the appeal was whether their legacies had lapsed.

So much of the decree of his Honor, the Circuit Chancellor, as relates to this question is as follows:

Inglis, Ch. The purpose of the plaintiffs in this case is, to have a distribution of the

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estate of the late Thomas *Cureton, in conformity with the directions of his will, and in order thereto to obtain from the Court an authoritative construction of certain clauses of the will which have come to be considered of doubtful interpretation. Under an order heretofore made, the whole estate has been sold by the Commissioner, and it only remains, by a solution of the doubts stated by the executors, to ascertain the mode of distribution.

* * * * *

In distributing among "the children and descendants" of his deceased sister "Mary," he disposes thus: "To Mrs. Matheson, wife of C. Matheson, one share; to Elizabeth Knox, one share." Each of these nieces of the testator died in the interval between the execution of his will and his death, leaving children. On behalf of these two families of children, it is claimed that each family is entitled to take, by representation, the share thus given to the mother. The other legatees, or some of them, insist that the devises and legacies to Mrs. Matheson and Mrs. Knox lapsed by the death of the devisee, &c., in the testator's lifetime, and must fall into the residue, or, rather, must, by reducing the number, increase the value of the shares into which the residue is distributable.

If Thomas Cureton had died intestate, his nephews and nieces then living would have taken by descent his whole estate among them in equal shares; and the children or remote issue of such as were then deceased would have been excluded. This result would have disappointed his wishes.—"If I was to die intestate," says he, "some of my grandnephews and nieces that I desire to take part of my estate would not be entitled under the Statute of Distributions, and this is the great purpose of my making a will, to include some of my grandnephews and nieces in the distribution of my estate." It is quite certain, however, as well from the form of

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expression here used as from the *disposition actually made, where he proceeds to state how, and in what manner, and to whom and what persons will receive his whole real and personal estate, that neither all his then living nephews and nieces, nor the children of all such as were then deceased, were equally or at all within the purpose of his bounty. There cannot be a doubt that the whole issue, in whatever generation, of his brother

William, for some cause not appearing, are "cut off" with a comparatively trifling pecuniary legacy. It is, however, true, as is manifested by the form of words in which he constantly expresses himself, that in every instance provision is made for the children of every deceased nephew or niece who would, if living, have been in person a partaker in his bounty. And it cannot therefore be doubted that if the testator had happened to anticipate and bring within the range of his thought at the moment the possibility that any nephew or niece for whom he was providing a share might die, leaving issue, before his will should take effect, he would have adapted the terms of bequest to meet such contingency, and given the parents' shares to the issue, as a substitute. Every one who reads what the testator has written will most probably be persuaded of this from the carefulness with which he has, in so many instances, remembered the issue of nephews and nieces whom he knew, at the making of the will, to be deceased. It is, however, too plain that he was contemplating only the state of things existing at the time, and has not provided for the consequence of such an event as has occurred in the instances now under consideration. The question is one of construction purely, and can be answered only by declaring what intention, if any, the testator has expressed, in reference to the particular case or class of cases. If he has wholly failed to provide for the contingency which has happened, the Court may deplore his want of forethought, but cannot supply the omission resulting therefrom. The

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*Judgment of the Court on this part of the case is, that the gifts to Mrs. Matheson and Mrs. Knox lapsed by their deaths, severally, in the lifetime of the testator. The gift to each of them is of one share in the general residue of his whole estate, described by himself as "consisting of many tracts of land," besides divers sorts of personal chattels. If this had been a bequest of specific property, personal and real, under the distinction between the two kinds of property which the law—at least as it stood at the date of the testator's death—recognized, the realty thus lapsed would have descended to, and been distributable among, the heirs at law of the testator as intestate property, while the personalty would have fallen into the residuum. It is probable that our Act of 1858, (sec. 1, 12 Stat. 700,) which went into operation only some few weeks after the death of Thomas Cureton, by taking away the distinction between realty and personalty, as to the time at which the will speaks in reference thereto, has also removed the grounds of this distinction, as to lapsed devises and lapsed legacies, and in a proper case will be held to have abolished it. The present, however, is not a case of specific gifts

lapsed, but of shares in the general residue itself; and they do not, therefore, either as respects the realty or the personalty, fall into the residuum, or, by reducing the number, go to swell the value of the shares into which that is to be divided, but descend, as undisposed of, to the distributees, or next of kin, under the statute, (*Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 P. Wms. 480; *Page v. Chapman*, 1 Ves. Sr. 544; *Ackroyd v. Smith*, 1 Er. C. C. 503; *Salt v. Chattaway*, 3 Bouv. 576.)

* * * * *

It is ordered and decreed that the distribution of the proceeds of the estate of Thomas Cureton be made by the Commissioner of this Court, in conformity with the directions of the will, as the same are expounded in the

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particulars considered by the Court in the present judgment. The cost of the cause, if there be any not hitherto provided for, to be paid out of the general estate.

The defendants, children of Catherine Matheson and Elizabeth Knox, appealed from the decree of his Honor, on the ground that, upon a proper construction of the will of the testator, the legacies to Catherine Matheson did not lapse, but passed to their respective children.

Kershaw, for appellants.
Williams, contra.

Curia, per DUNKIN, C. J. This Court concur with the Chancellor, and for the reasons stated in the decree.

The appeal is dismissed.

WARDLAW and INGLIS, A. J., concurred.
Appeal dismissed.

13 Rich. Eq. *111

*EZEKIEL PICKENS and Others v.
THOMAS JONES PICKENS
and Others.

(Columbia. Nov. and Dec. Term, 1866.)

[*Assignments for Benefit of Creditors* ⚡239.]

An assignee for payment of debts, of a contingent interest in lands or chattels, whether the assignment be under the Prison House Act or be voluntary, has no power, implied by law, to sell such interest, but must wait until the interest becomes vested, before he can proceed to realize funds from the assigned interest to pay the debts.

[Ed. Note. For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 772; Dec. Dig. ⚡239.]

Before Dunkin, Ch., at Anderson, June, 1860.

Andrew Calhoun Pickens, one of the defendants, was entitled to certain contingent interests, in lands and slaves under the will of his father, the contingency being that he should survive his mother, who had a life-estate in the same lands and slaves. In 1855, during the life of his mother, he was ar-

rested under a ca. sa., at the suit of John B. Sitton, and on the 10th March, 1855, he filed a schedule of his property and effects, including therein the contingent interests aforesaid. On the same day he executed an assignment, as follows:

"I hereby assign and convey the estate and effects in the annexed schedule, or so much thereof as shall be sufficient to satisfy the debt, interests, and costs of the said cause, to John B. Sitton, the plaintiff, at whose suit I am confined, subject, nevertheless, to all prior encumbrances; the overplus of the said estates and effects I hereby assign and convey to my friend, Augustus T. Broyles, in trust, nevertheless, first, for the payment of all necessary fees and expenses incurred, or to be incurred, in carrying out this assignment; secondly, to collect and pay over to

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my schedule *creditors mentioned in a schedule marked A, and herewith annexed, pro rata, according to their several amounts."

The assignees advertised the assigned estate for sale at public outcry on Thursday, the 22d November, 1855, and on that day the contingent interests were put up for sale, and bid off by John E. Bellote, at the price of \$825, to whom the assignees by deed conveyed the same. On the 20th August, 1856, John E. Bellote, by deed, conveyed the said contingent interests to the defendants, James W. Harrison and John B. Sitton. There was no charge or pretence that there was any fraud or unfairness in any of the transactions, and the only question made on this part of the case was, whether the assignees, Broyles and Sitton, had power to sell the said contingent interests.

Mrs. Elizabeth Pickens, the tenant for life, died in December, 1859, and thereupon the interests of Andrew Calhoun Pickens became vested.

Other questions were made in the cause, but the one above mentioned is the only one that was taken to, discussed, and considered, in the Court of Appeals.

The decree of his Honor, the Circuit Chancellor, is as follows:

Dunkin, Ch. The will of Ezekiel Pickens, of St. Thomas' parish, was executed in the spring of 1813, and was admitted to probate in the fall of that year. To his wife, Elizabeth Pickens, the testator bequeathed the use of one-third of his personal estate during the term of her natural life. From and immediately after her decease, it is directed that the said third part of his personal estate, together with the increase of the slaves, "shall revert and be again considered as part of my estate, and be equally divided, share and share alike, between my children herein-after mentioned, or the survivor, or survivors of them, or their respective issue lawfully

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begotten, in manner and form as *the remaining part of my personal estate is hereinafter directed to be divided."

The remaining two-thirds of his personal estate the testator directs to be equally divided, share and share alike, between his three children, (by name, of his first marriage,) and his three children, (by name, of his second marriage,) the sons to be entitled to receive their shares as they respectively attain twenty-one years, and the daughters on attaining twenty-one years, or marriage after attaining eighteen years of age. In the event of the death of either son or daughter, "before attaining the respective ages above mentioned," provision is made for the division of the share among the surviving children of the first and second marriages in the manner therein prescribed.

The testator further devised to his wife, during life or widowhood, one-third part of his real estate that might remain after payment of his debts; and, in the event of the marriage or death of his wife, it is directed that the said one-third part "shall revert and be again considered as part of my real estate, and shall be equally divided, share and share alike, between my children herein before mentioned, or the survivor or survivors of them, or their respective issue lawfully begotten, in manner and form as the two-thirds of my personal estate has been already particularly directed to be divided to them respectively, their heirs and assigns."

Mrs. Elizabeth Pickens survived her husband, the testator, some forty-six years, and died his widow in December, 1859. The object of these proceedings is the sale and distribution of two tracts of land and some sixteen slaves, held by the life-tenant under the foregoing provisions of the testator's will.

At the death of Elizabeth Pickens, four of testator's six children were alive, and were parties in this cause. Elizabeth Bonneau Pickens, a daughter of the testator, and the

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*wife of his late Excellency, Patrick Noble, departed this life in 1834, leaving issue, who are among the plaintiffs. Samuel Bonneau Pickens, a son of the testator, died in 1852, without issue. His widow and administratrix, Martha J. Pickens, is also a plaintiff.

Some administrative orders were passed by consent at the hearing of the cause, but it becomes necessary to give construction to the clauses of the testator's will which have been recited.

Mr. Jarman, citing the judgment of Sir John Leach, in *Crapps v. Wolcott*, 4 Madd. 11, declares it "to be now settled that if a legacy be given to two or more, equally to be divided between them, or to the survivor or survivors of them, and there be no special intent to be found in the will, the survivorship is to be referred to the period of division. If there be no previous intent given in the legacy, then the period of division is the death of the testator, and the survivor at his death will take the whole legacy. But if a previous life-estate be given, then the period of division is the death of the tenant

for life, and the survivors, at such death will take the whole legacy." 2 Jarm. GIS.

The principle was considered and fully recognized in *Evans v. Godbold*, 6 Rich. Eq. 26. "Persons claiming the estate of the testator (say the Court) must bring themselves within the description of heirs of the testator, surviving the widow." Until the death of the widow, it could not be ascertained which of the testator's children would be able to bring themselves within the description, and the right of each child was, therefore, contingent until that event occurred. Mrs. Noble and her brother, Samuel Bonneau Pickens, having died before the widow, their contingent interest ceased, as they could never be brought within the description of those who would be entitled to take—those children not falling within the description are excluded. Mrs. Noble and her brother,

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Samuel Bonneau, come within *the latter category. Although Mrs. Noble's death terminated her contingent interest, her issue are protected, not as claiming through her, but as direct purchasers under the testator's will—the legacy is to the children, or the survivor or survivors of them, "or their respective issue lawfully begotten." The language of the bequest in *Anderson v. Smoot* Sp. Eq. 312, is very similar. It was there held that this provision was intended for such of the children as might survive the tenant for life, and for the issue of those who might not have survived. The issue of Mrs. Noble take the share intended for their parent, and the administratrix of Samuel Bonneau Pickens, is excluded.

Then as to the purchase of the interest of Andrew Calhoun Pickens. The Court is unable to distinguish this case in principle from that of *Bently v. Long*, 1 Strob. Eq. 53 [47 Am. Dec. 523]. Judge Johnson there held that the situation of the assignee under the Prison Bounds Act was in some sort fiduciary. "The interest which the defendant, Benjamin Long, had in the estate was (says the Judge) a chose in action, and the effect of his assignment to complainant Bently was to constitute him his agent, to reduce it into possession, and to pay himself out of it the amount due him in the judgment, and no more. It did not invest him with the unqualified right of property, but invested him with a power which he had no authority to assign to another, and, if a stranger had purchased at the sale, he could, under no circumstances, have been in a better condition than Bently himself." The complainant Bently appealed upon the ground, (among others,) that he had acquired a good title to the interest of defendant Long, in the estate of his father, by virtue of his assignment under the ca. sa. to him, the complainant, and by his (Bently's) purchase of said interest for a full and valuable consideration, under a fair sale and competition. This part of the decree was

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sustained by *the Court, and the complainant only allowed to be subrogated to the rights of creditors whose liens he had discharged.

The principle seems more emphatically applicable to a voluntary assignee, as the pleadings indicate *A. T. Broyles*. Such an assignment of a chose in action authorizes the assignee to collect and receive it, and apply the same to the purposes of his trust. It does not, in the language of the Court, "invest him with the unqualified right of property, but invested him with a power which he had no authority to assign to another." A purchaser from him stands in the same relation with himself, and the chose, in his hands, is liable to the same condition. To wind up a bankrupt concern, the Court has, in some rare instances, ordered choses in action to be exposed to sale; but the province and the duty of an assignee for the benefit of creditors is to collect the choses in action, and unless specifically authorized, he cannot discharge himself of his trust by putting them up at auction.

It is presumed that the sum paid by the defendants in November, 1855, was applied to the debts of A. C. Pickens, and they could (very properly) claim that this sum, with interest, should be deducted from his share, and it is so ordered and decreed.

It is necessary that Augustus T. Broyles should be made a party for the purpose of having an account both from himself and John B. Sitton, the assignee under the Prison Bounds Act. Until A. T. Broyles has had the opportunity of answering, it would be premature to make any final order as to the disposition of the share of Andrew Calhoun Pickens.

Parties may be at liberty to apply at the foot of the decree for such further and other order or orders as may be necessary.

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*The defendants, Harrison and Sitton, appealed, on the grounds:

1. It is respectfully submitted that the only question raised for the decision of the Chancellor was the construction of the will of Ezekiel Pickens. The effect of the assignment made by Andrew C. Pickens of his interest in his father's (Ezekiel Pickens') estate was expressly reserved by complainants' and defendants' solicitors at the hearing, and was not argued.

2. It is respectfully submitted that the assignment made by Andrew C. Pickens to John B. Sitton and Augustus T. Broyles was voluntary, and the assignee conveyed his entire estate to the assignees, and authorized them to sell to execute the trusts in the deed of assignment.

3. It is submitted that Harrison and Sitton are the bona fide owners of the interest of A. C. Pickens in his father's estate, and the decree of the Chancellor should have ordered

the same to be paid to them, instead of subrogating them to the rights of creditors.

4. Because Andrew C. Pickens is estopped from denying the rights of defendants, Harrison and Sitton, as his deed was voluntary, and no allegation is made of fraud or bad faith either against the assignees or the purchasers.

Harrison, for appellants.

Noble, contra.

The opinion of the Court was delivered by

INGLIS, A. J. The plaintiffs having abandoned their appeal touching the nature of the interests which the children of Ezekiel Pickens took, under his will, in the property, real and personal, therein devised and be-

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queathed to his *widow for life, the only question upon which the judgment of this Court is now required is that made by certain of the defendants respecting the power of the assignee of A. C. Pickens, under an assignment made while his interest was yet contingent, to dispose of that interest.

The Prison Bounds Act, (5 Stat. 78,) while exacting of the debtor, who seeks the benefit of enlargement which it proffers, an assignment of his whole estate if necessary, or otherwise of so much as will be sufficient to pay and satisfy the debt for which he is confined, does not in terms ascertain or define the estate, interest, or power, which the assignee, by virtue of such assignment, takes in or over the property and effects therein assigned. In this respect it is distinguished from the Insolvent Debtors Act of 1759, (4 Stat. 86.) Inasmuch, however, as the object of the assignment is the payment and satisfaction of the debt, such effect must be given to it as will, so far as from the nature of the property and interests assigned may be, accomplish this object. There is no absolute transfer of the debtor's property to the assignee for his own proper use, for that would overreach its purpose wherever the property proved to be more than sufficient to pay and satisfy the debt. But there must be a power to enter upon, possess, and sell, to collect, or reduce into possession, according to the nature of the property, for this is necessary in order to payment and satisfaction. But no more is necessary, and therefore no more can be implied. Whatever of the property assigned has "present existence and visible form" may be sold, for it is in law capable of sale, and that is the only proper mode of applying it in payment and satisfaction. Choses in action, such as bonds and other securities, may be collected, for that is the method appropriate to their nature of making them available. Contingent interests may be reduced into possession when the contingency is determined, and if the interest then at-

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taches upon any thing having *present ex-

istence and visible form," so as to vest this in the debtor, doubtless the assignee, if payment and satisfaction has not been previously otherwise made, may, with the aid of equity, convert it by sale into the means of such payment and satisfaction. "A contingent remainder is included in the description, 'estate, property, and effects,' mentioned in the Act of 1788, (5 Stat. 78,) and an omission to include it in the schedule is within the penalties of the Act," (Clerry v. Spears, 2 Sp. 687.) A debtor under arrest, and desiring the enlargement offered him by this Act, is therefore compelled to assign any such contingent interest that he may be entitled to. But the effect of his assignment thereof is not to vest any property in the assignee, for the debtor has no property capable of transfer. What he has is a possibility of property at some future time, arising, it may be, by gift or grant, but too remote and uncertain to be the subject of sale and conveyance. Such assignment operates, not as a grant, but as a contract or agreement to convey, and gives to the assignee a right of action only—that is, a right to compel specific performance by the assignor as soon as, by the determination of the contingency and the vesting of the estate, the assignor has acquired the power to perform it. The assignee has then a mere equitable chose in action. Such a chose in action is not the subject of sale; it is not a marketable commodity. A power to sell in the market such a mere right, and by so doing to convey away the whole interest which the debtor may ultimately be entitled to in possession, without reference to the sufficiency of the proceeds of that interest, when actually reduced into possession, to fulfil the purposes of the assignment, cannot be implied from the fact of assignment. Nothing can be implied beyond the legal incidents, because more is not necessary in order to effectuate the purposes of the assignment. The assignee does not, by virtue of an assignment

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such as is now under consideration, take a power to sell in the market a bond or other security assigned, although the delay in its collection, resulting from the long postponement of its maturity by the terms, may be a grievance. He has pursued his debtor to the last extremity, and has got all he now has to give him; the limit of legal remedies for the present has been reached, and he may convert what he has got into the means of satisfaction in those legitimate modes severally appropriate to each kind of "estate, property, and effects." Under the Insolvent Debtors Act, upon the discharge of the debtor, all future remedy of the suing creditors is gone, and it is therefore their interest to make the property assigned yield for satisfaction its utmost value. Hence the large powers therein given cannot result in any injury to the debtor. But under the Prison Bounds Act, if the property assigned prove insufficient, the

creditor may subject to the purpose of satisfaction any after-acquired property of his debtor. It will often be to his advantage to convert the property and interests assigned without delay, though at a sacrifice, and, secure of so much as these will yield, hold his judgment ready to fasten its lien on the future acquisitions, taking his chance for such further fruit as he may thus be able to gather. The only protection of the debtor is in the limited power of the assignee under this Act to dispose of all those kinds of interests most liable to a sacrifice. If he departs from the legitimate modes of the application of such interests to the satisfaction of his debt, and, in his eagerness for immediate realization, auctions in the market a mere contingency to which capability of sale is not a legal incident, when he calls upon the debtor through the Court to make his conveyance effectual by a specific performance of his agreement involved in the assignment, the debtor may justly reply, "Non in hoc federa veni"—"I am ready to perform specifically my agreement, but only for the purposes for

tion of debts, or his own enjoyment of the surplus.

This Court concurs, therefore, with the Chancellor on this point, and the motion to reform the decree is refused, and the appeal dismissed.

DUNKIN, C. J., concurred.

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*WARDLAW, A. J. I agree except that as the contingency might have been wholly defeated by the death of A. C. Pickens before his mother, the chance of obtaining certainly something for the creditors seems to me to have required a power of sale.

Appeal dismissed.

13 Rich. Eq. *123

*ELIAS HORLBECK v. THE PROTESTANT EPISCOPAL CHURCH OF THE PARISH OF ST. PHILIP.

(Columbia, Nov. and Dec. Term, 1866.)

[*Landlord and Tenant* § 200.]

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which that agreement was made, to wit, that the estate now vested in possession may be applied, according to the intention of the assignment, to the payment and satisfaction of my debt." Such application of the full value of the property which, upon the determination of the contingency, is the fruit of the expectancy assigned, was the consideration of the assignment, and the assignor may well insist upon that consideration being assured to him before he is required to convey. If the right derived under the assignment be capable of transfer at all, the transferee must take it subject to the equities of the assignor growing out of the original transaction, and through whatever number of successive mesne transfers it may pass, the final holder can be in no better condition than was the original assignee.

The wisdom of the law in discountenancing the sale of interests so remote and uncertain in their character is well illustrated in this case. A. C. Pickens had a contingent interest in remainder in two distinct gifts, the one a devise of realty, the other a bequest of personalty. At the time of the attempted sale, Samuel B. Pickens, one of his coremaindmen under the will, was already dead, and the share of A. C. Pickens, in case of his survivorship, was therefore at least one-fifth of the whole. Yet the interest in the two gifts was sold in a mass, and that interest described as one-sixth only.

A debtor who has made an assignment of this kind, where no power of present conversion by sale is expressly given by himself, or made incident by law, is entitled to the benefit of the full value of the interest when it shall be reduced into possession, whether the result be for his relief from the obliga-

tion of the lease into lots, and grant leases of the same for thirty-one years, and from time to time after the expiration of the said leases to renew the same, provided such renewed leases do reserve the same rent, or a greater rent, not exceeding as much again as the first rent reserved by the former lease, and do not exceed the said term of thirty-one years, and so on from time to time as such renewed leases shall expire;" and that on every renewal the lessee "do pay a fine equal to two years rent reserved on said first-made lease." The original leases were made in 1770. In 1833, on the second renewal of one of them, double the rent of the first lease was reserved, and in 1844 the vestry and wardens refused to renew again, unless double the rent of the second renewal was reserved. *Held*, that the words "the first rent reserved by the former lease" meant the rent reserved by the first lease, and that the vestry and wardens had no right to require that double the rent of the next preceding lease should be reserved.

[15]. Note. For other cases, see *Landlord and Tenant*, Cent. Dig. § 794; Dec. Dig. § 200.]

Before Johnson, Ch. at Charleston, November, 1866.

This was a bill for specific performance. The following is a brief of the bill:

Elias Horlbeck, of Charleston, physician, complains, on behalf of himself and all other persons, having similar interests and rights with himself in the matters in bill stated, who shall come in and seek relief by and contribute to the expenses of the suit.

Sets forth the Act passed in Council Chamber of the Colonial Legislature, by Governor and Council, (7 St. at Large, 79,) on the 7th day of April, 1770, entitled "An Act for laying out and establishing several new streets in the northwest part of Charlestown,

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and for building a new *parsonage house for the Parish of St. Philip, Charlestown, and

for empowering the Vestry and Church-Wardens of said parish, for the time being, to lay out part of the glebe land of the said parish in lots, and to let the same out on building leases, and for other purposes therein mentioned."

That by indenture in 1797, recorded R. M. C. office, Charleston, Book S. 10,425, the glebe lands were partitioned between the churches of St. Philip and St. Michael.

That by the A. A., 1770, the vestry and wardens of the Parish of St. Philip, in December, 1770, caused the lands to be surveyed, and laid out into thirty-eight lots, and put them up for sale to the highest bidder, and that Charles Pinckney purchased the lots Nos. 19 and 20, at the yearly rent of £29, then late current money, equal to seven-teen dollars seventy-six cents for each lot.

That, on the renewal of the original leases thereof, the same were granted to William Greenwood, assignee of Charles Pinckney, on leases to expire 25th March, 1833, and became afterwards vested in Richard Lord, trustee of John Horlbeck and Maria his wife.

That, on the 25th March, 1833, two several indentures were made between the vestry and Mr. Lord as trustee as aforesaid, by which the lessors—reciting the A. A. 1770, the survey and laying out of the lots, the sale of the lots 19 and 20 to Charles Pinckney, and his purchase at the rent aforesaid, and the renewal of the leases to William Greenwood, assignee of Charles Pinckney, and subsequent vesting thereof in Mr. Lord as trustee, and that he had paid a fine of thirty-five dollars fifty-two cents on each lot, being equal to two years rent reserved on the first-made leases, and had agreed to pay the yearly rent of thirty-five dollars fifty-two cents for the purchase of the renewal leases of each lot—demised the said lots by their respective descriptions, to hold for thirty-one years, yielding the rent of thirty-five dollars fifty-two cents for each

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lot, to be paid *annually. That if the same should be in arrear for twenty days, the lessors should have the right to re-enter, and to eject and remove the lessee, with power of distress also reserved to enforce payment of the rent.

That Mr. Lord covenanted to pay the rent and all State and other taxes and rates, imposed or to be imposed, and at his own cost and charges to erect on each lot a substantial two-story house, 30 by 18 feet on the one, and 30 by — on the other, with ceilings at least nine feet in the clear, and to maintain, uphold, and keep the same in tenantable repair, and, at the end of the term or other sooner determination thereof, to leave and surrender the buildings and all the improvements to the lessors.

It was provided that the lessors, at request of the lessee, would renew the leases at the expiration of the terms, according to the

directions of the Act, if request be made in reasonable time for such renewals.

And the lessors reserved the right to enter to view the premises twice per year, and covenanted for quiet enjoyment.

That Mr. Lord, 23 April, 1842, assigned the lease of lot 19 to complainant. That on 3 August, 1839, lessors extended the time for the building thereon until 25 March, 1846. That Mr. Lord, on the day of April, 1846, assigned the lease of the lot 20 to complainant. That on the 3 August, 1839, the lessors extended the time for the building thereon until 25 March, 1846.

That complainant, in pursuance of the covenant, and in full expectation and confidence of a renewal of the leases, has erected very valuable and costly buildings on the said lots, and has always paid his annual rents. That the terms determined 25 March, 1864. That on the day of 1863, and at divers times since, he has applied for renewals of the leases, and tendered payment of the several fines, and to execute indentures with

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like covenants and agree*ments as in the former leases, and to pay the rent reserved thereupon on the renewals thereof, according to the A. A., 1770, and has always been ready to accept the said renewals on the terms of the said leases, but the lessors have refused.

Sets forth the refusal of the lessors, and that they require complainant to pay double the rent reserved on the leases last expired, and charges that they are bound to renew on the payment on each lease of the fine of double the rent reserved on the first-made lease, and on complainant's covenanting to pay an annual rent on each lease equal to double the rent reserved on the first-made lease.

Prays that the lessors may answer the premises, and that the renewals may be specifically executed, and that defendants may be decreed to execute them on the terms charged, and for general relief.

Brief of answer of the vestry and church-wardens of St. Philip's church.

The defendants, saving all right of exception, admit the statement of complainant's bill in relation to the Act of 1770, the laying out of the glebe into thirty-eight (38) lots, according to the plan referred to, the sale of the said lots, the division of vestries and church-wardens of the churches of St. Philip and St. Michael into two separate corporations, and the division of the glebe land between the said churches, and that the lots described in complainant's bill were allotted to St. Philip's church. They neither admit nor deny the allegations of complainant's bill in relation to the original sale of the lots 19 and 20 to Charles Pinckney, and the several assignments by which the right of renewal is vested in complainant, and the extension by the vestry and wardens, in 1839, of the time for the erection of the buildings covenanted to be erected on said lots, be-

cause the counterparts of the lease of complainants which were in possession of the de-

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fendants were destroyed, among other papers, in the city of Columbia, and pray that the proofs of the material averments may be produced by complainant.

They admit that complainant has erected very valuable buildings upon the lots leased to him, and that he has paid the annual rent during the terms, and that the terms determined on the 25th day of March, 1864.

They aver that, previous to the expiration of the leases, notice was given to all the lessees that the defendants were willing and ready to renew the said leases to such persons as were entitled to renewal of the same, upon payment of the fines stipulated to be paid for such renewal; and the rent reserved upon such renewed lease would be as much again as the rent reserved in the then existing leases; that the complainant, and some others of the lessees, offered to pay the fines for renewal required of them, but denied the right of defendants to increase the rent, upon the renewal of the leases, beyond the amount reserved in the leases then about to expire, and notified them of their intention of testing before the Court the defendants' right so to increase the rents.

That these defendants expressed their willingness to have the said question submitted to the Court, and agreed that the delay necessarily consequent thereupon should not prejudice the right of the tenants to renewals; and further agreed that the question raised should be decided in one case for the benefit of all having a like interest.

They admit that it is incumbent upon them to renew the said leases, and to prepare and execute the same at the expense of the lessees, and are prepared to do so as soon as the Court shall determine the question as to the amount of rent which these defendants may reserve upon said renewals.

That the defendants and the complainants differ only in one particular, and that is, as

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to the amount of the annual rent which shall be reserved in the renewal leases, to which complainant is entitled upon the payment of a fine equal to two years rent reserved in the first-made or original lease, and about which there is no dispute: these defendants refusing to renew unless the rent reserved in said renewal leases is as much again as the amount of the rent reserved in the former leases, while the complainant insists that these defendants cannot increase the rent to be reserved in the renewed lease beyond the amount reserved in the lease which has just expired, inasmuch as the rent so reserved in the last lease was already as much again as the first rent reserved in the original lease, beyond which amount he contends that the rent upon renewals cannot be increased.

Defendants submit themselves to the order

and decree of the Court, upon the point raised in the bill, and agree to release the leases of complainant and of all other tenants who held under similar leases, and who will come in under the proceedings in the cause, and establish their right to such renewals, upon their complying with the terms and conditions with which they are under covenant to comply.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnson, Ch. On hearing the pleadings in this case and the argument of counsel, it is ordered and decreed that the vestry and church-wardens of the Protestant Episcopal Church of the Parish of St. Philip, in Charleston, in the State of South Carolina, renew the leases of the glebe lands made under the authority of the Act of Assembly of 1770, and which expired on the twenty-fifth day of March, A. D. 1864, to the assignees of the original leases, who shall establish their right as such assignees to renewal before James Tupper, Esq., one of the Masters of this Court, by the first day of April next, and

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who shall pay the fines for renewal prescribed in the said leases, and the costs of the leases respectively, and who shall contribute to the expenses of the complainant in proportion to their respective interests.

And it is further ordered and decreed that the said leases shall be renewed for the term of thirty-one years from the expiration of the last leases, to wit, the twenty-fifth day of March, 1864, and that the rent reserved upon the said leases shall not exceed the rent reserved in the said leases last expired, and shall contain the same covenants as the last expired leases.

And it is further ordered that the complainant's costs be paid by the complainant, and such lessees as shall come in under this decree, and establish their right to renewal, in proportion to their interests, and the other costs by the defendants.

And it is lastly ordered that the parties have leave to come in and apply at the foot of this decree for any further orders which may be necessary in the cause.

The defendants appealed on the ground—

Because his Honor, Chancellor Johnson, erred in ordering that, upon the renewal of the lease to complainant, the rent reserved shall not exceed the rent reserved in the lease last expired; whereas, it is submitted that, according to the provisions of the Act of 1770, the defendants have the right to increase the rent to be reserved upon such renewed lease, not exceeding as much again as the rent reserved in the former lease last expired.

Miles, for appellants. First. The construction of the leases is not to be affected by the acts of the parties: *Bayman v. Guy's Hospital*, 3 Ves. 295; *Moore v. Foley*, 6 Ves. 232; *Iggulden v. May*, 9 Ves. 324; *Same*

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case, 7 East, 244; *Same case, in Exchequer Chamber, on writ of error, 2 New Rep. 449; Clifton v. Walmsley, 5 T. R. 565; 2 Pratt on Leases, 727-729, citing later cases.

Second. The right to double the rent upon every renewal is clear upon the words of the Act of 1770, 7 Stat. 95. Sec. VI., after reciting that, by laying out certain streets therein directed to be laid out, a great part of the ancient glebe of St. Philip may be leased out to great advantage, for the benefit of the rector of the parish and other purposes, enacts, that the vestry and churchwardens of the said church and their successors in office for the time being, or a majority of them, shall have power and authority, and they are authorized, directed, and required, to lay out a parcel of the glebe land for erecting a new parsonage house; and when that is laid out—

1. "That then the said vestry and churchwardens for the time being, or a majority of them, shall divide and lay out all the remaining parts of the said glebe (except such part as is hereinafter particularly specified to be absolutely sold) into such and so many lots, pieces, or parcels of land as they, in their discretion, shall think most proper and advantageous to be let out by them, on written leases, with reserved rents thereon, for the use of the said rector or minister for the time being, and such other use as is hereinafter declared concerning the same, for any term or time not exceeding thirty-one years."

These words authorize the vestry and wardens to lay out the glebe in lots to be let.

2. The words next following authorize the vestry and wardens for the time being to execute the leases: "and that the said vestry and churchwardens for the time being, or a majority of them, shall forever hereafter have full power and authority to make and execute such lease or leases, with proper covenants, to be inserted therein, for the better improvement of the said lots of land,

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with the buildings *thereon, and for the more easy recovery of the rents to be reserved by the said lease or leases."

3. The next clause gives authority to the vestry and wardens, on the expiration of these leases, to renew them, and prescribes the terms of such first renewals: "and from time to time, after the expiration of the said leases, to renew the same, provided such renewed leases do reserve the same rent, or a greater rent not exceeding as much again as the first rent reserved by the former lease, and do not exceed the said term of thirty-one years."

4. From the words which next follow, and from those alone, is the right of perpetual renewal derived: "and so on from time to time, forever hereafter, as such renewed leases shall expire."

The effect and meaning of these words is, that every renewal after the first shall be upon like terms and conditions as the first renewal—that is, that the rent reserved shall be the same, or greater, not exceeding as much again, as the rent reserved in the preceding lease.

5. The remainder of the section provides "that, on every such renewal of the lease or leases of any of the said lands, the person or persons, lessee or lessees thereof, do pay a fine equal to two years rent reserved on such first-made lease or leases: and provided, that in all cases of renewed leases, forever hereafter, the original lessee or lessees of the said land, and their executors, administrators, and assigns, shall always have the preference of such renewed leases."

In the cases of *Black v. The Vestry and Wardens of St. Philip's Church*, and *Dawes, executor of Laurens, v. The same*, decided by the Court of Appeals in 1833, Judge O'Neal, in delivering the opinion of the Court, says: "The tenants must pay the fines equal to two years rent not exceeding double the rent reserved on each of the leases last expired. It is ordered and decreed that

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the church renew *upon the lessees covenanting to pay a rent not exceeding double the rent reserved by the former lease."

Third. The Court will lean against construing a covenant to be for perpetual renewal as "improvident, absurd, and unequal," and will apply the same principle in interpreting the language which prescribes the terms upon which such renewals shall be made. *Tritton v. Foote*, 2 Br. C. C. 636, 2 Cox, 174; *Baynan v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, Ib. 694; *Moore v. Foley*, 6 Ves. 232; *Iggulden v. May*, 9 Ves. 324; *Furnival v. Crew*, 3 Atk. 82; *Redshaw v. Governor & Co. of Bedford Level*, 1 Eden, 346; *City of London v. Mitford*, 14 Ves. 41; *Watson v. Hemsworth Hospital*, Ib. 324; *Willan v. Willan*, 16 Ves. 72; *Harnett v. Yielding*, 2 Sch. & L. 549; 2 Platt on Leases, 707, et seq.; *Bac. Ab.*, Tit. "Leases and Terms for Years," U; "Renewal of Leases;" *Watson v. Hinsworth Hospital*, 2 Vern. 596; *Bac. Ab.* 240.

Fourth. The usual mode of providing for perpetual renewals "is not by providing directly how long the renewals should go on, but by a covenant with regard to the renewal to be introduced into the second lease;" and the same mode is adopted in the Act of 1770 in providing the terms upon which all renewals subsequent to the first shall be made. *Moore v. Foley*, 6 Ves. 235; *Furnival v. Crew*, 3 Atk. 83; *Willan v. Willan*, 16 Ves. 72; *Bayley v. Corporation of Leominster*, 3 Br. Ch. Rep. 237; *Attorney-General v. Smith*, 2 Vern. 746, *Bac. Ab.* 240.

Fifth. The express provision of the Act of 1770, by which the fines to be paid for renewals are limited to "two years rent on the

first-made lease or leases," excludes the construction that the words used in directing the terms of the first renewal shall be applied to the subsequent renewals. *Expressio unius est exclusio alterius*.

Sixth. The glebe lands were not given by the State, but were previously given to the

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minister or rector of the *church by Mrs. Afra Coming, in 1698. Daleho's Church History. This statute was to enable the vestry and church-wardens to lease for a period beyond the life of the rector. A rector was, by the common law, a corporation sole, who could not lease for a period beyond his own life. Coke Lit. 250a, 300b; 2 Blackstone, 318; Bac. Ab., Title "Leases," E.

Seventh. By providing that the lots were to be originally rented at their then market value, and that the rent should not be less but might be greater upon the first renewal, the Legislature showed that it was not intended to cut off the church from the benefit of the subsequently increasing value of the lands.

Simons, Porter, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. By the "Church Act" of 1706, Charlestown and the Neck between Cooper and Ashley rivers, as far as a certain boundary therein designated constituted a distinct parish, known as the Parish of St. Philip in Charlestown. In 1751, this parish was divided, and "that part of Charlestown on the southward of the middle of Broad street" was declared a distinct parish by the name of the Parish of St. Michael.

On 7 April, 1770, (7 Stat. 93,) an Act was passed for the purpose (among other things) of laying out and establishing several new streets in the northwest parts of Charlestown; and for empowering the vestry and church-wardens of the Parish of St. Philip to lay out part of the glebe land in the said parish in lots, and to let the same on building leases. It is recited in the Act that the proprietors of the lands in the said northwest part of Charlestown commonly called Coming's Point, and the lands adjacent

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thereto, had, by their *petition, prayed that the same might be done; and it was further recited that whereas, by the laying out of the streets aforesaid, according to a plan thereto annexed, a great part of the large and ancient glebe of St. Philip's Parish, Charlestown, might be divided and put into lots, which might be leased out to great advantage, for the benefit of the rector or minister of the said parish, and for other purposes therein mentioned, and will still leave a large and commodious parcel of land for the habitation, use, and occupation of the said rector or minister; and it was furthermore recited that the rector and the vestry

and wardens of the said parish were desirous that the same should be done. Provision was thereupon made that the new streets should be opened at the expense of the proprietors of the lands, and they were thereby declared public streets, &c. By the sixth clause of the Act the vestry and church-wardens of the said Parish of St. Philip were authorized, directed, and required to lay out a parcel, not exceeding four acres, of the land for the building a new parsonage, &c.; and that, when the parcel is so laid off, the vestry and wardens shall divide and lay out all the remaining parts of the said glebe into so many lots, &c., as they in their discretion shall think most proper and advantageous, to be let out by them on written leases, with reserved rents thereon, for the use of the rector and such other use as is hereinafter declared, for any term not exceeding thirty-one years; and the vestry and wardens are thereby empowered to make such leases, "with proper covenants, to be inserted therein, for the better improvement of the said lots of land, with buildings thereon, and for the more easy recovery of the rents to be reserved, &c., and from time to time, after the expiration of the said leases, to renew the same; provided, such renewed leases do reserve the same rent, or a greater rent, not exceeding as much again as the first rent reserved by the

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former lease, and do not exceed the *said term of thirty-one years, and so on, from time to time, forever hereafter, as such renewed leases shall expire; and that, on every such renewal of the lease, &c., the lessee do pay a fine equal to two years rent reserved on such first-made lease or leases as a further consideration for the renewal of such lease; and provided, that in all cases of renewed leases, forever hereafter, the original lessee or lessees of the said land, and their executors, administrators, and assigns, shall always have the preference of such renewed leases."

In pursuance of the directions of this Act, the vestry and wardens of the Parish of St. Philip, in December, 1770, caused the glebe lands to be surveyed, and laid out into thirty-eight lots, and put them up for sale. At this sale (as the plaintiff alleges) Charles Pinckney purchased the lots Nos. 19 and 20, at the yearly rent of £29, then late current money, equal to seventeen dollars and seventy-six cents (\$17.76) for each lot.

It may be here remarked that, subsequent to the survey and sale aforesaid, to wit, in 1797, by indenture duly recorded in the office of Register of Mesne Conveyances for Charlestown, the glebe lands were partitioned between the churches of St. Philip and St. Michael, and that, in such partition, the lots Nos. 19 and 20 (among others) were assigned and set off to the Parish of St. Philip.

On the expiration of the leases to Charles

Pinckney, (A. D. 1801 or 1802,) the same were renewed to William Greenwood, assignee of Charles Pinckney, on leases to expire 25 March, 1833; which leases became afterwards vested in Richard Lord, trustee of John Horibeck and Maria his wife.

On the day last mentioned, to wit, 25 March, 1833, two several indentures were executed between the vestry of St. Philip and Mr. Lord, in which the Act of 1770 and the subsequent proceedings are recited, and that

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Mr. Lord had *paid a fine of thirty-five dollars and fifty-two cents on each lot, being equal to two years rent reserved on the first-made leases, and had agreed to pay the yearly rent of thirty-five dollars fifty-two cents, for the purchase of the renewal leases of each lot; the vestry thereupon demised to him the said lots, by their respective descriptions, to hold for thirty-one years, yielding the rent of thirty-five dollars fifty-two cents for each lot, to be paid annually. If the rent was in arrear for twenty days, lessors were entitled to enter and eject the lessee, and with a power of distress also reserved to enforce payment of the rent. The lessee covenanted, also in addition to the rent, to pay all State and other taxes and rates, and, at his own costs and charges, to erect on each lot a substantial two story house, 36 by 18 feet, on the one, and 30 by — on the other, with ceilings at least nine feet in the clear, and to keep the same in tenantable repair, and at the end of the term, or other sooner determination thereof, to leave and surrender the buildings and all the improvements to the lessors. It was also provided that the lessor should, at the expiration of the leases, renew the same, according to the directions of the Act, on request made in reasonable time, and the lessors reserved the right to enter to view the premises twice a year.

In August, 1839, lessors extended the time for the building thereon until 25 March, 1846, and on 28 April, 1842, the lease of lot No. 19 was assigned to the plaintiff, who has erected very valuable buildings on the lots, and has always paid his annual rents.

The leases expired 25 March, 1864, and the plaintiff had previously applied for a renewal of the same, tendering payment of the same fines, and an agreement to pay rent as provided in the indenture of 25 March, 1833, which the defendants declined to grant unless he would covenant to pay double the rent reserved by the last mentioned indenture.

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*By the decree filed 28 November, 1866, the defendants were required (among other things) to renew the leases for the term of thirty-one years, from 25 March, 1864, and that the rent reserved should not exceed the rent reserved by the leases of 25 March, 1833.

The defendants have appealed, on the

ground that, according to the provisions of the Act of 1770, they have the right to increase the rent to be reserved upon each renewal lease, not exceeding as much again as the rent reserved in the lease last expired.

From the foregoing statement, it is manifest that the sole question for the consideration and judgment of the Court is, the true construction of the Act of 1770, as to the rent to be reserved on the renewal of leases, which the defendants are confessedly required in perpetuity to make. The plaintiff relies on this Act, and the covenants made in pursuance of it. If it was not passed at the instance of the defendants, (or their predecessors,) it was certainly enacted with their consent, and with the view of advancing the interests of the church which they represented, as well as for the public benefit. Both parties base their rights on the provisions of the Act of 1770; and the question would seem to be properly circumscribed to the grammatical construction of a legislative enactment. But the argument has taken a wider range. On the one side, it is urged that the conduct of the parties has been in accordance with the construction on which the plaintiff insists, while the defendants submit that the Court "should lean against a construction which would render the terms of renewal improvident, absurd, and unequal," as against the lessors, the vestry and wardens of the church.

If it be meant that the conduct of the successors of the former vestry and wardens, done thirty-one or sixty-two years after the enactment, can be relied on to aid the Court in the construction of a statute, the proposi-

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tion seems not *sanctioned by any of the numerous authorities cited. But the duty of analyzing these cases is rendered superfluous, as the evidence indicates no past act of the defendants, in reference to former renewals of the plaintiff's lease, inconsistent with the construction on which they now insist. The true rule seems, however, to be, that, for the purpose of giving construction to an instrument of this description, the Court should look only at the instrument itself, and at the subject-matter to which it related. Sec. 1, Platt on Leases, 730, and the authorities there cited. To this extent the Court is at liberty to invoke the aid of external evidence, whether in relation to a deed inter partes, a will, or an Act of the Legislature.

Looking then at the subject-matter, it appears (from the concessions of counsel) that these glebe lands consisted of some seventeen acres of unimproved ground, vested in St. Philip's Church, under a deed from Mrs. Afra Coming, dated 10 December, 1698, lying in the northwest part of Charlestown, and portion of the land called Coming's Point. The Act of 1770 required the vestry and wardens to lay out these lands in lots, and to grant leases of the same, with reserved rents thereon, giving them power to execute such leases,

with proper covenants, for the better improvement of the said lots of land, with the buildings thereon, and for the more easy recovery of the rents to be reserved by the said leases, and, from time to time, after the expiration of the said leases, to renew the same.

Then follows the proviso under which more than one difficulty has arisen: Provided, "that such renewed leases do reserve the same rent, or a greater rent, not exceeding as much again as the first rent reserved by the former lease, and do not exceed the said term of thirty-one years; and so on, from time to time, forever hereafter, as such renewed leases shall expire." In *Black v. P. E. Church St. Philip*, and *Laurans v. Same*, Ms. Ct. Ap-

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peals, March, 1835. *It was held that, under the provisions of this Act, the lessees and their assigns were entitled to a perpetual renewal. The inquiry remains as to the rent to be reserved on such renewal. The proviso contemplated perpetual renewal. Without expunging the word "first," what other construction can be given than that adopted by the Circuit Court? If the word be expunged, then, and not till then, can the ambiguity be created, and the defendants be entitled to contend, as urged in their ground of appeal, that "rent reserved by the former lease" meant "rent reserved in the former lease" has expired. The Court has no authority to expunge or disallow any word of the enactment, but, on the contrary, is bound to give to every word its full effect and meaning, and for this purpose may, if necessary, transpose the words. In this way the sentence may well be read, "reserving a rent not exceeding as much again as the rent reserved in the first of the former leases," which would, of course, remove any ambiguity; and the succeeding words of that sentence are thus also perfectly intelligible, "and so on, from time to time, forever hereafter, as such renewed leases shall expire." Had it been intended, on the contrary, that, on every renewal forever thereafter, the church should be at liberty to double the rent on the lessees, the natural and obvious language would have been, reserving at each renewal "a rent not exceeding as much again as that reserved in the preceding lease," and so on, from time to time, forever thereafter, &c.

But the Act provides for something more to be done by the lessee at each renewal, and so on forever. It is declared that, on every such renewal of the lease of any of the said lands, the lessee "shall pay a fine equal to two years rent reserved on such first-made lease or leases." It is not suggested that any ambiguity here exists, or that, at any subsequent renewal, the lessee should be required to pay a greater fine than double the annual

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rent reserved by the leases of 1770. The terms used are not identical, but the variance is so slight as not to disturb the conviction that the mind contemplated the same object.

Double the first rent reserved by the former lease, or "as much again as the first rent reserved by the former lease," mean the same, and were intended to mean the same, as "two years rent reserved on such first-made lease." The difference in the application is, that the fine at every renewal was uniform and fixed, while the annual rent might be varied, provided it never exceeded double the rent reserved in the original or first-made lease. Such is the construction of the Act which was adopted by the Chancellor, and this Court concurs in the conclusion.

Nor is it perceived that this construction renders the covenant, on the part of the vestry and wardens, "improvident and unequal," as urged in the argument. In the matter of the *Lawford Charity*, 2 Mer. 453, Lord Eldon, commenting on the objection that the rent reserved on the lease was too low in reference to the actual value, says: "It ought to be remembered that the case of a charity estate is one in which, of all others, the security of the rent is the first object to be regarded; and therefore, in such cases, the inadequacy of the rent reserved is less a ground of objection." These were originally unimproved lots, of moderate dimensions—sixty feet front, by one hundred and eighty feet in depth. The annual rent first reserved on each lot would be about seven per cent. on a supposed valuation of two hundred and fifty dollars for the fee simple of the premises. The Act contemplated the improvement of these vacant lands, and building leases of thirty-one years were, in general if not uniformly, granted. The lessee covenanted, not only to pay all State and other "taxes, rates, and assessments imposed or to be imposed on the premises," but to erect on each lot a good, firm, and substantial two-story house, of pre-

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scribed dimensions, and to keep the same in tenantable repair, and at the expiration of the term, or other sooner determination thereof, to leave and surrender the buildings and improvements to the lessors. The most ample, efficient, and summary provisions are made for securing the prompt payment of the rent, which might be, at any time, in arrear; not only by leave to enter and take possession, and oust the lessee, but also by distress, &c. It is maintained by very high authority that such covenant to keep in repair imposes on the lessee or his assignee the obligation to rebuild, if the premises be burnt by an accidental fire. *Bullock v. Dommitt*, 6 T. R. 650; 2 Chit. 608. When to this is added the consideration that, on the forfeiture or failure to renew the lease, &c., the lessors were entitled, not only to the land, but to all the improvements thereon, without further compensation, it is not easy to perceive that the administrators of Mrs. Afra Coming's charity were unmindful of the duties of their trust when, in 1770, they consented to an Act which restricted their reserved rents on future renewals to double the original rents on

lands which were to derive their enhanced value mainly from improvements to be made at the expense of the lessees, and without any additional burthen on the trust; nor could their successors be justly charged with acceding to improvident and unequal terms, if, as suggested at the bar, they, in subsequent renewals, acted on the construction of the Act of 1770 now adopted by the Court.

It is ordered and decreed that the appeal be dismissed.

WARDLAW and INGLIS, JJ., concurred.
Appeal dismissed.

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*JAMES M. STAGGERS and ELIZA ANN,
His Wife, v. SAMUEL P. MATTHEWS
and Others.

(Columbia. Nov. and Dec. Term, 1866.)

[*Husband and Wife* ⚭31.]

By ante-nuptial marriage settlement the property of feme, consisting of lands and slaves in which she had but a life-estate, and a little personality, which she held absolutely, was conveyed to a trustee, his executors, &c., during "the natural life of" feme, in trust, for her sole and separate use, during "her natural life," and to permit her to take the income for her exclusive use; and it was agreed that the income shall be accounted "as a separate and distinct estate" from the husband's, and that "the ready money accruing out of such separate and distinct estate" shall, from time to time, be put out at interest on such securities, and invested in such property as she shall direct, "which securities, during the coverture, and bills of sale and titles to the property so purchased," shall be taken in the name of the trustee, &c., in trust for the feme during her natural life, and at her death for the children, issue of the marriage:—*Held*, that according to the legal construction of the settlement, the trusts were intended to last, and did last, only during the coverture, and that, upon the death of the husband, the legal estate in the corpus of the settled property revested in the feme, she being the survivor.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 189; Dec. Dig. ⚭31.]

[*Husband and Wife* ⚭31.]

Held, further, that the terms "ready money" meant surplus income accruing during the coverture, and that such surplus income, whether invested or not under the directions of the feme, became an accessory trust-estate, for the use of the feme for life, with remainder to the only child of the marriage.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 189; Dec. Dig. ⚭31.]

[*Husband and Wife* ⚭33.]

Whether the trusts of a marriage settlement end with the particular coverture then contemplated, or whether they extend to future covertures, is a question of intention, to be determined by the terms of the settlement.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 196–202, 204, 885; Dec. Dig. ⚭33.]

Before Lesesne, Ch., at Williamsburg, March, 1866.

The facts of the case sufficiently appear in the Circuit decree, and in the opinion delivered in the Court of Appeals. The marriage

settlement which was before the Court for construction bore date December 10th, 1850. The parties were James L. Mouzon, the in-

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tended husband, *of the first part, Eliza Ann Burgess, widow of James A. Burgess, deceased, the intended wife, of the second part, and Leonard W. Mouzon, the trustee, of the third party. After reciting the said intended marriage, and that the feme was entitled, under the will of her late husband, James A. Burgess, to an estate for life in a certain tract of land, describing the same, and in certain slaves, horses, mules, cattle, &c., described in the schedule thereunto annexed, (and therein valued at \$9,950), and that she was possessed of the same, and also that she was possessed in her own right of certain other personal property described in the schedule, (and therein valued at \$1,389,) and that it had been agreed that the said real and personal property should be settled to the uses, purposes, and trusts therein after mentioned, she, the said Eliza Ann Burgess, conveyed the same, with the rents, issues, profits and increase, to the said Leonard W. Mouzon, "his executors, administrators and assigns, for and during the term of the natural life of her the said Eliza Ann Burgess, in trust nevertheless, and to and for, and upon the several uses, trusts, conditions, limitations and provisions hereinafter expressed, limited and declared of and concerning the same and any part thereof, that is to say, in trust to and for the sole use and benefit and behoof of the said Eliza Ann Burgess, until the solemnization of the said marriage, and from and immediately after the solemnization thereof, then in trust to and for the sole and separate and exclusive use, benefit and behoof of the said Eliza Ann Burgess, for and during the term of her natural life, without being in any manner whatever subject to the debts, contracts, control, engagements or intermeddling of the said James L. Mouzon, his executors, administrators or assigns, or of any other person or persons whomsoever claiming or to claim the same or any part thereof by, through or under him or them, and in trust to permit and suffer the said Eliza Ann Burgess and her assigns

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to *have, take and receive the rents, issues and profits of the said lands, and the proceeds of the labor of the said slaves and their increase, and the proceeds arising from the work of the said horses and mules, and the profits arising from the said cattle, sheep and hogs, and of all and singular the aforesaid property, to and for her sole, separate and exclusive use, benefit and behoof.

"And it is further mutually covenanted and agreed upon by and between the parties to these presents, and the said James L. Mouzon, for himself, his executors, administrators and assigns, doth covenant, promise and agree to and with the other parties to

these presents, that the said Eliza Ann Burgess, notwithstanding the said marriage, shall have, take and receive the rents, issues and profits of the said lands and the proceeds arising from the labor of the said slaves aforesaid, and their increase, and the profits arising from the labor of the horses and mules and the profits of the said cattle, sheep and hogs, to and for her sole and separate use, benefit and behoof, and the same shall be accounted, reckoned and taken as a separate and distinct estate of and from the estate of him the said James L. Mouzon, and he in nowise liable or subject to him, or the payment of any of his debts, but with the profits or increase that shall hereafter be begotten, gained or made of the same, be ordered, disposed and employed to such person and persons, and to and for such use and uses, intents and purposes, and in such manner and form as is hereinafter mentioned and declared—that is to say, that the ready money accruing out of the said separate and distinct estate before mentioned, shall from time to time be placed out at interest on such securities as she, the said Eliza Ann Burgess, shall think fit, and invested in such property as she, the said Eliza Ann Burgess, shall direct, which securities, during the said coverture, and bills of sale and titles to the property so purchased, shall be taken and made

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in the name of the said *Leonard W. Mouzon, or in the name or names of such other person or persons as she, the said Eliza Ann Burgess, shall order and appoint in trust for her, the said Eliza Ann Burgess.

"And it is further mutually covenanted and agreed upon by the parties to these presents, that such property of whatever kind so purchased, with the moneys accruing or arising out of the said separate estate, may be sold, disposed of, exchanged, and such purchased, exchanged or substituted property shall be invested in the name of the said Leonard W. Mouzon, as trustee, and shall be held subject to the uses, trust and conditions as hereinbefore limited and declared of and concerning the hereinbefore assigned premises; and such sales or dispositions of the aforesaid property so purchased out of the proceeds arising from the said separate estate or its substitution may be made toties quoties as she, in her discretion, may direct or effect.

"And it is further mutually covenanted and agreed upon by and between the parties to these presents, that any property of whatsoever kind, which may be hereafter begotten, gained or made of the profits of the said separate and distinct estate of her, the said Eliza Ann Burgess, shall be reckoned, accounted and taken as the separate and distinct estate of the said Eliza Ann Burgess, for and during the term of her natural life, and from and after the decease of her, the said Eliza Ann Burgess, then the same shall be held by the said Leonard W. Mouzon, to and for the sole and separate use, benefit and be-

hoof of any child or children to be begotten by and between the said James L. Mouzon and the said Eliza Ann Burgess, issue of the said intended marriage, to him, her or them, forever; and in case the said Eliza Ann Burgess should die in the lifetime of the said James L. Mouzon, without any child or children, issue of the said intended marriage.

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surviving her, then and *In that case the property so held in trust by the said Leonard W. Mouzon, trustee as aforesaid, acquired, gained and made, as aforesaid, of the profits of the said separate and distinct estate of her, the said Eliza Ann Burgess, shall be the absolute property of him, the said James L. Mouzon, and shall be delivered up by the said Leonard W. Mouzon, trustee as aforesaid, to the said James L. Mouzon, forever free and discharged from trust, to and for his own proper use, benefit and behoof, any clause or clauses in this instrument contained to the contrary notwithstanding."

Here followed two covenants, one giving the said Eliza Ann Burgess power to substitute a trustee in place of the said Leonard W. Mouzon in case of his death, resignation, removal from the State, &c., and the other, a covenant by the said James L. Mouzon and Eliza Ann Burgess, for further assurance.

The decree of his Honor, the Circuit Chancellor, is as follows:

Lesesne, Ch. Eliza Ann Burgess, widow of James A. Burgess, being entitled under his will to a life-estate in all his property, real and personal, intermarried with James L. Mouzon, on the tenth day of December, 1850. By a settlement executed in contemplation of the marriage, the same, among other things, was conveyed and assured to Leonard W. Mouzon, in trust, for her sole and separate use, benefit and behoof during her natural life, not subject to the debts or control of her said intended husband, or of any person claiming under him; and in trust to permit her and her assigns to take and receive the income thereof for her sole and separate use. And it was thereby agreed that the said income so to be taken and received by her should be accounted as a separate and distinct estate from the estate of the said James L. Mouzon, and not be liable for his debt; but, "with the profits or increase" that

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should *thereafter be gained, "be ordered, disposed or employed" as follows, viz.: The ready money accruing out of the said separate estate to be invested during the said coverture, under her direction, in the name of the trustee, in trust for her; such investments to be accounted as her separate estate during her life, and the same after her decease to be held for the sole and separate use of the children of the said James L. Mouzon and herself.

James L. Mouzon was in insolvent circumstances at the time of his marriage, and continued so, having no property except a life-

estate in about ten slaves, which, upon his death, on the ninth day of December, 1855, vested absolutely in his infant son, Samuel H. Mouzon, the only child of the aforesaid marriage.

His widow, the said Eliza Ann, afterwards intermarried with Samuel P. Matthews. Matthews died intestate, and she administered on his estate. He left one child by a former marriage, Samuel P. Matthews the younger.

She afterwards intermarried with James M. Staggers, and the bill is filed by Staggers and wife against Samuel P. Matthews, Leonard W. Mouzon and Samuel H. Mouzon.

It states that, during the lifetime of James L. Mouzon, some personal property was purchased with money arising from income of the plaintiff, Eliza Ann's separate estate, a schedule of which is filed as an exhibit.

It states further that between the death of James L. Mouzon and her intermarriage with Matthews, the latter acted as the agent of her trustee and herself, and received notes for the hire of the negroes, her life-interest in whom formed one of the subjects of the settlement, and a note for the sale of a tract of land that had been purchased with her income and sold by her; that after the marriage he received all the income to which she was entitled, consisting in part of notes for the hire of negroes, and invested moneys arising from income in property in his own

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name; that she, as *his administratrix, included all these things, as well as the crops on hand at the time of his death, in the inventory of his estate, by mistake, believing that the provisions of her marriage settlement in regard to her income had no effect after the death of Mouzon, and that the said things belonged to Matthews by virtue of the marital right. The plaintiffs are now advised that they constituted her separate estate, and the bill prays that they may be decreed not to belong to his estate, and the inventory be corrected accordingly.

It is now settled that, when the separate use is meant to apply to any and every marriage, it is suspended if the wife become discover, and arises again if she make another marriage. (*Tullett v. Armstrong*, 4 Mylne & Craig, 390.) But the separate use may be confined to a particular coverture, (*Knight v. Knight*, 6 Sim. 121; *Lewin on Trusts*, 130-1;) and if the intention be so to confine it, and the husband afterwards die and she marry again, the marital right of the second husband will attach. (*Bradley v. Hughes*, 8 Sim. 149; *Newland v. Paynter*, 4 Mylne & Craig, 408.)

In the case under consideration, I think the separate use is limited, by the proper construction of the deed, to the coverture, in contemplation of which it was made. Thus, directions are given in regard to the investment of the separate estate created by the deed, and the same are expressly limited by

the terms, "during the said coverture," referring to the marriage with Mouzon. Again, it is declared to be protected from the debts of Mouzon alone, and those claiming under him, and not from the debts of any future husband.

It is true, if the deed showed otherwise, that the income was to continue as it accrued during her whole life, to form an accumulating estate for her separate use, those words would not be necessary. But they are commonly, if not always, found in settlements,

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when that is the intention; and *this deed was evidently prepared with care by a trained conveyancer, who does not manifest any disposition to spare stereotyped expressions.

Again, the said separate estate is limited on the death of the wife to the children of the marriage with Mouzon. If it was not intended to restrict the separate estate to the interest accrued during that coverture, can it be supposed that she would have excluded the issue of any subsequent marriage she might contract from participation in it? Then, what were the circumstances of the parties? It was admitted at the hearing that Mouzon was an improvident man, and an insolvent. He, however, won her affections, and she resolved to marry him—having an abundant income of her own. But inasmuch as the income that would accrue during the coverture would be liable for his debts, it was natural that she should protect it against his creditors, and secure the surplus of it to the issue of that marriage; and that, in my opinion, is precisely what she did. It would have been very extraordinary for her to debar herself of the right of free disposal of her own income in case of her becoming discover, and bind herself to set it apart as long as she lived, as an accumulating fund for the issue of that marriage alone. And I see nothing in the deed which requires such a construction.

These remarks have reference to the surplus only of the income; but the proposition of the plaintiffs is more extraordinary, namely, that the entire income, to the end of her life, was intended to be so set apart.

I am, therefore, of the opinion, that, on her marriage with Mr. Matthews, the marital right attached on any income or proceeds of income in hand, which had accrued after the date of Mr. Mouzon's death; and it is so adjudged and decreed.

As to the income which accrued before Mouzon's death, I am of opinion that it is

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subject to the trusts of the settle*ment—provided, however, that it was invested in the trustee's name, as prescribed; otherwise, the marital right attached on it too. For I think she was entitled to its use, free from any control whatever on the part of the trustee. The deed provides, in unqualified terms, that she and her assigns should be permitted to take and receive the same,

for her exclusive use. It then provides for the creation of an estate, which I will designate as the permanent separate estate, by declaring that the ready money acquired as income shall be invested in such securities and other property as she shall direct, "which securities, during the coverture, and bills of sale, and titles to the property so purchased, shall be taken and made in the name of" the trustee, and be for her during the term of her natural life, and be held from and after her decease for the use of the child or children of the marriage absolutely.

If the construction put on this latter clause by the plaintiffs be correct, it is in flat repugnancy to the former, and must yield to it. (*Ingram v. Porter*, Harp. 492; *Frazer v. Boone*, 1 Hill Eq. 367 [27 Am. Dec. 422], affirming *Ld. Coke's Maxim*.) But I think that both may stand and be interpreted together, thus: the wife was to receive the income and use it as she pleased; and if she chose from time to time to apply any part of it to the formation of the permanent separate estate, then the same should be invested in the name of the trustee, and held for the uses declared thereof. Non-investment of any part by the trustee showing that she fancied to use that herself.

It does not appear that any such investments were made. The trustee's answer, on the contrary, avers "that she never directed any of the proceeds or profits of the trust-estate to be invested subject to the trusts of the deed, and he denies having now in his power, possession or control, any part of the said estate." He submits that the settlement had no further force and effect after

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the death of *Mouzon, and avers that, before the marriage with Matthews, in and by a paper under her hand and seal, a copy of which is filed as an exhibit to the answer, she acknowledged that he had fully accounted with her for all moneys received by him as trustee up to the first day of January, 1856, and discharged him from all further accountability for the same; and he denies that he has intermeddled with the estate since that date. The plaintiffs may have a reference on this subject, if they be so minded.

The bill states that some property belonging to the estate of James A. Burgess was inadvertently put in the inventory of the estate of Samuel P. Matthews; and that the said Samuel P. Matthews was indebted to the infant defendant, Samuel H. Mouzon, on various accounts; and that the plaintiff, Eliza Ann Staggers, as administratrix of Matthews, desires to settle this debt, but is unable to ascertain the amount. These two matters are referred to the Commissioner for inquiry and report.

The bill also prays for a partition of the real estate of Samuel P. Matthews, deceased, between the plaintiff, Eliza Ann Staggers, and the defendant, Samuel P. Matthews, in the

proportion of one-third to the former and two-thirds to the latter; and it is ordered and decreed that a writ of partition issue for that purpose, according to the rules and practice of this Court. The land mentioned in the bill as having been purchased and improved by the said Samuel P. Matthews, deceased, with moneys derived from income of the property of the plaintiff, Eliza Ann Staggers, to be included in the partition as belonging to his estate.

And, lastly, it is ordered that it be referred to the Commissioner to take an account of the defendant, Eliza Ann Staggers, as administratrix of Samuel P. Matthews, deceased, and report the state of the same; also the debts that are still unsatisfied, and the assets for payment of the same, according to the principles of this decree, and a

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*scheme for the settlement and distribution of the estate, with leave to report any special matter.

Copies of the marriage settlement of James L. Mouzon and wife, and the release from Eliza Ann Mouzon to Leonard W. Mouzon, form an appendix to this decree.

The complainants appealed, and now moved this Court to reverse or modify the decree, on the grounds:

1. Because, by the terms of the marriage settlement mentioned in the pleadings, the property was conveyed to the trustee for the "sole and separate use" of the feme expressly "during her natural life," and that this is true not only as to the corpus, but also as to the income; that the only period fixed for the termination of the "sole and separate" estate is the death of the feme; and that during its existence no power of disposition over the income in money is granted to her, except to direct its investment, which investments were to be held in trust "as her separate estate during her life, and the same after her death to be held for the sole and separate use of the children of the marriage;" and that the marital rights of any husband she might have could not attach during the existence of such estate.

2. Because, if the incidents of an absolute estate attached to the property during the discovery, yet whatever remained undisposed of, either of corpus or income, at the time of the marriage with Samuel P. Matthews, ipso facto et eo instanti, became again the sole and separate estate of the feme, with the equitable incidents of such an estate, and entitled to protection as such in this Court, whether the functions of the trustee had previously ceased or not.

3. Because, if the Chancellor's construction as to the duration of the separate estate be correct, still, it is respectfully submitted, it

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was not necessary that the income arising during the coverture with Mouzon should have been invested in the name of the trus-

tee, in order to have impressed on it the trusts of the settlement; but that such income, whether it consists of notes for the hire of negroes, bonds for the rent of land, improvements of real estate, or real estate itself, when they can be identified as investments of the income, constitute the separate estate of the feme, and will be followed in this Court against all parties not having a superior equity.

4. Because the construction of the Chancellor wholly ignores the rights of the issue of the marriage, which were the chief purposes of the settlement.

5. Because the Chancellor's decree is inconsistent with itself in this, that if the "separate estate" ceased at the death of James L. Mouzon, then the corpus, as well as the income, became the subject of the marital rights of the said Samuel P. Matthews, so far as the personalty is concerned.

6. Because the only question submitted to the Chancellor was the construction of the deed of marriage settlement, all others being reserved; and the decree of his Honor touching other matters, it is respectfully submitted, is irregular, and contrary to the practice of the Court.

Dozier, for appellants.

Pressley, contra.

The opinion of the Court was delivered by

INGLIS, J. When property has been settled to the separate use of a feme, whether sole or covert at the time, in terms and under circumstances which evince an intention so to extend the effect, it will, by such set-

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tlement, be secured *against the marital rights of each one of as many husbands as she shall successively take. During each interval of discoverture, the property will, indeed, be absolutely subject to her control and disposition, and, by her own act for that purpose, may be aliened as if no such trust existed, but upon each coverture, as it occurs, the "separate use" will revive and attach upon the property, or upon so much thereof as has not been by her, while discovered, so disposed of. (*Nix v. Bradley*, 6 Rich. Eq. 43; *Tullet v. Armstrong*, 1 Beav. 1, & 4 M. & Cr. 390; *Scarborough v. Borman*, 1 Beav. 34; 4 M. & Cr. 377; *Davies v. Thornycroft*, 6 Sim. 420; *Gaffee's Settlement*, 14 Jur. 277; 1 Mac. & G. 541, 1 Wh. & Tud. Lead. Cas. Eq. 341-5.) The Chancellor has, therefore, correctly indicated that, in every such controversy as the present, the question to be resolved is: What was the intention of the settlement?

If the subsequent acts and declarations of the parties could be permitted to ascertain the intention in this behalf with which a settlement was executed, there would seem to be left little room to doubt that the operation of the deed of December 10, 1850, which is the subject of the present controversy,

was meant to be confined to the particular marriage then in contemplation. The plaintiff, Eliza Ann, to whom the legal estate in the settled property belonged, avers in her bill, in direct contradiction of the claim which the suit prefers, that she "supposed that at the death of her former husband, the said James L. Mouzon, the legal effect and virtue of the said deed was at an end;" "that she was under the impression that the marriage-settlement ceased to operate, after the death of the said James L. Mouzon, upon all the property which she had in her possession which was not included in the inventory of the estate of her first husband." And in exact conformity with this understanding of the extent of what she had, by her said deed, accomplished, she is found,

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within six months after *the decease of the husband, Mouzon, in immediate contemplation of her intermarriage with whom the settlement had been executed, taking from the trustee under that settlement an account which embraced the exact period of the coverture up to its close, and granting him a final acquittance and discharge. The legal effect of this discharge is not now under consideration. The trustee also, another party to the deed, and a defendant in this cause, in his answer insists that "the said deed had no further force and effect after the death of the said James L. Mouzon." And the significant fact, in exposition of what these parties intended to do, and of their understanding of what they had done, is that, from the determination of that coverture until the present time, the trustee under the deed has never acted in the execution of the trust, nor in anywise, in fulfilment of the duties thereof, intermeddled with the settled property, and, until the origin of this litigation, has never, so far as appears, been called upon so to do, by the cestui que use, who was also herself the creator of the trust. It is thus made very clear, in point of fact, that the parties to the deed of December 10, 1850, intended that the trust thereby created for the separate use of the plaintiff, Eliza Ann, should endure only while the particular coverture then in view would last, and should cease with its determination; but this does not produce judicial persuasion of the intention of the settlement.

The material inquiry is, whether this intention appears in the deed itself. This deed is the only authoritative exposition of the purpose of the parties at the time of its execution, and can alone be heard in response to the inquiry, What was the intention of the settlement? In interpreting its utterances, however, it is not inadmissible to seek assistance from the circumstances under which it was executed, and, placing

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ourselves in the situation in which the *parties were at the time, thus the more nearly realize the exact import of their words.

Eliza Ann Burgess held, under the will of her late husband, an estate for the term of her own life, in the whole residue, being the great bulk of his estate, consisting of real and personal property, which was limited in remainder at her death to certain of his kindred, and this estate, with some personal chattels, of no very great comparative value, belonging to her absolutely, constituted her whole fortune. She was about to intermarry with James L. Mouzon, who is described as "an improvident man and an insolvent," "largely indebted beyond his ability to pay, having little, if any, estate in his own right, and subject to the claims of creditors." He had nothing, then, wherewith to endow her, but fortunately she needed nothing; her own was sufficient. But such a marriage, if no barrier were interposed to its legal operation, would imperil this provision for her comfort and support which the bounty of her former husband had made, and put in jeopardy the interests of his kinsfolk, who were entitled in remainder. It was reasonable that some security should be sought against such results, and all that was needed for this purpose was to exclude the legal effect of this marriage upon her property and its fruits. To divest herself of that control over and enjoyment of these, to which her legal ownership entitled her, so far as was legally essential to this exclusion of the intended husband's marital rights, was necessary; but no greater or more enduring fetter on that ownership was necessary, and she would not, therefore, be reasonably expected to intend more. Doing no more, when the purposes of that exclusion should be accomplished and ended, the legal proprietorship, with all its incidents, substantially and effectually, if not formally, must result to her.

Under such circumstances, the deed under consideration was executed. Does it in its

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terms and provisions conform *to the requisition which these circumstances made upon her, or is there something in those terms and provisions which carries its operation forward beyond the immediate mischief which there was present occasion to prevent? The contemplated marriage with Mouzon, and the agreement between them upon the treaty thereof, are recited as constituting the occasion and reason for the execution of the settlement. The trust is for the separate use of the wife, "without being in any manner subject to the debts, contracts, control, engagements, or intermeddling of the said James L. Mouzon, his executors, administrators, or assigns, or of any other person or persons whomsoever, claiming or to claim the same or any part thereof, by, through, or under him or them." "James L. Mouzon, for himself, &c., covenants, &c., that the said Eliza Ann, notwithstanding the said marriage, shall have, take, and receive the rents, issues, and profits, &c., to and for her sole and separate

use, &c., and the same shall be accounted, &c., as a separate and distinct estate of and from the estate of the said James L. Mouzon, and be in nowise liable or subject to him, or the payment of any of his debts." The investment of "the ready money accruing out of the said separate and distinct estate" is to be made "during the said coverture," in the name of the trustee, or other person, in trust for the wife, but no direction is given for so making investments of the "ready money" income accruing after the determination of that coverture.

The property thus acquired with the accumulated profits of the separate estate during the coverture is, upon the death of the wife, to go to the issue of this particular marriage, and if no issue, then to the said James L. Mouzon, if surviving, but no disposition is made thereof upon her death in the contingency of her surviving Mouzon, and there being no issue of the marriage; of the personal chattels owned by the feme absolutely

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at the execution of the *deed, and constituting part of the corpus conveyed thereby to the trustee, no disposition is made to take effect upon her death; and, finally, the covenant for further assurance is by the said Eliza Ann and the said James L. Mouzon. Some of these particulars standing singly might not have a very decisive significance, but standing, as they do, around the particular coverture in contemplation, and all pointing with converging lines of indication to that coverture, as in the minds of the parties at the execution of the deed, they unitedly confine the intention and so the operation of the settlement to that coverture with a power difficult to be overcome. It is a settlement by a feme of her own property in immediate contemplation of a particular marriage, and rendered peculiarly necessary by the condition and habits of the intended husband; reciting this marriage as its occasion, and professing to be in execution of one of the terms of the treaty therefor; excluding the marital rights of the particular husband by name; making provision for the contingencies of the particular coverture only; furnishing a check against the improvidence of the husband, in the motive to economy and thrift in the management and use of the income of her property, during the coverture, presented by the dedication of the savings from that income to a provision for the husband himself or the issue of his union with her, after her death; leaving all her interests in the subject-matter outside of and beyond that coverture to the protection of the powers and rights of ownership, which, upon the determination of the coverture otherwise than by her death, must result to her, and in no part expressly extending its terms to embrace any subsequent marriage, or affect the rights of any after-taken husband. It discloses not so much a general purpose to secure the separate en-

joyment of the property to the feme, as a special purpose to protect it against the husband then to be taken.

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*The property constituting the corpus of the principal estate is conveyed to the trustee, his executors, administrators and assigns "for and during the term of the natural life" of the feme; the trust is, of this corpus, "to and for the sole, separate and exclusive use," &c., of the feme, "for and during the term of her natural life;" and the new acquisitions made with the surplus profits are to be taken as the separate estate of the feme, "for and during the term of her natural life." These provisions are supposed to manifest "the intention of the settlement"—that the separate use should endure throughout the life of the feme, and, therefore, must exclude the marital rights of every husband afterwards taken.

The legal estate in the trustee is intended only to support the separate use, and should be large enough for that purpose. As the coverture upon which the feme was about to enter might be determined by her own death, the separate use might need to endure for the term of her actual life. And the separate use, even if limited to the coverture, was in legal contemplation a life-estate. In the great mass of the property constituting the corpus of the principal estate, she held only a life-estate, and she conveyed to the trustee all she had therein. If she had held a larger estate she would probably have conveyed it, either by technical description, or in general terms, without words of limitation. The legal interest of the trustee in the new acquisitions, which were to constitute the corpus of the accessory estate, is not so limited; but is general in its terms, open to be construed just so large as the necessities of the trust to be supported by it require. This circumstance does not seem entitled to much weight.

The duration of the "separate use" might, it is true, have been limited in express words, to the continuance of the contemplated coverture, but this, as has been remarked, would have been, in the regard of the law,

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equivalent to an *estate "for the term of her own life," because possible to endure so long, though liable to be sooner determined, by the determination of the coverture otherwise than by her death. If, therefore, the other parts and provisions of the deed clearly show, as they do here, that the separate use was intended to be confined to the particular coverture, this description of the quantity of the estate she took, under the deed to her separate use, would not be so inconsistent as by its technical force to control such intention and extend the operation of the deed beyond that coverture. In *Benson v. Benson*, 6 Sim. 201, the separate use was expressed to be "for and during the natural life" of the feme, and this was insisted on;

yet the separate use was not extended to the second coverture. So, in *Knight v. Knight*, 6 Sim. 199, the trust was held to be impliedly for the life of the feme, yet the separate use was confined to the one coverture. And in each case the explanation was, that the party creating the estate seemed to have contemplated the determination of the coverture by the death of the wife alone, and not to have adverted to a determination by the death of the husband, the wife surviving. In England, the separate use is not fettered, as with us, by the disability of the feme, and an express clause against anticipation is now usually introduced into settlements there to protect such an estate against the husband's supposed control over the wife's will. The creation of the separate estate and the restraint of anticipation are, therefore, two distinct things, and may or may not be commensurate. The precise question in *Gaffee's case* (14 Jur. 277, Mac. & Gord. 541) seems to have been whether, under the terms of the particular deed there, the restraint on anticipation was or was not confined to a particular coverture. It is matter of regret that access cannot be had to the report of the final hearing and judgment. It is difficult, with the facts as reported in 7 Hare, 101, to be reconciled to

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the conclusion which seems *to have been finally reached in the particular case. But the effect of the judgment, so far as it settles any principle, is represented to be, that "a restraint on the power of alienation in a settlement for the separate use of a married woman will be effectual during each and every successive coverture, whenever it is imposed in or by the clause which creates or limits the estate, and there is nothing in the rest of the instrument to warrant an opposite conclusion." (1 White & Tudor Lead. Cas. 544, Am. Note.) And Lord Chancellor Cottonham is reported as saying, in delivering his judgment: "It must depend on the construction of the particular words used whether the provisions for the separate use and against anticipation are applicable to the whole of the life-estate given, or only during the then existing coverture." (Hill on Trustees [420], Note 3.) In these propositions nothing is perceived inconsistent with the present judgment. This Court discovers no error in the judgment of the Chancellor that the separate use created by the deed of December 10, 1850, is "limited, by the proper construction of the deed, to the coverture in contemplation of which it was made."

Under the terms of the settlement, the issue of the marriage with Mouzon is entitled to an absolute estate in remainder upon the death of the plaintiff, Eliza Ann, in the corpus of what has been herein called the accessory separate estate, and, in the circuit decree, the "permanent separate estate." This corpus is made up of the property of whatsoever kind, "begotten, gained or made" of the profits of the principal separate es-

tate—that is, the estate consisting of the property in existence at the execution of the deed, and conveyed therein to the trustee. The acquisitions, which thus constitute this corpus of the accessory estate, arise from investments which, under the directions of the deed, have been made or ought to have been made, of the surplus cash income or profits of the principal estate, accruing during the coverture with Mouzon, in “se-

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curities” or “property.” *The principal estate was a planting interest, consisting of a plantation, slaves, stock of work, animals, cattle, &c., and was, doubtless, intended to be maintained as such. The feme, cestuy que use for life, was entitled, under the deed, “to have, take and receive the rents, issues, proceeds and profits” for her separate use, applying the same to the current expenses of the estate, and to her own and, incidentally, her family’s maintenance and up-bringing according to her discretion. These “rents, issues, profits and proceeds,” most probably, were expected to be, and were almost wholly received, enjoyed and applied in kind, and, for the residue, according to the custom of the country, by exchanging the produce of the estate in kind for needed articles of personal or family consumption not there produced, which mode of use and enjoyment is not, in popular regard, very distinguishable from the other. If the annual issues and proceeds of the separate estate exceeded at any time these primary uses for which it was created, the excess was realized in cash, and is hence called “ready money accruing out of the said separate and distinct estate”—the yearly income not consumed in the current yearly expenses of the estate or the life-tenant, but remaining a surplus over and above these. Such “ready money” was required by the deed to “be placed out at interest” or “invested in property.” The directions of the cestuy que use for life were to be taken and followed in the selection of securities and property, but the dedication of this surplus to investment subject to the trusts declared in the deed (and this remainder to the issue was one of them) was made by the deed itself. If there was in fact, therefor, accruing during the coverture with Mouzon, any such surplus income as has been herein indicated, any “ready money” as now defined, any yearly issues and profits not in fact consumed by the life-tenant in yearly use and expenses—this trust in favor of the issue must attach thereupon wherever it can be

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followed, according to the principles of eq-

uity, in any property or securities in which it has been invested, and, in the absence of investment, the accumulations of such surplus profits, in whosoever hands, and in whatever form, must stand in the place of investments. The directions of the cestuy que use for life as to the particular mode of investment might relieve the trustee from responsibility for an injury or loss resulting from such mode of investment, but the absence of such directions could not discharge any actual “ready money” surplus from the trusts impressed upon it by the deed itself. Thus, for illustration, it may possibly be, and it seems probable even, that the balance which was found due by the trustee upon the accounting mentioned in the bill, “for moneys produced by the separate estate,” and in satisfaction of which he conveyed the tract of land afterwards sold to McClary, was such an accumulation of surplus profits or “ready money” income. And it may be that the purchase with the income of the separate estate of articles of property, the use and enjoyment of which does not itself consist in their consumption, as it does in the instances of articles of food and clothing, would constitute evidence that the income so applied was surplus in the sense here indicated, and would affect such articles of property with this trust. An inquiry by the Commissioner on this entire part of the case, as wide in its range as is herein indicated, is necessary, and such inquiry is hereby ordered. The details of such inquiry above adverted to for illustration, not having been discussed at the hearing, are not intended to be concluded by any thing heresaid, but are open for adjudication if it shall be necessary, upon exceptions on either side to such report as the Commissioner shall finally make upon the whole matter here referred for inquiry. The decree of the Chancellor, in so far as it restricts the subject-matter of the trust in favor of the issue to such part only of the income of the prin-

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cipal separate *estate as the feme, cestuy que use for life, “chose from time to time to apply to the formation of the permanent” (called herein the accessory) “separate estate, as indicated by investments under her direction in the name of the trustee,” is modified in conformity with the present judgment, and in all other respects it is affirmed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Decree modified.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—APRIL AND MAY TERM, 1867.

JUSTICES PRESENT.

HON. BENJAMIN F. DUNKIN, CHIEF JUSTICE.
 " DAVID L. WARDLAW, ASSOCIATE JUSTICE.
 " JOHN A. INGLIS, ASSOCIATE JUSTICE.

13 Rich. Eq. *165

*FRANCIS E. A. WHITLOCK v. T. J. WHITLOCK, Administrator, and Others.

(Columbia. April and May Term, 1867.)

[*Executors and Administrators* ⇨ 310, 502.]

Pending a bill for distribution, an administrator has no right to pay some of the distributees in full, and in that way, if losses should afterwards occur in the assets reserved, throw those losses on the other distributees exclusively. The account should be so stated that each distributee will sustain his proportion of the losses.

[Ed. Note.—Cited in *Lay v. Lay*, 10 S. C. 219.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1264, 2150; Dec. Dig. ⇨ 310, 502.]

Before Lesesne, Ch., at Union, June, 1866. The decree of his Honor, the Circuit Chancellor, is as follows:

The intestate died on the 11th of April, 1859, and his personal estate was sold by the administrator on the 29th and 30th November in the same year, on a credit of twelve

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months by order of the Court of Ordinary. This bill, for partition and distribution, was filed March 6, 1860, and at June Term, 1860, an order was made, directing the Commissioner to audit and state the administrator's accounts, and report the balance for distribution, all questions affecting the partition of the real estate being reserved.

The distributees are the plaintiff (who is the intestate's widow) and his children by a former marriage, nine in number, of whom the administrator is one.

The Commissioner's report, filed June 1, 1866, charges the administrator with the sale-bill and interest, thus making the amount for distribution on that day, \$23,689.08. The plaintiff's share of this (one-third) is \$7,896.36; and each child's share

(one-ninth of two-thirds) is \$1,754.75. Three of the children have been overpaid, namely, John Whitlock, Amanda Whitlock, and Melissa Harlan, who have received, respectively, \$143.64, \$512.52, and \$1,107.30, more than their respective shares. Each of the other children has been paid in part. The balances due them are as follows, viz.:

To Nancy Whitlock.....	\$658 44
" Eliza Durham.....	1,214 72
" Ellinor Black.....	1,418 78
" Mary Whitlock.....	338 47
" Sarah A. M. F. Whitlock.....	420 14

The widow has received nothing. The payments to the children were principally in property purchased at the sale.

The report states further, that on the 21st of September, 1863, the administrator received, in payment of J. B. Dillard's sale-note and interest, the sum of \$5,488.14, in Confederate States notes, and soon after invested \$5,200 of it in Confederate States bonds. He also received during the same year \$3,400 or \$3,500 and \$435, in payment,

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respectively, of the sale-notes of R. V. Gist and Thomas G. Fowler. And on the 23d March, 1863, he invested \$2,000 in a note of William Bevis. He also produced before the Commissioner original sale-notes, amounting, without interest, to \$179.65, and other notes and bonds, amounting in the aggregate to \$2,056.03, without interest, as constituting assets of the estate, and stated that the remaining assets in his hands consisted of Confederate Treasury Notes.

The report allows the Confederate States bonds and Bevis' note as investments, but none of the other credits claimed by the administrator.

Exceptions were taken to the report by the plaintiff and by the administrator, on various grounds, which it is not necessary

to set out in full, as they were not all insisted on at the hearing. The Commissioner overruled all the exceptions, and stated the result of the account as follows:

Widow's share and balances due to five of the children as above stated.....	\$11,946 91
Cr.	
Invested in C. S. Bonds.....	\$5,200 00
Interest from 21st of September, 1863	979 77
William Bevis' note.....	2,000 00
Interest from 24th March, 1863....	445 66
	<hr/> 8,625 43
To be paid by the administrator.....	\$3,321 48
Widow's share, \$7,896 36 27-8 per cent.	\$2,195 88
Nancy Whitlock, bal. \$658 44 27-8 per cent.	182 94
Eliza Durham, \$1,214 72 27-8 per cent.	337 59
Ellenor Black, \$1,418 78 27-8 per cent.	394 30
Mary Whitlock, \$338 47 27-8 per cent.	93 98
Sarah A. M. F. Whitlock, \$420 14 27-8 per cent.	16 79
	<hr/> \$3,321 48

The plaintiff contended, at the hearing, that no credit should be allowed the administrator on account of the investments, because his return to the Ordinary makes no mention of investment. But the Court

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agrees with the *Commissioner, that if there were errors or omissions in the account rendered to the Ordinary, it was competent to correct them in this accounting. The administrator, moreover, seems only to have pursued a practice, very common, as I understand, throughout the State, though not to be commended, namely, charging himself with the entire amount of sales, when due, whether received or not, and then at the final account bringing in, by way of discharge, the sale-notes that might not have been collected, payments to distributees, investments, &c.

The plaintiff also contended that, if credit for the investments be allowed, those investments being valueless, the loss should be shared by all the distributees, instead of falling only on those who have not received their shares. This would require reclamation to be made against the distributees who have been settled with. But I do not think they are liable to such a claim. They have only received the shares to which they were entitled, and no favor was shown them by the administrator. They were paid, either entirely in their own notes for purchases, or partly in them and partly in Confederate notes. And their own notes must be put on the same footing with Confederate notes. For if they had gone through the ceremony of paying the amounts of those notes to the administrator and then received them back, Confederate notes would have been the instruments employed. They may properly be regarded then as having been paid in that currency. But the same currency was reserved for the other distributees, and in-

vested in Confederate bonds and Bevis' bond. If the plaintiff has any claim arising out of the failure of the fund reserved, the administrator alone is answerable for it.

This brings me to consider whether he is answerable. Unless he can show cause to the contrary, it was his duty, when he received money in payment of sale-notes, to pay it to the distributees instead of invest-

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ing it. No reason has *been assigned for his not paying to the five children, who still have balances due them, their shares of the fund in question. They, however, make no claim against him. But as to the plaintiff, it appears that she went to her native State, Massachusetts, some time in the year 1861, before the fund was realized, and has remained there ever since. And, moreover, in June, 1862, the administrator was served with notice of proceedings, under an Act of the Congress of the Confederate States, to sequester any thing in his hands belonging to an alien enemy. A payment to her in Confederate notes would have been regarded as mockery, even admitting that remitting to Boston was practicable, and that the notice mentioned did not stay his hands.

On the part of the administrator it was contended that he should not be charged with interest up to 1866, seeing all the funds of the estate, not actually paid to the distributees, excepting \$179.65 in sale-notes, were in Confederate money in 1863. But the report says it was not proven so, and it does not appear what proof was offered on the subject. But admitting that it was so, it was the administrator's plain duty to have paid out all the money to the distributees; or if that was not practicable, then to have invested it as he did with respect to the sums invested in Confederate bonds and Bevis' note. Upon the whole, the Court sees no reason why the balance reported to be due by the administrator should not stand. But in adjusting the amount of it in the present currency, the administrator should have all the benefit to which he may be entitled under the proviso to the fourth section of the Ordinance of the Convention, passed on the 27th day of September, 1865, entitled "An Ordinance to declare in force the Constitution, &c., &c.," and he may have a reference on that subject if he is so minded. It will be necessary, too, to modify the plan reported for the distribution of the said balance. If any of the five distributees nau-

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ed desire to participate in that *fund, they must bring into the account what they have received on their shares. *Smith v. Perdriau*, Rich. Eq. Cases, 223.

It is ordered and decreed, that it be referred to the Commissioner to recast his statement of the balance due by the administrator, and of the distribution of the same, in conformity with the views expressed in

this decree, with leave to report any special matter.

The plaintiff appealed, on the grounds:

1. Because if the administrator is to be credited with the investments made in Confederate securities, the loss, under the circumstances, should be shared by all the distributees, and should not fall exclusively upon the plaintiff.

2. Because the administrator should not have been credited with the sum said to have been lent to Bevis; and if credited, the loss, if any, should fall upon the whole estate, and not exclusively upon the plaintiff.

3. Because the decree is in other respects erroneous.

4. Because the account should have been so stated that the credits for investments claimed by the administrator should have been charged against the whole fund, and not against the plaintiff's share.

B. F. Arthur, for appellant.
Gouldlock, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. The testimony which was taken by the Commissioner has not been laid before this Court, and the course of the argument here did not require that it should have been. It must be taken as settled by the Commissioner's report and the decree, that the investment in Confederate bonds was made of money received from I. B. Dillard, and that the note on William Bevis

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was, *under the circumstances, a prudent investment, and was an investment of money belonging to the estate. It is admitted here that that note is now worthless.

These investments then constitute losses to which the estate has been subjected by misfortunes, which relieve the administrator from responsibility for them. But there is no necessity for transferring them to some of the distributees in exclusion of others. When a bill for distribution was pending, the administrator was not at liberty to make computations and payments of his own head, whereby some parties are to be saved and others sacrificed. In fact, he did not make settlements with any of them; for, besides that he made investments, he still holds the notes which were given to him by those distributees who became purchasers at his sale. Those notes constitute part of the estate, and the credits which shall be entered on them depend upon the final adjustment of the shares to which those purchasers shall be entitled.

The whole amount of the estate must be ascertained—that is to say, every thing which the administrator has received or should properly have received from the rights or property of the intestate—and this amount must be carried to the debit of the administrator. The investments aforemen-

tioned and all other proper matters of discharge must then be put to his credit, and the balance be distributed according to the rights of the several distributees. To the items of account the Ordinance mentioned in the decree may be applied, so far as the same is applicable.

It is ordered, that all matters of account in the case be referred again to the Commissioner; that he do make a report thereon in conformity with the directions hereinbefore contained, and that he have leave to report any special matter.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Decree reformed.

13 Rich. Eq. *172

*MARY J. JACKSON v. JAMES M. JENNINGS and Others.

(Columbia. April and May Term, 1867.)

[Descent and Distribution \hookrightarrow §1.]

After appraisement and division of the personal estate had been made by Commissioners in partition, a slave which had been allotted to A. but which he had not taken possession of, died. Some days afterwards the Commissioners again met and divided the land, and then made their return, taking no notice of the death of the slave: *Held*, that, as the partition was not complete before the death of the slave, the loss must be borne by the general estate, and not solely by A.; and that the measure of loss was not the value of the slave, but interest upon his value up to the time of emancipation, which in the meantime had taken place.

[Ed. Notes.—For other cases, see Descent and Distribution, Cent. Dig. § 284; Dec. Dig. \hookrightarrow §1.]

Before Carroll, Ch., at Sumter, June, 1863.

The decree of his Honor, the Circuit Chancellor, is as follows:

Carroll, Ch. Upon the death of Hastin Jennings, intestate, the Ordinary made due grant of the administration of his estate. Payment of debts having been made, or provided for, under proper proceedings in this Court, a writ of partition issued to divide the net residue of his visible estate, comprising his lands, negro slaves, beasts of the plough, crops on hand, household furniture and other chattels. The Commissioners first proceeded to make partition of the negroes, and on February 13 and 14, 1863, appraised them, divided them into different lots or parcels, and assigned them to the distributees respectively. After the division of the negroes and of the great bulk, if not the whole of the other personalty, but before the Commissioners had divided the lands, one of the negroes named Billy died. He was one of the slaves that had been assigned to the

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defendant. *Mrs. Anne McClellan, and the Commissioners had valued him at thirteen hundred dollars. The negro died on February 24, 1863. On the 5th or 6th of March

succeeding, the Commissioners divided the lands. Their return to the writ bears date the 12th of that month, and it was filed in this Court on March 28, 1863.

Upon completing the division of the negroes, remarks were made by one or more of the Commissioners importing that the negroes were now at the control and disposal of the parties to whom they had been respectively assigned. For a few days next after their division, the negroes were retained and employed by the administrator upon the premises of the intestate, but after that time they seem to have passed into the immediate possession of the distributees respectively according to the division of the Commissioners. Mrs. McClellan and her husband, S. K. McClellan, were both absent at the division of the negroes, but were represented by L. R. Jennings as their agent. After the negroes had been divided, the slave Billy "worked for nobody but the estate," and was never removed from the premises of the estate. Jennings, the agent of McClellan and wife, testified "that he had never had any possession of the negro Billy."

The Commissioners were advised that the loss involved in the death of the slave Billy would fall upon Mrs. McClellan. In their return to the writ of partition, the slave is set down at the valuation of \$1,300 among the other negroes assigned to Mrs. McClellan, without any mention of his death being made, or any compensation to her therefor being proposed. Subsequently an order was passed confirming that return, except as to the negro Billy, and reserving the question "whether the loss of that slave falls on the distributees generally, or on Mrs. McClellan alone," and that is the sole question to be now adjudged.

It is contended that, until the confirmation of the return of the Commissioners, the divi-

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sion made by them was ineffectual to divest the interests in common of the distributees and convert them into interests in severalty in the portions assigned to them respectively, and that the slave Billy being therefore, at his death, the property in common of all the distributees, his loss falls upon them all, and not upon Mrs. McClellan solely.

In the opinion of Lord Redesdale, upon the commission of partition in *Curzon v. Lyster*, Seaton's Decrees, 192, it is said the Commissioners "are to act as Judges—they examine witnesses to inform their own consciences, and therefore have a discretion to what points and what witnesses they are to examine. They decide upon the evidence given, and their decision is final, unless the Court sees ground for controlling it. The whole authority of the Court is therefore delegated to them, though subject to appeal. They act as a Court." The Commissioners, being named by the parties, are regarded as Judges of their own choice, and the principles which apply to arbitrators are held properly applicable to them. (*Jones v. Totty*, 2 En. C. R.

137.) In *Buckler v. Farrow*, Rich. Eq. Cases, 180, it is said: "The Commissioners are the agents of the parties, acting under the authority of the Court, and they are as much bound by their return made in due form, fairly and impartially, as a plaintiff and defendant would be by an award of arbitrators made under a rule of Court." The result seems to be that the return of the Commissioners means something more than the mere suggestion of a scheme of division, and that a partition by them, regularly and fairly made, is in the nature of a judicial proceeding, and which adjusts and settles the interests of the parties, in the consideration of this Court, except so far as it shall see cause to reverse or modify it.

But there is another aspect in which the question may be considered: "Partition in this Court is effected by the action of the Commissioners under the writ, and not otherwise." "In every case of an order to con-

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firm the return to a writ of partition," says Chancellor Harper, "the order must have relation to the actual partition, and operate to vest the legal title from that time. The actual partition is a fact, and the order of Court recognizes and establishes that fact." (*Huson v. Wallace*, 1 Rich. Eq. 6.) It has not been suggested that the slave Billy was unsound, or even indisposed, when the negroes were divided. In the condition he was in at that time, it must be assumed he was fairly worth the value set upon him by the Commissioners. It has not been proved or alleged that the Commissioners placed an extravagant valuation upon him. The division of the negroes, then, was fair and equal at the time it was made. But this was all that the Commissioners were bound to do, or could by possibility have done. The inequality complained of has been occasioned by an event of subsequent occurrence altogether, which, so far as we are informed, no human eye could have foreseen. There are, of course, no means provided by law to preserve equality or proportion between the shares after division. The death of the negro was a casualty incident to the ownership of that form of property. It is not a present division that the Court is invoked to make, but the question is whether it shall approve and confirm a partition already made. No irregularity, misconduct or mistake is imputed to the Commissioners in their proceedings under the writ, except that in their return they included, among the negroes assigned to Mrs. McClellan, the slave Billy, who, at the date of the return, was no longer in existence, and the value of whom, it is insisted, should have been made up to Mrs. McClellan by contributions, ratably, from the shares of all the distributees. When the Commissioners had made division of the negroes, their work was wholly accomplished in regard to the actual partition of that portion of the property. Their return to the writ was nothing more

than an authentic certificate to the Court of

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what had already been done by *them as such Commissioners. It is not perceived that they erred in the course that they pursued.

My conclusion is, that the return of the Commissioners in regard to the slave Billy should be also confirmed, and it is accordingly so ordered and decreed.

Mrs. Anne McClellan and husband now moved this Court to reverse the decree of his Honor, the Chancellor, on the grounds:

1. Because the writ of partition refers to, and requires, a division of the whole estate of the intestate, and the "work" of the Commissioners is not "accomplished" until partition is made of all the property included in the writ, unless suspended by the order of the Court.

2. Because no right or title was acquired by any distributee in any property intended by the Commissioners for such distributee, until a confirmation of return by the Court.

3. Because, until a return is made under the hands and seals of the Commissioners, the manner of allotting the property, and every portion of it, is under their control and power.

4. Because the return made on March 12, 1865, allots to one of the distributees, at the value of \$1,300, a negro who was then dead.

5. Because the testimony proves that the Commissioners, after being apprised of the death of the negro, and before their return, did not proceed on their own judgment in making it in the form it appears as to the dead negro, as they were in doubt, at their meeting on 27th February, who should bear the loss, and requested that counsel might be consulted, on whose advice they acted in said particular.

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*6. Because the return upon its face shows error, to wit, that the gross value in money of the share of one of the distributees in the whole estate of the intestate includes a negro at the price of \$1,300, who was dead at the time the Commissioners made a return of their actings and doings under the writ.

7. Because the decree is, in other respects, against equity and justice.

De Saussure, for appellants.

J. S. G. Richardson, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. When, in the course of a partition under a writ directed to Commissioners, a chattel has, with the assent of all concerned, been allotted to a party who takes possession of it, a subsequent confirmation of the return of the Commissioners has relation to the time of actual allotment completed, so as from that time to ratify in that party a title to the chattel which he then acquired. To the return there may, however, be exceptions, and whether before its confirmation the title is ever more than

inchoate, we need not here consider, for in this case we think there was no complete allotment of shares before Billy died. The writ required partition of both real and personal estate. On the 13th and 14th of February, the slaves were appraised and thrown into lots, and the lot of each party was designated; the slaves continued for a short time afterwards to remain in the possession of the administrator, for some services to be rendered to the estate; after a few days some of the parties took possession of their lots, but Billy did not come to the possession

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of Mrs. McClellan or her agent, *and died February 24. Afterwards a partition of the lands was made, and the return of the Commissioners was signed March 12th, and filed March 28th. In this the share of each party in the real and personal estate, as a whole, was ascertained, and payments from one of them to others was directed for equality of partition. Before the Commissioners completed their work, misfortune had disturbed the result of their earlier operations, and they should not, by adhering to what no longer suited their scheme, have permitted the defeat of that proportionate equality which it was their office and desire to effect. If a new division of the slaves was inexpedient, Mrs. McClellan might, by payments of money directed in the final adjustment to be made to her by others have been relieved from sustaining singly the burden of the loss, which had diminished the aggregate of the property to be distributed before distribution was complete. What ought to have been done by the Commissioners, this Court is of opinion, should now be done, so far as is practicable and just. But as the emancipation of the slaves has affected all of these parties, it would not be fair to give Mrs. McClellan the full price of Billy, for if she had received him, and he had lived hers, she would, about May 15, 1865, have been deprived of his services, as the others have been of the services of the slaves allotted to them, which they continued to keep. The probable amount of what Billy, if he had lived, could have hired for, from the time of his death to the time of emancipation, is the measure of what Mrs. McClellan has been deprived of, by the assignment of Billy to her. But since we regard Billy as having belonged to the estate at the time of his death, and the exact price at which he was set down by the Commissioners can be seen, the easier and more precisely just mode of correcting the inequality of partition is to calculate interest on that price, from the day the return of the Commissioners was confirmed, except in reference to

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Billy, *up to May 15, 1865, and that interest to divide between the parties, as the estate was divided between them, in like shares and proportions.

It is therefore ordered that the decree of the Chancellor be reversed; that the Commissioner do calculate and divide the interest on Billy's price, as above directed; and that each of the other parties do pay to Mrs. McClellan the share of such interest, which upon such division shall be found due by such party.

DUNKIN, C. J., and INGLIS, A. J., concurred.

Decree reversed.

13 Rich. Eq. *180

*ALLEN S. BARKSDALE and Wife v. D. L. HALL and A. J. HALL.

(Columbia. April and May Term, 1867.)

[Wills \hookrightarrow 734.]

A legacy to one child of an equal share with the other children of testator's estate is not a pecuniary legacy which bears interest from the end of one year after testator's death; the interest should be carried into the common fund until apportionment is made.

[Ed. Note.—Cited in Ketchin v. Rion, 68 S. C. 271, 47 S. E. 376.]

For other cases, see Wills, Cent. Dig. § 1849; Dec. Dig. \hookrightarrow 734.]

[Trusts \hookrightarrow 305.]

On bill for account against an executor and trustee, the answer alleged that funds of the cestui que trust, the plaintiff, had been invested in certain bonds which the defendant held;—*Held*, that the answer, being in avoidance, was not self-proving, and that the investment must be shown by evidence aliunde;—*Held*, further, that the evidence adduced was insufficient to prove the alleged investment.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. \hookrightarrow 305; Account, Cent. Dig. § 92.]

Before Johnson, Ch., at Anderson, June, 1866.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnson, Ch. This case comes before the Court upon exceptions by the complainants to a report of the Commissioner, which is as follows: "It having been referred to the Commissioner of this Court to ascertain and report as to the truth of the statements therein made—the gross amount of the funds of the cestui que trust, Martha A. Barksdale, in the hands of David L. Hall and A. J. Hall, as executors of the will of David Hall, deceased, and trustees of Martha A. Barksdale under said will, the fitness of Dr. William J. Milford and William S. Sharpe to exercise the trust prayed for, and particularly to report as to the propriety of the change of trustees, and also, whether it will be promotive of the interests of the cestui que trust to change the investment from personal into real estate, with leave to report any special matter—he submits:

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First, That *the gross amount of the fund of the cestui que trust, in the hands of Da-

vid L. Hall and Absalom J. Hall, as executors of the will of David Hall, deceased, and trustees of Martha A. Barksdale, under said will, was, according to returns and statement of settlement, filed in the Ordinary's office for Anderson District, on 27th December, 1862, \$2,414.04. That the sale of the property of David Hall, deceased, under the will, by his executors, was made on the 20th November, 1860, on a credit of twelve months, with interest from date. That the first return and statement alluded to above made up the account to November 20, 1861. That the interest due complainants for the first year, to wit, from 20th November, 1860, to 20th November, 1861, was added to the principal of the fund, as was done on all the shares in said estate; that her annual interest has been paid her for 1862, 1863, and 1864, as shown by her receipts. That for 1865, and down to June, 1866, she has been paid \$118.75, in provisions and necessities mainly, at fair prices, and she is from time to time receiving supplies from the trustees.

"In reference to the real estate devised in trust under the seventh clause of said will, it appears, from a bill and proceedings filed in this Court, in April, 1861, wherein Barksdale and wife were complainants, and said executors and trustees were defendants, that an order for sale was obtained, and the proceeds thereof paid over to Herbert Hammond, Esq., who was appointed trustee of that fund by the Court. It also appears, from the testimony before me, that the rents of that real estate for the year 1860 went into the general estate of the said David Hall, amounting to about forty dollars, and was distributed among all the heirs. This may not have been regular, but as it is so small a matter, and as no question was made in the bill and proceedings referred to, or before the Ordinary, the Commissioner would doubt

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the propriety of opening the *settlement for so small a sum. So also as to the first year's interest arising from the general estate of David Hall, deceased, which went into the principal of her share, upon which she is annually receiving her interest. The settlement before the Ordinary has been acquiesced in by all the distributees, and their several shares receipted for, except the complainants. These two matters of interest were the only matters of complaint before the Commissioner, in reference to the accounts of the executors and trustees.

"The defendants also offered testimony as to the investment of twelve hundred dollars of this trust fund in seven per cent. Confederate bonds. It appeared from the testimony that David L. Hall, who was the acting trustee, was absent in the army of the Confederate States, from the commencement of the war to its close, with the exception of two visits home. The first was in the fall of

1862, at which time this settlement was made before the Ordinary, and again in the summer of 1863. The proof was that he sold cotton at thirty-six and a-half cents per pound, to J. J. Cunningham, and received from him, in part payment for the same, one thousand two hundred dollars in Confederate bonds; that it was suggested to him by a friend, at that time, that he might invest the trust fund in that way. A few weeks afterwards, he said to the same friend, that he intended to apply these bonds to the trust fund. From these facts, and from the good character of the trustees, the Commissioner is satisfied that the said investment was made at that time in good faith, and in the exercise of such prudence as governed many capitalists, and should be allowed them in their accounts. The present trustees are men of high character and substantial property, and have exhibited a commendable interest in the welfare of their sister, Mrs. Barksdale, with whom they are on good terms, and the Commissioner can see no good reason why they should be removed from the trusteeship, nor

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is the Commissioner satisfied that it will promote the interest of Mrs. Barksdale or her children, to change the investment, as in his judgment, for a few years to come. A certain small allowance in money or provisions will better maintain her than the uncertain profits from such a farm as could be purchased with her funds, especially as it was proven that the husband, Allen S. Barksdale, was an improvident, litigious person, without trade or employment, or habits of industry, and living, the greater portion of his time, apart from his family.

"For the above reasons, the Commissioner is of the opinion, that Mrs. Barksdale and her family will be more comfortably maintained and protected by remaining in the neighborhood of her brothers, and under their supervision. If, however, the Court should see fit to change the trusteeship, the Commissioner would recommend Dr. Milford and W. S. Sharpe as suitable and proper persons to exercise the said trust."

Exception First. "Because the Commissioner has, contrary to the clear rights of the cestui que trust, thrown the rents of the land for the first year, devised to her by her father, into the general fund of the testator's estate for distribution."

If it be conceded that, in principle, the exception is well taken, the complainant would not be benefited by its being sustained; for in the settlement, they received a share of the rent of all the lands of the estate of the testator, and were not charged with interest on eight hundred dollars, the estimated value of the land devised to the defendants for their benefit, which is sixteen dollars a year more than the land rented for, and which they would be entitled to charge, if they were required to pay the rent of that partic-

ular tract of land to their cestui que trust. The exception is therefore overruled.

Exception Second. "Because the Commissioner has *erred in including in the trust

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fund the interest accruing on the cestui que trust's portion of the estate, from November 1, 1861, instead of decreeing the same to be paid to Mrs. Martha A. Barksdale."

The testator died on the 15th day of April, 1860. The rule of law is, that interest is to be allowed on a pecuniary legacy from the time it is payable, and if no time of payment is specified, it is at the end of a year from the testator's death: *Smith v. Eady*, Rich. E. C. 397; *Gillon v. Turnbull*, 1 McC. Eq. 148. Fixing the 15th day of April, 1861, instead of the first day of November, 1861, as the time from which the interest is to be allowed to Mrs. Barksdale, it becomes necessary to ascertain what was the amount of her share of the estate on that day. By deducting the interest which accumulated between the two periods, it is ascertained, that the defendants had in their hands, for their cestui que trust, on the 15th day of April, 1861, two thousand three hundred and seventeen dollars and eighteen cents, and that from that day she became entitled to all the accruing interest on the same. The exception to that extent is therefore sustained.

Exception Third. "Because the Commissioner has erred in accepting the investment of twelve hundred dollars in Confederate securities, when there is no evidence to show that such an investment was ever made for the cestui que trust."

The only competent evidence before the Court respecting the matter is, that one of the defendants, in June, 1863, sold some cotton of his own, and received, in part payment for the same, twelve hundred dollars, in seven per cent. Confederate bonds, with coupons attached, payable 1st January, 1864, and at the same time it was suggested to him by J. P. Tucker "that he could invest the money in seven per cent. Confederate coupon bonds, to be applied to this trust fund," to which he

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made no reply. And on the reference *before the Commissioner, just before the trial of the case, the said bonds were produced as twelve hundred dollars of the trust fund, with all the coupons still on them, although different payments of interest had been made to the cestui que trust, after the first day of January, 1864, which, in the opinion of the Court, is altogether insufficient to establish the fact, that twelve hundred dollars of the trust fund were ever invested in such bonds, and the exception is therefore sustained.

Exception Fourth. "Because the Commissioner has decreed against the investment of the funds in the hands of the trustees, in real estate, when the interest of the cestui que trust required it, and the safety and security of the trust funds demand it."

There is no evidence before the Court that would justify it in sustaining this exception, and if there was, it would not order such investment to be made until the remaindermen were made parties, and it would only do it then upon being satisfied that the interests of all the parties would be promoted by investing the funds in some particular tract of land, and not generally in real estate. The exception is therefore overruled.

Exception Fifth. "Because the Commissioner recommends against the change of trustees, when one of them is seeking to absolve himself from all pecuniary liability, and the other facts in the case show that the interests of the cestui que trust require it."

It is not the practice of this Court to change trustees appointed as these were, only upon grave charges in the pleadings, and the charges fully sustained by the evidence, neither of which has been done in this case, and the exception is therefore overruled.

It is ordered and decreed that it be referred to the Commissioner to make up the interest account between the trustees and their cestui que trust; computing it from

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*the time, and upon the amount above indicated, and that all proper credits be given to the trustees for payments made by them or either of them.

It is further ordered and decreed that either party may take further orders at the foot of this decree, and it is also ordered and decreed that each party do pay his own costs.

The defendants appealed, and now moved this Court to modify or reverse the decree of the presiding Chancellor, on the grounds:

1. Because it is respectfully submitted that the Chancellor erred in not overruling complainants' second exception, as the bequest made to Mrs. Barksdale was not strictly a pecuniary legacy, but an equal share in the estate of testator, which share was ascertained in the Ordinary's office, and acquiesced in by all the distributees, including the defendants and trustees of Mrs. Barksdale.

2. Because the Chancellor erred in deciding that the testimony was not sufficient to show an investment of \$1,200 of the trust fund in Confederate securities, when it is submitted, that the answer of defendant, David L. Hall, was responsive to the allegations of the bill, and therefore competent, and that the remaining testimony corroborated the answer.

3. Because the Chancellor erred in decreeing that the defendants pay their own costs, when it is submitted, that the defendants, as trustees, were not in default, but had acted in all matters conscientiously, and for the best.

4. Failing in the above motion, then the defendants applied for a new hearing, on the ground, that the Act of the General Assembly, September, 1866, has changed the rule

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*of evidence, and defendants should have the benefit of said Act.

Harrison, for appellants.
Murray, contra.

The opinion of the Court was delivered by

DUNKIN, C. J. The testator, David Hall, after devising, for the use of his daughter, the complainant, a tract of land valued at eight hundred dollars, and some inconsiderable articles of personalty at a valuation, devises and bequeaths to her "an equal share with his other children of his estate, including the above-mentioned land and property in trust" as thereafter declared. The property of the testator was sold in November, 1860, on a credit of twelve months, with interest from date. A settlement took place before the Ordinary, December, 1862, of the amount due to the respective parties, under the provisions of the testator's will, and the share of the complainant in the aggregate amount of principal and interest was fixed at \$2,414.04. The Chancellor sustained the complainant's second exception to the Commissioner's report, on the ground that this was a pecuniary legacy, on which the interest was payable at the end of a year from the testator's death. The legacy to the complainant was of "an equal share with his other children of his estate." It was therefore a common fund until the estate was sold, and the apportionment made, and the accruing interest was properly brought into this fund. The bequest to the plaintiff was not a legacy of a particular sum, on which interest was payable twelve months after the testator's death, but the share of an aggregate fund to be afterwards ascertained. The account stated by the Commissioner, is based on this principle, and the exception should have been overruled.

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*The second ground of appeal from the Chancellor's decree is founded on a misapprehension of the efficacy of the defendant's answer. The trustee admits the receipt of the trust fund belonging to the plaintiff, but seeks to discharge himself by alleging an investment of a portion of the fund in Confederate securities. In *Hart v. Ten Eyck*, 2 Johns. Ch. 62, Chancellor Kent says: "Where the defendant, by his answer, admits a fact, and insists upon a distinct fact by way of avoidance, he must prove the fact so insisted on in defence." And in our own case of *Ison v. Ison*, 5 Rich. Eq. 15, the Court used this language: "Defendant in his answer admits the gift, and whatever he says afterwards of payments made was matter in avoidance, and is not proved by the answer, but must be established by evidence aliunde."

This is the clear and well-established rule on the subject. Apart from the defendant's answer, it is difficult to say that there is any evidence of the investment of the plaintiff's money. The averment of the answer is, that "some time in 1863, the defendant made the investment." This is very general. Cunningham proves that, in the spring or early

summer of 1862, he purchased cotton from the defendant for about \$1,200; that, at defendant's request, this sum was funded in seven per cent. Confederate States bonds. It was funded in defendant's name, and the bonds transferred to him; does not remember being told that the bonds were for his sister, the plaintiff. There is no proof that the defendant then, or afterwards, advised his sister, or any one else, of the investment. But, further, on 15 May, 1865, two years after the alleged investment, the defendants, as coexecutors and trustees of the plaintiff's share of her father's estate, made a return to the Ordinary, commencing 20 November, 1862, and ending 28 November, 1864. In this account no entry is made of any such investment, or of any interest received on account of the same. Certainly this negative evidence is

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not conclusive, but, in the absence of *explanation, it affords additional vindication of the judgment of the Chancellor.

Costs are not generally the subject of appeal, but we think the discretion of the Chancellor was properly exercised.

It is ordered and decreed that so much of the decree as sustains the plaintiff's second exception to the Commissioner's report be reformed. In all other respects the decree is affirmed, and the appeal dismissed.

WARDLAW and INGLIS, J. J., concurred.
Decree modified.

13 Rich. Eq. *190

*THOMAS DUNHAM v. CHARLES J. EL-
FORD and JAMES B. SHERMAN,
Executors.

(Columbia. April and May Term, 1867.)

[Constitutional Law ⇨145; Executors and Administrators ⇨291.]

After assent by an executor to a pecuniary legacy there is a contract, express or implied, to pay it, and though no action at law may lie on such contract, it is, nevertheless, within the protection of the constitutional provision that "no State shall pass any law impairing the obligation of contracts."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 423; Dec. Dig. ⇨145; Executors and Administrators, Cent. Dig. § 1159; Dec. Dig. ⇨291.]

Before Johnson, Ch., at Greenville, July, 1866.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnson, Ch. Many years ago, Benajah Dunham, after having duly executed his last will and testament, departed this life, leaving the same unrevoked and of full force, in which he appointed the defendants the executors of the same; and soon after his death they had the same proved, and qualified as the executors thereof. In his will he gave to the complainant, who was his brother, the annual interest on the sum of three

thousand dollars, for and during the term of his life; and the sum of three thousand dollars to his children, after his death. The executors have paid up, in full, many of the legacies, and, until some time in 1860 or 1861, they regularly paid the annuity of two hundred and ten dollars to the complainant.

On the thirtieth day of May, 1866, the complainant filed his bill for the recovery of the interest due him under the bequest in said will, to which the defendants, in their answer, interposed various objections; one of which is, that the complainant was prohibited from filing and prosecuting his bill for the collection of money, by the Act of

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the Gen^{eral} Assembly, passed on the twenty-first day of December, 1861, and continued from year to year, up to the time of filing the bill, and commonly known as the "Stay Law." Does the decision of the case of *The State v. Carew* apply to this? If the complainant's right to recover is founded upon a contract with the defendants, either express or implied, it clearly does; but if not, it has no application to this case. "An executor is not liable, at law, to the payment of a pecuniary legacy, (5 T. R. 690,) but if he, in respect of a new and sufficient consideration, as forbearance, &c., expressly promise to pay the legacy, and such promise be reduced to writing, so as to bring it within the fourth section of the Statute of Frauds, both the consideration of it and the payment of it may be enforced by action. *Pea. Ev. 73.*" 2 Saunders on P. & E. 505; and 2 Williams on Ex. 1186. There is no allegation in the pleadings of any promise by the defendants to pay the complainant the amount he claims, upon any new consideration, moving thereto. And the scope and tenor of the bill is not to enforce a contract, but the payment of a pecuniary legacy. And as to this case, it is the opinion of the Court, that the "Stay-Law" is not unconstitutional, and that it is subject to its provisions. It is, therefore, ordered and decreed that the bill be dismissed.

The complainant appealed, and now moved this Court to reverse the decree, on the grounds:

1. His Honor, the Chancellor, erred in deciding that there was no contract, express or implied, on the part of the defendants, to pay the complainant his annuity under the will of the testator.

2. When the defendants qualified as executors, and were sworn to execute the will, they undertook to pay the legacies.

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*3. The defendants having paid the annuity for eight or ten years, thereby assented to the legacy due the complainant.

4. His Honor erred in deciding that the complainant could not maintain his suit for the continuance of his annuity, and that the

decision of *The State v. Carew*, did not apply to his suit.

Perry, for appellant.

Trusts are contracts, and that no action at law lies, is not the test. *Dartmouth College Case*, 4 Cur. 527. After consent to a legacy, action at law lies, and here there was consent. The payment of interest was consent. The law implies a contract where there is an obligation to pay. Every one who undertakes an office or duty, impliedly undertakes to perform it. The claim is for breach of trust, and that ranks as a simple contract. *Atkins v. Hill*, Cowp. 284; *Hawkins v. Sanders*, Cowp. 289; 2 Bl. Com. 483; Chit. on Con. 17, 27, 207; 1 Story Eq. 506; *Smith on Con.* 96; 1 Mad. Ch. 178; 4 Wheat. 518; 1 Kent Com. 417.

Elford, contra.

The Constitution applies to technical contracts, and not to mere trusts such as this is.

The opinion of the Court was delivered by

INGLIS, A. J. An executor, by qualifying, taking possession of the assets, and assenting to a pecuniary legacy, may well be regarded as having expressly undertaken to the legatee to pay it, or, at the least, to have acknowledged a liability from which a promise will be implied. In *Hawkes v. Sanders*, Cowp. 289, which was an action at law to recover a pecuniary legacy, after assent, the declara-

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tion *alleged an express promise to pay, but it is to be inferred, from a remark of one of the Judges, that the express promise was no more than the executor's express assent to the legacy. In *Atkins v. Hill*, Cowp. 284, an express promise was alleged, and the demurrer admitted it. The recovery in both of these cases was rested upon the alleged promise. But Lord Mansfield distinctly and without qualification affirms the proposition that, after assent, an action at law will lie for the recovery of a pecuniary legacy. In our own case of *McTeer v. Ferguson's Executors*, 1 Bay, 112, Judge Bay, in his abstract of the case, seems to have assumed, that the amount of a pecuniary legacy, after assent, might be recovered as money had and received in the executor's hands for the legatee's use. It is said (in note 6 to sec. 592, 1 Story's Eq.) that "an action at law for a pecuniary legacy has been maintained against an executor after assent in some of the Courts of America." But the proposition is not there supported by a reference to any decided case. Mr. Chitty, in his *Treatise on Contracts*, at page 678, says: "Where money is due in equity, and the trustee states an account concerning it, with the *cestui que trust*, it may be recovered at law in the action for money had and received, or in an action on an account stated." It is not very clear why an assent to a pecuniary legacy of definite

amount should not have the same effect as stating an account.

But in *Deeks v. Strutt*, 5 Term Rep. 690, which was an action at law for the recovery of the arrears of an annuity bequeathed, when the annuity had been regularly paid for several years, and then suffered to fall in arrear, and was therefore an exact parallel of the present case, except as to the forum, it was adjudged that such an action would not lie. This case seems to have finally settled the law on the point in England, and there is no direct decision to the contrary reported in our own books.

It is to be observed, however, that, in

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Deeks v. Strutt, *Lord Kenyon does not intimate the absence of a contract as a ground upon which the jurisdiction of the Law Court is denied, but rests that denial on the inconvenience that would result from such jurisdiction compared with the superior facilities in the peculiar modes of proceeding and relief in equity for protecting the rights and interests of all parties; his illustration being the case of a legacy to a married woman, which the Equity Court can and the Law Court cannot secure in whole or in part to her own use, &c. It appears to follow from all this, that there is, after assent, a contract or promise, express or implied, upon sufficient consideration, to pay the legacy to the legatee—but that, like some other classes of contracts, owing to special circumstances and considerations, it can only be enforced in equity.

This contract, in the present case, was long prior in date to the passage of the *Stay Law*, and is, therefore, within the constitutional protection asserted in *The State v. Carew*, 13 Rich. 498 [91 Am. Dec. 245].

It is ordered that the circuit decree dismissing the bill be reversed, and that the cause be set down for a hearing in the Circuit Court upon the pleadings and proofs.

DUNKIN, Ch. J., and WARDLAW, A. J., concurred.

Decree reversed.

13 Rich. Eq. *195

*THE COLLIERIE OF CHARLESTON v.
THOS. N. WILLINGHAM.

(Columbia. April and May Term, 1867.)

[Trusts \hookrightarrow 316.]

Where the instrument creating a trust fixes the compensation which the trustee shall be entitled to for his trouble in executing the trust, the general law in reference to the commissions of trustees has no application to the case, and the trustee must be content with the compensation allowed by the instrument.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 455; Dec. Dig. \hookrightarrow 316.]

[*Executors and Administrators* \hookrightarrow 495.]

Where a trust deed conveyed to the trustees a certain certificate of stock and other

property, real and personal, and directed them immediately after the death of the grantor "to transfer and deliver to" A the certificate of stock, "and convey for the best prices that can be obtained" the other property, real and personal, and, after retaining as compensation for their trouble five per cent. "on the proceeds of all such sales, as well as all costs and charges," to distribute "the net proceeds" between certain persons named, *Held*, that the trustees were not entitled to commissions on the certificate of stock transferred and delivered by them to A.

Held, Note. Cited in *Jones v. Jones*, 39 S. C. 251, 17 S. E. 587, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2103; Dec. Dig. ~~C~~495.]

Before Johnson, Ch., at Charleston, January, 1866.

The decree of his Honor, the Circuit Chancellor, is as follows:

Johnson, Ch. On the 25th day of April, 1864, Ephraim M. Baynard, of the District of Charleston, by a deed, for good consideration, conveyed to Thomas H. Willingham and Benjamin L. Willingham his plantation in Beaufort District; thirty-eight negro slaves, by name; eighty-one bales of sea-island cotton; all the money due him by his factors, William M. Lawton & Co., or by any other person; four hundred and thirty-six shares in the Georgia Railroad and Banking Company; four hundred and ten whole and four hundred and ten half shares in the South Carolina Railroad and Southwestern

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Railroad Bank; three hundred *and twenty-six shares in the Bank of South Carolina; two hundred and twenty-one whole and nine half shares in the Bank of Charleston; twenty shares in the Charlotte and South Carolina Railroad; five thousand dollars in six per cent. bonds of the State of Georgia; two thousand dollars in the bonds of the South Carolina Railroad Company; fifty-eight thousand five hundred dollars in the bonds of the Charleston and Savannah Railroad Company; forty-three thousand dollars in the bonds of the State of South Carolina; twenty thousand dollars in the bonds of the Confederate States of America; and one hundred and sixty-six thousand dollars in the city of Charleston six per cent. stocks; in trust for the following purposes, viz.: "To sell the said cotton, and to invest the proceeds of the same, and all moneys of his that shall come into their hands; and the profits thereof, and the dividends and profits of all sums now invested which shall be received by them, in public or private securities; after deducting ten per cent. on their receipts, and retaining the same for their own use as compensation for their care and trouble in the premises, and so much as shall be necessary for the comfortable support of the grantor, for his life, which shall be paid over to him; and to permit the grantor to retain possession of the land and negroes, and to receive to his own use the rents, issues and profits thereof," and "immediately after my (his) death to transfer and deliver to the Charleston College the certificate of

stock for one hundred and sixty-six thousand (166,000) dollars in the city of Charleston six per cent. stocks, and convey, for the best prices which can be obtained, the said plantation, with the negroes and their increase, and all the aforesaid stocks and securities, with such others as shall come to their hands, and after deducting and retaining to their own use as compensation for their care and trouble in the premises five per cent. on the proceeds of such sales, as

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well as all costs and *charges they may incur or be put to in the transaction, shall divide the net proceeds into fourteen (14) equal parts, and pay over one-fourteenth part to each of the following persons, who are my (his) nephews or nieces, or have intermarried with them." Each of the defendants having married a niece of the donor is directed in the said deed to retain for his own use one of the fourteen equal parts.

The said Ephraim M. Baynard departed this life on the fifteenth day of May, in the year of our Lord one thousand eight hundred and sixty-five. From the day on which the said deed was executed till the death of the grantor there were standing on the books of the City Treasurer of Charleston one hundred and sixty-six thousand one hundred and ten dollars in city of Charleston six per cent. stocks, to the credit of the grantor.

On the second day of December, in the year of our Lord one thousand eight hundred and sixty-five, Thomas H. Willingham, one of the defendants, (the other having declined to accept the trusts conferred upon him by the deed,) transferred one hundred and fifty-seven thousand three hundred dollars of the Charleston six per cent. stock (as is alleged by the bill, and sustained by a copy of the transfer which was admitted in evidence by consent) "to Daniel Ravenel, president of the board of trustees of Charleston College, for Charleston College." The defendants in their answer state, that on the day last aforesaid Thomas H. Willingham transferred one hundred and fifty-seven thousand seven hundred dollars of the six per cent. stock of the City of Charleston, being the amount given by the said Baynard to the said college, less a commission of five per cent., and that they are advised they are entitled to charge the same, to wit, the sum of eight thousand three hundred dollars, under the authority of an Act of the General Assembly of the State of South Carolina, passed in 1745; 1 Brev. Dig.

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392; and *this bill was filed for the purpose of compelling the said trustees to transfer to the trustees of the College of Charleston the balance of the capital of said stock, and to pay over to them all arrears of interest since the death of the donor.

By the common law a trustee is not entitled to any compensation for personal trouble or loss of time in the management of a trust estate; and in South Carolina the law

is the same, except so far as it has been altered by statute. In the case of *Muckenfuss v. Heath* and another, 1 Hill, Eq. 182, Chancellor Harper intimates the opinion that the Act of 1745 only modifies the law so far as to authorize trustees who have the management of the estate of infants to charge commissions, though the point was not involved in the decision of the case.

In the case of *Francis Moore v. Executors of Eliza Kohne*, deceased, (a manuscript decision,) the point was made, but Chief Justice Dunkin waived the question, on the ground that the agreement under which the trust was created and accepted was made in Pennsylvania, and should be construed in its nature and incidents by the law of that State; that it was, therefore, unnecessary to decide what was the law of South Carolina as to the rights of a trustee in such cases; and, from the opinion which I entertain on other points in this case, I deem it unnecessary for me to attempt to decide the question.

The direction of the deed to the trustees is "to transfer and deliver the certificate of stock to the Charleston College" immediately after the death of the donor. Is the transfer and delivery of any portion of the same a compliance with the terms of the deed? Certainly not. It is the duty of an executor to deliver specific legacies to the legatee, and of a trustee to deliver specific donations to the cestui que trusts, in all cases where the general assets of the estate or trust fund are sufficient to pay the debts and expenses incident to the execution of the trusts, with-

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out any abatement. And it is just as clearly the duty of the trustees in this case to transfer and deliver the whole amount of the stock to the trustees of the college as it would have been to have delivered a watch or any other chattel under similar directions. But to this it is replied that the trustees are entitled to commissions. Suppose it to be admitted that they are so entitled, they are not to be paid out of this stock, but out of the general assets of the estate, or rather of the trust fund. See *Williams on Personal Property*, 248. But the question recurs, Are the trustees in this case entitled to commissions? In the case of *Ruff v. Summers*, 4 DeS. 529, it was decided that "an executor could not charge commissions for delivering a specific legacy to the legatees, whatever trouble may have attended the service. He cannot charge for any services but the receipt and payment of money." And there has been no case decided in the Courts of this State which has extended the doctrine laid down in the said decision further than this, that when an executor or other trustee, in the payment of money due by him in his fiduciary character, transfers bonds, notes or other choses in action, held by him in his said character, in payment of the same, though the bonds, notes or other choses in action might be refused by

the party receiving them, and the money demanded, yet he is entitled to his commissions as for so much money received and paid out by him. *Deas v. Spann*, Harp. Eq. 176; *Gist v. Gist*, 2 McC. Eq. 474; and *Moore v. Executors of Kohne*. It is therefore clearly the opinion of the Court that the said trustees, conceding to them all the rights of executors, are not entitled to commissions for transferring and delivering the certificate of stock to the trustees of the college, for it is done not in the payment of money due by them as trustees, but in obedience to the directions of the deed; and if it were necessary, I would even go further and decide, that if the donor had directed them in the deed

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*to pay over to the trustees of the college one hundred and sixty-six thousand dollars in money immediately after his death, that it would be their duty to pay over the whole amount, conceding their right to commissions, if the general assets of the trust fund were sufficient for their payment.

But suppose the first two objections to the defendants' claim had been decided in their favor: would they then be entitled to commissions? I think not. The deed under which they act has fixed the measure of their compensation; and in accepting the trust they have become parties to it, and are concluded by its provisions; and there is certainly no reason to complain that they are not sufficiently liberal in the compensation allowed.

On the question of interest, all the authorities agree that specific legacies of stock carry interest from the testator's death; 2 *Mad. Ch.* 79; 2 *Wms. on Exors.* 876; and if the general rule were otherwise, the direction in the deed to transfer and deliver the stock immediately after the donor's death would fix that as the period from which it should be calculated in this case.

It is ordered and decreed that it be referred to one of the Masters to ascertain how much of the said stock has not yet been transferred to the complainants; and also to ascertain the amount of interest in arrear, the same being computed from the 15th day of May, 1865, the day on which the donor died; and that upon the same being ascertained, that the acting trustee, Thomas H. Willingham, do transfer and deliver to the complainants the residue of the city of Charleston six per cent. stocks, with all the arrears of interest ascertained by him to be due, calculated from the time aforesaid.

It is further ordered and decreed that the bill as to Benjamin L. Willingham be dismissed.

And it is further ordered and decreed that the costs of these proceedings be paid by Thomas H. Willingham.

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*The defendants appealed, on the grounds:
1. That all trustees are entitled to commissions by the Act of the General Assembly,

and the decisions of our Courts, unless expressly excluded by the will or deed. A. A. 1745, P. 1. 201; 1 Brev. Dig. 392; Muckenfuss v. Heath, 1 Hill's Eq. Rep. 182; Ex parte Witherspoon, 3 Rich. Eq. 13.

2. That trustees are entitled to commissions on the transfer of stocks and bonds, in kind, where they are received in payment, or where a previous life-estate has been carved out and administered. Gist v. Gist, 2 McCord's Eq. Rep. 474; [Vance v. Gary], Rice Eq. 2.

3. That specific donations are governed by the same rules of law as specific legacies, and may in like manner be adeemed or abate when necessary. 1 Roper on Legacies, 190, 254.

Whaley, for appellants.

Porter and Conner, contra.

The opinion of the Court was delivered by

INGLIS, A. J. Persons sustaining fiduciary relations, although entitled to be reimbursed their actual expenditures in the execution of their trust, are not, in the absence of statutory regulations to this effect, entitled, merely by virtue of the relation, to any allowance for their "care and trouble" therein. Such relations were in their origin mere honorary confidences, and the service and labor involved were considered only a fulfillment of the obligations of friendship and benevolence. A right to compensation may, however, be conferred in the creation of the trust by its

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*terms, or it may be the subject of express contract between the parties. A bargain to this effect, even between trustee and cestui que trust, if the latter be sui juris, although to be regarded with jealousy and scrutinized with rigor before it will be respected and enforced, is not necessarily void. Such is the general rule of equity jurisprudence on this subject. Lewin on Trusts, 545; Hill on Trustees, 574; Robinson v. Pett, 3 P. Wms. 132; 2 Lead. Cas. Eq. 206, et seq.

Here, at a comparatively early period of our separate jurisprudence, the general rule was, to a large extent, at least, if not entirely, superseded by statute, and the allowance of a compensation for "care, trouble, and attendance," in the form of commissions, was made legally incident to the relation, certainly in several of its forms, "All and every executor, administrator, guardian, or trustee, shall for his, her or their care, trouble, and attendance in the execution of their several duties and trusts, take and receive or retain in his, her or their hands, a sum not exceeding two pounds and ten shillings for every hundred pounds which he, she or they shall hereafter receive; and the sum of two pounds and ten shillings for every hundred pounds which he, she or they shall hereafter pay away in credits, debts, legacies or otherwise, during the course and continuance of their or either of their management or ad-

ministration, and so in proportion for any sum or sums less than one hundred pounds." A. A. 1745, Sec. 11. (1 Brev. Dig. 392.) The sixth section of the same statute requires "guardians, and trustees who shall have the care, management, and custody of the estates, real or personal, of any infant or minor," to render from time to time inventories of the trust property in their hands and accounts of moneys received, &c. From construing the two sections together, it has been commonly assumed that the statutory allowance of commissions is applicable to the case of trustees

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only where their cestui que trusts are infants, and therefore incompetent in law to allow compensation by their own consent, and that the claim of a trustee for an adult cestui que trust, to an allowance for his care and trouble in the administration of his trust, must rest upon the terms of his appointment, or of express contract with his cestui que trust, or else abide the application of the general rule. In Muckenfuss v. Heath, 1 Hill Eq. 182, it was expressly decided that a trustee, who, under a deed, held real and personal property for the use of a minor, was within the very letter of the Act of 1745, and so entitled to the commission, allowed therein. The reasoning of the Court apparently assumes that a trustee for an adult would not, under the terms of that Act, be entitled. But the law on this particular point has not been ascertained by an authoritative adjudication. It will be observed that, although the statutory allowance to trustees, &c., is "for their care, trouble, and attendance, in the execution of their several duties and trusts," yet the basis on which the commissions are to be calculated is the aggregate of the receipts and payments of money. The course of decision on the cases which have, from time to time, called for the judgment of the Court upon the proper interpretation of the statute has established this distinction. Where the legacy is of a specific thing, and to be satisfied only by the delivery of that thing in kind, commissions upon the value of such legacy are not chargeable upon the general estate, even much less upon the legacy itself. Thus, in Ruff v. Summers, 4 Des. 529, testator disposed of his estate chiefly in specific legacies, and the executors claimed to charge the estate in their accounts two and one-half per cent. commissions for paying or delivering these legacies, but the Court disallowed the charge. But wherever a demand against the estate, whether debt, legacy or distributive share, is to be or may be satisfied by payment in money, there, if by consent or agreement between the parties, prop-

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erty, choses *In action, stocks, &c., are given and received as money and at a money value, commissions are chargeable upon the payment of such debt, legacy or share, as commissions are chargeable upon every transaction which is substantially, though it may be

not in form, the receipt and payment of money. Thus in *Deas v. Spann*, Harper Eq. 176, certain distributees purchased property at the sale of the estate and gave their bonds. On a settlement with these distributees their bonds were delivered to them as payment pro tanto of their shares, and upon the amount of these bonds so delivered, as upon money payments, the whole Court held that the executor was entitled to charge the usual commissions. So in *Gist v. Gist*, 2 McC. Eq. 473, the executors sold the estate, under an order of the Ordinary, on credit, and took bonds from the purchasers. Some of these bonds were transferred by them in payment of debts of the testator, and the residue remained in their hands, in specie, to be distributed among the heirs. In their accounts they charged commissions on the whole amount of the bonds as on so much money. The Commissioner and the Circuit Chancellor refused the commissions on those retained for distribution. But the Court held that they were entitled to commissions on the whole. In these cases the whole property had, by competent authority, been converted into money securities. The distributees were not in terms entitled to any specific articles, but only to a share of the residue. A partition of the estate in kind was no longer possible; they could only have a decree for so much money. The executor was entitled to time to convert the securities into money. If, in anticipation of the proper period of distribution, or for any other reason, they chose to take the securities themselves, they took them as money and in satisfaction of a money demand. In *Moore v. Kohne's Executors*, decided in the Circuit Court for Charleston, at February Term, 1857, and not brought up by appeal, to which reference is

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*made in the present circuit decree, several questions were made on the subject of commissions. William Ravenel, who was one of the executors of Eliza Kohne's will and a defendant in the cause, had also been a trustee for her and others under an agreement or deed executed by her in Pennsylvania, by the terms of which deed no provision was made for compensation to the trustee. One of the questions made disputed the right of the trustee (the cestui que trust being an adult and sui juris) to retain commissions on his receipts and payments. The deed creating the trust having been executed in Pennsylvania, where most of the parties were then resident, "with no reference or stipulation as to performance elsewhere," it was held that the claim of the trustee to commissions must be determined by the law of Pennsylvania, according to which law, it appeared from the evidence, commissions were in such cases allowed under the equity of an Act of Assembly. A wholly distinct question was made upon the administration, by the then defendants, as executors of the estate of Eliza

Kohne, which came to their hands under the appointment of her will. The plaintiff, Frances Moore, was sole residuary legatee under this will. She filed her bill in July, 1853, for an account of the administration, and payment of the residue. Pending the proceedings, she received from the executors, while the event of her suit, so far as respects the amount of the recovery was not only uncertain but also uncertain, various public securities, at an appraised or estimated money value, some at par and others at a discount, and gave them a receipt for the aggregate value as of so much money, to wit, "twenty-six thousand one hundred and forty-seven dollars and ninety-nine cents, on account of testatrix's bequest of the residue of her estate," with a stipulation that if, as the result of the accounting which was in progress, this sum should prove to be in excess of the residue to which she should be found

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entitled, *she would make good and pay to them the balance in excess. The right of the executors to charge and retain commissions on the sum so paid was disputed by the plaintiff, but affirmed by the Court. This seems to be in strict conformity with the principle settled by the previous cases.

Such has been the construction of our statutes on the questions made in the argument of the present cause. But the Acts of Assembly which settle the allowance to be made to persons sustaining certain fiduciary relations for their care and trouble in the administration of their trusts, do not supersede the right of parties who are thereto legally competent to make their own contracts in this particular. If they agree upon a different form or rate of compensation, their agreement will constitute the law of the particular case, and as such be enforced. Only when the particular law is silent, the general law speaks. In the creation of Baynard's trust, the parties have exercised this right and made the law for themselves. The Act of 1745 has, therefore, here no place for operation, and the question, whether, under that statute, trustees generally, without discrimination in reference to the legal competency of their cestui que trust, are entitled to the commissions therein allowed, cannot arise. It need scarcely be said that it is contrary to the rule of this Court, as it would be indeed in violation of the proprieties of its office, to go outside of the case to ascertain and affirm a general rule of law for the satisfaction of the community at large or of the profession. It is, moreover, a familiar fact, that an expression of opinion by the Court, on a point not necessarily involved in the adjudication of the particular case before it, does not carry conviction or satisfaction to the mind of the profession, as to the final settlement of the particular question which is the subject of such expression.

The trust created by the Baynard deed con-

sists of two parts—one, the management of

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the property conveyed *during the residue of the settler's life, and the other, its disposition immediately upon his death; and for the care and trouble of the trustees involved in each of these parts, a different rate of compensation and a different basis of its calculation is established. The second part of the trust requires the trustees, immediately upon Baynard's death, to transfer and deliver to the Charleston College the one hundred and sixty-six thousand (166,000) dollars in the city of Charleston six per cent. stocks, which by the deed had been conveyed to them, and to convert all the other trust property into money by "conveying the same for the best prices that can be obtained," which is only another form of expression for selling. The compensation allowed them for their care and trouble in the execution of this part of their trust is five per cent. on the proceeds of such sales. The delivery and transfer of the city stocks, in conformity with the direction of the deed, is not a sale; there is no single distinguishing element of a sale in such a transaction. But if, by any latitude of interpretation, such a transfer could be embraced under the description "sales," what are the proceeds of such sale? These constitute the only basis for the calculation of the five per cent. commissions. When a sale proper is effected, the money, or the thing received in exchange for the specific article sold, constitutes the proceeds of the sale. Such a use of the term "proceeds" is appropriate and familiar. But what was received by, or proceeded to the trustees, from the transfer of this stock? Nothing whatever. This was a mere donation, a gratuity. Of such a transaction, from its very nature, there could be no "proceeds." The appeal claims to calculate the commissions upon, and deduct them from, the stock itself in kind. But there is clearly no authority in the deed for such a proceeding as this. By its terms the whole stock—the very one hundred and sixty-six thousand dollars city six per cent. stocks, identical with that

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described in the *conveying part of the deed—is to be "delivered and transferred." There is no warrant for any deduction or diminution. The donee is to have the whole. But only the net proceeds of the residue of the property is to be divided among the fourteen nephews and nieces. The net proceeds must be the proceeds after subtracting therefrom some sum chargeable upon the gross proceeds, and in this case that sum clearly is whatever commissions, costs and charges are authorized to be retained at all, as a compensation for the care and trouble of the trustees in the premises.

If all the donations in a deed are specific, and compensation by commissions on the whole property is expressly provided for, or,

in the absence of such express provision, is under the general law chargeable, the charge in such case can only be satisfied by a proportional abatement of all the gifts, or a quasi taxation upon each of its share of the charge; for, by the supposition, there is no other fund to satisfy the terms. But this deed provides for one specific gift, and then a distribution of the net residue, converted into money, after the deduction of commissions, costs and charges. If the view of the intention of this deed which the appeal urges could be entertained, and the trustee be held entitled to commissions on the par or other value of the stock transferred, and it were doubtful whether in such view the commissions are not expressly charged on the residue, yet, reasoning to the proper interpretation of the deed from the analogies to be found in the construction of the statute law, the fund chargeable with such commissions would be not the specific gift itself, but the other property of which only the net residue is given, for such residue must bear all the charges unless expressly relieved. So, also, if the terms of the deed left any room for doubt whether the settler intended that the trustee should take commissions on the stock transferred, analogies drawn from the same source would conduct to a conclusion unfavorable to the claim of

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the *trustee. *Ruff v. Summers*. But the language of the trust-deed itself clearly enough evinces the intention of the settler, and resort to such extraneous aids is not necessary. The Court is well satisfied that the trustee is not entitled to the commissions which are claimed by this appeal, either as against the specific stock or against the general estate.

The decree of the Circuit Court is affirmed, and the appeal is dismissed.

DUNKIN, C. J., and WARDLAW, A. J., concurred.

Appeal dismissed.

13 Rich. Eq. *210

*C. S. MENG v. ABSALOM HOUSER and WILLIAM STEEN.

(Columbia. April and May Term, 1867.)

[*Mortgages* ⇨ 440; *Process*, ⇨ 125.]

Defendant was served with subpoena to answer by copy left at his residence—he being at the time, as alleged by him, in the military service of the State:—*Held*, that defendant (if the service was irregular under the Act of 1841) had, by his subsequent acts and conduct, waived the irregularity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1298, 1299, 1363, 1397; Dec. Dig. ⇨ 440; *Process*, Cent. Dig. § 153; Dec. Dig. ⇨ 125.]

[*Mortgages* ⇐440.]

Where defendant is in the military service of the State, service of subpoena to answer by copy left at his residence is, it seems, valid.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1298, 1299; Dec. Dig. ⇐440.]

[*Equity* ⇐409.]

A Commissioner's report of his own acts in execution of an order must be treated as true until the contrary be shown.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 904, 920-923; Dec. Dig. ⇐409.]

[*Judicial Sales* ⇐16.]

Where property is advertised by the Commissioner to be sold for cash, it is no variance for him to announce at the sale that payment will be received in United States treasury notes.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. §§ 38, 39; Dec. Dig. ⇐16.]

[*Mortgages* ⇐290.]

Where mortgaged property has been sold by the mortgagor to several purchasers, the mortgage is properly enforced primarily against the last purchaser.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 792; Dec. Dig. ⇐290.]

[*Judicial Sales* ⇐58.]

Where A purchased land at a Commissioner's sale under a decree for foreclosure, and then conveyed to B, the aid of the Court, by rule and attachment, to compel the defendant to deliver possession to B, was refused.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 114; Dec. Dig. ⇐58.]

[*Mortgages* ⇐515.]

[In the terms of a commissioner's notice of sale on mortgage foreclosure, "cash" does not necessarily mean coin, but ready money, in contradistinction to credit.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1517; Dec. Dig. ⇐515.]

Before Carroll, Ch., at Chambers, Columbia, December, 1866.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. The motion made in December last was to rescind the order of the Commissioner for an attachment against the defendant, William Steen. After argument, the Commissioner was directed to inquire and report whether, prior to the sale of the mortgaged premises on the 5th November last, advertisement of such sale was published, and how published, for twenty-one days, as required by the order of Chancellor Lesesne. The Commissioner's report has been submitted. But previously to the motion before the Court being disposed of, a

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further motion is presented *on behalf of the defendant, Steen. The motion last made is, in effect, that the rules granted by the Commissioner against Steen, the sale of the mortgaged property, the decree directing it, and the order pro confesso, be all set aside, and the defendant Steen be now admitted to answer, plead or demur, as he may be advised.

In support of the motions submitted, various grounds have been assumed. Service upon Steen of the subpoena to answer was made by leaving a copy of the writ at his place of residence. It is contended that Steen was

not thereby lawfully served with process, because he was at that date in the actual military service of the State, and was for the time protected from suit by the Act of 1841. (11 Stat. 208.) Whether the Act conferred the immunity from suit which is claimed, need not be considered. The bill was filed in February, the subpoena served upon Steen in April, and the decree for foreclosure and sale made in June, of the year 1861. After an interval of five years, the order for sale was renewed on the 14th June, 1866, and the sale under that order was made on the 5th November, 1866. That Steen was aware of the suit appears by his own affidavit, in which he states, as to the service of the subpoena, "that, as he supposed the same null and void, he paid no attention to it." He does not state that he was absent from his residence either when the subpoena was served or the decree for foreclosure and sale made. According to the proof, the probability seems to be that he was at his dwelling in Union at both those dates. From the commencement of the suit until subsequently to the sale, he appears to have offered no opposition or objection to it at any of its stages. There was on his part not merely acquiescence in the proceeding, but distinct recognition of the decretal order made, and submission to it. It appears that he had frequent interviews with the plaintiff concerning the sale before it occurred, and as to the divi-

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sion of the mortgaged premises into convenient parcels, so as to enhance the price. He was present at the sale, was one of the bidders, and actually purchased a portion of the mortgaged property. The purchasers of the other parcels of the mortgaged premises have paid the purchase-money to the Commissioner, and have received from him deeds of conveyance. More than that, the Commissioner, as he reports, has paid to H. F. Means, the assignee of the plaintiff, but not a party to the suit, more than \$1,600 of the proceeds of the sale; "the defendant Steen," says the report, "having informed the Commissioner that he would surrender possession of the premises on the 1st January, 1867, and the Commissioner not supposing there would be any litigation in the matter." Such acts and declarations on the part of Steen, with their necessary effect upon the other purchasers at the sale, and their actual influence over the Commissioner's disposition of the bulk of its proceeds, may well be considered as constituting an equitable estoppel against any attempt by him to impeach the sale in question. It was at least competent for him to waive the irregularity complained of, if it existed, and he is regarded as having done so unequivocally.

What has been said of course disposes of the other and more direct objections made to the sale. But it may not be amiss to suggest

some additional considerations specially applicable to them.

In his report, the Commissioner states that notice of the sale was posted by himself, in person, upon the door of the court-house, for twenty-one days prior to the 5th November last, besides being published in three successive numbers of the local weekly newspaper. The advertisement is objected to—not as to the mode, but as to the time of its publication. A witness deposes to having seen the notice upon the court-house door before the day of sale, but does not remember how long

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before. When, in response to an *order of the Court, the Commissioner submits a statement of his personal acts in the execution of a prior order, such statement, it is apprehended, must be treated as true until the contrary is shown. The presumption is that the officer has performed his duty. That presumption is here confirmed by the testimony adverted to, and no opposing evidence appears.

The mortgaged property was advertised to be sold for cash, and immediately before the sale it was announced that payment would be received in United States treasury notes. It is objected that cash means coin, and that the premises were therefore sold upon other terms than those specified in the advertisement of sale. It would be difficult to show that the term cash in the notice of sale was intended to mean or actually imported anything else than ready money, in contradistinction to credit. That it does not mean coin when employed in an advertisement of sale is shown by the very case cited to sustain the objection. (*Farr v. Sims*, Rich. Eq. Cases, 131 [24 Am. Dec. 396].) If the Commissioner's announcement, that payment would be received in United States treasury notes, was in reality a variance from the published terms of the sale, such variance was undoubtedly to the advantage of the defendant Steen, and the objection now made to it comes most ungraciously from him. In the Commissioner's report it is stated that the announcement referred to was made at the instance and request of Steen himself, and it may be added that, in his written response, under oath, to the report, the defendant Steen has not ventured to deny that statement, but evades denial by saying that, "if the same was made, it was made in ignorance of his legal and equitable rights." The proceeding by rule is said to be an appeal to the equitable discretion of the Court. If there is controversy as to the facts, or if the right of the party who is the actor be not clearly established, or if other persons not parties

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are interested, the Court will not *interfere, but will leave the matter to be determined by formal suit. (*Key v. Griffin*, 1 Rich. Eq. 67.) It is manifest that what has been already performed under the decree cannot be

undone in this proceeding. The larger part of the proceeds of the sale have passed into the hands of Means, the plaintiff's assignee, who is no party to the suit, and is beyond the reach of any order that could be granted. If any order or decree avoiding the sale is to be made, he undoubtedly should be impleaded. The motions to set aside the services of the subpoena to answer and the sale of the mortgaged premises are refused. As to the matters of defence upon the merits, it is sufficient to say that they cannot be here considered. A decree of the Court can be opened only by petition for rehearing or by bill of review.

At the sale by the Commissioner, a part of the mortgaged property was purchased by Spencer M. Rice. Having paid the price, Rice received from the Commissioner a conveyance of the property purchased, and on the same day, as it appears, sold and conveyed it to D. A. Townsend. The defendant Steen refusing to yield possession of the premises, certain proceedings were had before the Commissioner, who, on the 29th of November last, and upon the motion of the solicitors of Townsend, made an order that Steen surrender the possession to Townsend within seven days, or in default thereof be attached. That order the defendant Steen contends was unauthorized, and his motion is that it be rescinded. When a sale is made under a decree, the purchaser, by the very act of purchase, submits himself to the jurisdiction of the Court as to all matters connected with such sale. (*Sugd. Vend.* 78.) Being thus a quasi party to the cause, he is admitted to move for such orders as may be necessary to defend, enforce and perfect his rights as purchaser. (*Sugd. Vend.* 72; 2 Dan. Pr. 1277, 1283-84.) This privilege is granted to enable the purchaser to have his contract of purchase made with the of-

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ficer of the Court *fully executed and completed. But it is not perceived that D. A. Townsend occupies a position that entitles him to any such standing in the Court. The contract of sale between Rice and the Commissioner must be regarded as fully performed. The price has been paid by the one party, and the deed of conveyance executed by the other. Rice has no claim to be let into possession, for he has transferred his entire interest to Townsend. The purpose of the Commissioner's order for an attachment is not to complete the contract between himself and Rice, but to enforce a right springing out of another and subsequent contract of sale between Rice and Townsend, with which the Commissioner has no concern whatever; and the order is granted upon the motion and for the benefit of Townsend—a stranger to the first contract of sale, and not even a party to the cause. The judgment of the Court is that the order is erroneous, and should be rescinded; and it is so adjudged and decreed.

The defendant Steen appealed on the grounds:

1. That the bill of foreclosure was informal and void, in this that it prayed for only a foreclosure of a part of the mortgaged premises, and that to advance the personal and individual interests of the mortgagee, the plaintiff, and as it was to the prejudice of the defendant, Wm. Steen.

2. Because the defendant, Wm. Steen, has never been legally made a party to these proceedings, he having been in the actual military service of the State at the time of the filing of the bill, and also at the time of the alleged service of the subpoena; and the said service and the order pro confesso should, therefore, have been set aside, and the defendant permitted to appear and plead.

3. That the motion on the part of Wm.

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Steen requiring the complainant, Clough S. Meng, to amend his bill by making A. L. Hunsucker and Dr. James E. Hix parties defendants, should have been granted, as they are necessary and indispensable parties.

4. Because the defendant, Wm. Steen, should be allowed compensation for all the improvements put upon the premises, he being a purchaser without actual notice.

5. Because the complainant, C. S. Meng, should be required to account for the sum of \$1,787.17, received of Dr. James E. Hix, as the purchase-money of the Isaac E. Peak lot, a part of the mortgaged premises, being the part left out of his bill of foreclosure.

6. Because the mortgaged premises were not legally advertised for twenty-one days, as required by the decretal order of Chancellor Lesesne, and the acts and declarations of the defendant, Wm. Steen, cannot cure that defect.

7. Because the sale was not made in accordance with the terms of the advertisement, thus causing a great sacrifice of the property of about fifty per cent.

8. Because the acts and declarations of the defendant, Wm. Steen, referred to in the proceedings and the decretal order of Chancellor Carroll, were done and made in utter ignorance of his rights, and therefore cannot prejudice his equitable claim to relief.

9. Because the report of the Commissioner, dated was not responsive to the order of Chancellor Carroll of the of December, 1866, but stated matters not called for and not referred to him for inquiry, and on which the Chancellor predicates his decree.

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*10. Because the report of the sale of the mortgaged premises by the Commissioner not having been confirmed, the payment by the Commissioner of \$1,600 to Henry F. Means, not a party to the suit, was done in his (the Commissioner's) own wrong, and cannot deprive the defendant, Wm. Steen, of any of his legal and equitable rights, and, if neces-

sary, his Honor should have ordered him to be made a party.

11. Because there is error in the decree in supposing there was any evidence by any witness to prove the premises had been advertised twenty-one days before the sale, as the witness referred to (Davis Goudelock, Esq.) stated he could not say how many days before the sale he saw the paper on the court-house door, and it was not pretended that the premises had been thus advertised in any but one place, and the Commissioner was objected to as being incompetent to prove the advertisement, as he could not act as judge and witness at one and the same time, and the objection sustained, and not appealed from, but acquiesced in.

12. Because the defendant, Wm. Steen, cannot be deprived of his freehold or land by his parol declarations, and he cannot be required to prove the negative proposition, that his land had not been legally advertised for twenty-one days before the sale.

13. Because there are so many irregularities in the proceedings, and so many doubts and uncertainties in the whole matter, that the sale should be set aside, and a resale ordered, under a decree distinct and clear in all its terms as to the right of the purchaser to turn the defendant out, and as to what kind of money should be paid, so that those in attendance on the sale might be prepared

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to bid, so that justice and equity may be done to the defendant and his creditors and all concerned.

14. Because, from the further fact, that the bond for titles from A. L. Hunsucker to the defendant, Wm. Steen, who had purchased the premises of said A. L. Hunsucker, and paid him large amounts, and all Steen's papers in reference to the said lot, at the time of the filing complainant's bill, being then in the hands of Dawkins & Gadberry, complainant's solicitors, and the same being now burned, as it is said, and the plaintiff, as mortgagee, being the trustee of Wm. Steen, the loss of his papers, thus occurring, is such an accident as would, in equity, entitle him to the relief he now asks of this honorable Court.

15. Because the Commissioner refused to hear evidence to prove Wm. Steen was in the Confederate army, or service of the State, at the time of the filing of the bill and supposed service of the subpoena; and also refused to hear evidence to prove that Steen had been, for much of the time, non compos mentis, and wholly unable to attend his business, and that the war and the stay laws show the cause of the delay, and the facts show that C. S. Meng dared not to sue Wm. Steen while he was at home, but sued soon after he went into the army. Therefore, the defendant should be relieved.

D. A. Townsend also appealed from so much of the decree of the Chancellor as sets

aside the order granted by the Commissioner, on the grounds:

1. Because, the defendant, Steen, in refusing to surrender the possession of the mortgaged premises after the sale, was guilty of contempt of the Court, which subjected him to rule and attachment.

2. Because D. A. Townsend, as the vendee of the purchaser, was entitled to the aid of

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the Court to obtain possession of the premises sold under the decree; and if not entitled to it as a matter of strict right, yet (it is respectfully submitted) the Court might have resorted to its process of attachment in this case without enlarging the established jurisdiction of the Court, and because that process is the usual mode of enforcing obedience to the decrees of the Court.

Thomson, Shand, for appellant, Steen.

Arthur, for Townsend.

Goudelock, for plaintiff, Meng.

The opinion of the Court was delivered by

DUNKIN, C. J. The Chancellor, for the reasons stated in his decree, deemed it unnecessary to consider whether the Act of 1841 conferred on the defendant, William Steen, immunity from suit. But the earnestness and ingenuity with which the second ground of appeal has been urged have induced further inquiry. At the time of the service of the subpoena to answer the bill, to wit, April 26, 1861, the residence of the defendant, Steen, was in Union village, and the service was effected by leaving a copy. The defendant was at that time a member of Captain Gadberry's company, in the First regiment of South Carolina volunteers under Colonel Maxcy Gregg, then stationed near Charleston. This was not a corps created under any of the provisions of the Act of 1841, but was a regiment of volunteers organized under special resolutions of the Convention of 1860-61, and commanded by field officers, appointed as therein particularly directed.

But it is difficult to distinguish the terms of the Act of 1841 from those of the Act of

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1794. In the provision for immunity from arrest, the later Act is merely a transcript of the former. So far as may be inferred from previous judicial interpretation of the Act of 1794, the service here made was valid and not inconsistent with the immunity in-

tended by the Act. In *Gregg v. Summers*, 1 McC. 461, personal service on a defendant while on militia duty was set aside, and for the reasons there stated. But the Court add: "A writ may be served by being left at the most notorious place of defendant's abode."

The original order for foreclosure and sale was made June 11, 1861. The sale was not then made; and, in December following, the Act of the Legislature suspended all orders for sale, under decree, &c., until the same should be renewed in open Court, or at Chambers. At the sittings of the Court of Equity for Union, in June last, the previous order was recited, and the sale was directed to take place on the first Monday of August following. The sale was not made until 5 November. The Chancellor states, that, in the meantime, the defendant, Steen, "conferred with the plaintiff as to the division of the mortgaged premises into convenient parcels so as to enhance the price." "He was present at the sale, and purchased part of the property." Other purchasers paid the purchase-money, received conveyances, and a large portion of the money has been paid to the plaintiff's assignee. Late in December, the defendant submitted a motion to the Chancellor to set aside the decree of foreclosure and all the previous proceedings, principally on the ground of want of legal service of the subpoena. This Court is of opinion that the motion was properly dismissed.

The defendant's first ground of appeal objects, that all the mortgaged premises were not included in the proceedings for foreclosure. If the defendant has any equity against other parties, it should be made to appear (as indicated by the Chancellor) by

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the proper proceeding. But, so far as this Court can understand from the facts submitted by the defendant, the mortgage was properly enforced primarily against the last purchaser from the mortgagor. See *Clows v. Dickerson*, 5 John. Ch. 235. The other grounds of appeal are sufficiently met in the decree of the Chancellor; nor do the Court deem it necessary to add to the authorities cited by him for refusing the extraordinary aid of this Court to D. A. Townsend.

The appeal is dismissed.

WARDLAW and INGLIS, JJ., concurred. Appeal dismissed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF APPEALS OF SOUTH CAROLINA

AT COLUMBIA—NOVEMBER AND DECEMBER TERM, 1867.

JUSTICES PRESENT

HON. BENJAMIN F. DUNKIN, *Chief Justice*.
HON. DAVID L. WARDLAW, *Associate Justice*.
HON. JOHN A. INGLIS, *Associate Justice*.

13 Rich. Eq. *222

*WILLIAM G. McKNIGHT v. JOHN A. GORDON.

(Columbia. Nov. and Dec. Term, 1867.)

[*Chattel Mortgages* ⇨85.]

A having become surety for B on a promissory note, the latter executed and delivered to the former a paper writing, by which, "for the full and better securing A from all liability" as her surety, she "bargained, sold and delivered" unto A two negroes, "to have and to hold the same as his own right and title until he shall become relieved from all indebtedness" as her surety "as aforesaid." The negroes remained in B's possession until they were seized by the Sheriff under executions against her:—*Held*, that the paper writing was a mortgage, or "instrument in writing in the nature of a mortgage," within the terms of the Recording Act of 1843.

[*Ed. Note*.—Cited in *Herring & Co. v. Cannon*, 21 S. C. 217, 53 Am. Rep. 661.]

For other cases, see *Chattel Mortgages*, Cent. Dig. § 155; Dec. Dig. ⇨85.]

[*Chattel Mortgages* ⇨153, 194.]

Where a mortgage of a chattel is not recorded, and a creditor, whose debt was contracted before the mortgage was executed, afterwards recovers judgment and issues execution against the mortgagor, and under such execution the chattel is sold by the Sheriff to one who purchases for valuable consideration and without notice of the mortgage, such purchaser is a "subsequent purchaser" within the meaning of the Act of 1843, and is entitled to its protection.

[*Ed. Note*.—Cited in *Hand v. Savannah & C. R. Co.*, 17 S. C. 256; *Herring & Co. v. Cannon*, 21 S. C. 220, 53 Am. Rep. 661; *Ludden & Bates Southern Music House v. Dusenbury*, 27 S. C. 467, 4 S. E. 60.]

For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 255, 426; Dec. Dig. ⇨153, 194.]

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[*Execution* ⇨268.]

*A purchaser at Sheriff's sale takes his title, not mediately, but immediately, from the

defendant in execution, as whose agent, constituted and appointed by law, the Sheriff sells and conveys.

[*Ed. Note*.—Cited in *Horde v. Landrum*, 5 S. C. 215; *Hosford v. Wynn*, 22 S. C. 312; *Morgan v. Smith*, 25 S. C. 339; *Lanaham & Sons v. Bailey*, 53 S. C. 491, 31 S. E. 332, 42 L. R. A. 297, 69 Am. St. Rep. 884.]

For other cases, see *Execution*, Cent. Dig. § 763; Dec. Dig. ⇨268.]

[*Chattel Mortgages* ⇨153.]

The Act of 1843 protects, from an unrecorded mortgage, two distinct classes of purchasers at Sheriff's sales: (1) Those who purchase without notice even where the debt was contracted before the mortgage was executed; and (2) Those who purchase for satisfaction of debts contracted with a subsequent creditor without notice, and here it is immaterial whether the purchaser had notice or not.

[*Ed. Note*.—Cited in *Williams v. Beard*, 1 S. C. 311, 323; *Herring & Co. v. Cannon*, 21 S. C. 220, 53 Am. Rep. 661.]

For other cases, see *Chattel Mortgages*, Cent. Dig. § 257; Dec. Dig. ⇨153.]

[*Execution* ⇨226.]

Where a Sheriff has authority, in fact, to levy and sell, his acts, in levying and selling, will not be invalid because he refers them to a supposed authority, which does not exist; as for instance where the levy and sale are made under a satisfied *fi. fa.*, there being unsatisfied ones, at the time, in the office.

[*Ed. Note*.—Cited in *Agnew v. Adams*, 17 S. C. 371.]

For other cases, see *Execution*, Cent. Dig. § 615; Dec. Dig. ⇨226.]

It is not clearly settled in this State whether the mortgagor of a chattel has such an estate as is the subject of levy and sale under a junior *fi. fa.*, but the practice has been to make levies and sales in such cases, and the better opinion seems to be that he has such an estate.

[*Ed. Note*.—Cited in *Trumbo v. Cumming*, 20 S. C. 336; *Matthews v. Nance*, 49 S. C. 397, 27 S. E. 408.]

[*Chattel Mortgages* ¶84.]

[A chattel mortgage is valid between the parties without record.]

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 152; Dec. Dig. ¶84.]

[*Mortgages* ¶95½.]

[Cited in *Davis v. Days*, 42 S. C. 71, 19 S. E. 975, to the point that recording is not essential to the validity of a mortgage.]

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 206; Dec. Dig. ¶95½.]

[This case is also cited in *Lowrance v. Robertson*, 10 S. C. 31; *McNamee & Co. v. Huckabee*, 20 S. C. 196; *Givins v. Carroll*, 40 S. C. 417, 18 S. E. 1030, 42 Am. St. Rep. 889, without specific application, and cited and followed in *Herreng & Co. v. Cannon*, 21 S. C. 212, 53 Am. Rep. 661.]

Before Dunkin, Ch., at Williamsburg, February, 1860.

The decree of his Honor, the Chancellor, is as follows:

Dunkin, Ch. On 19th May, 1854, the plaintiff united with his mother, Mrs. Jane J. McKnight, in a note to Henry Eady for fifteen hundred dollars, payable 19th May, 1857. On the day following, to wit, on the 20th May, 1854, Mrs. Jane J. McKnight executed the following paper: "South Carolina, Williamsburg District. Know all men, that, for the full and better securing William G. McKnight from all liability for which he may become indebted as my security on any notes, bonds or other agreements, I have bargained, sold and delivered, and by these presents do bargain, sell and deliver unto the said William G. McKnight, my two negro fellows, Bill and James, to have and to hold the same negro fellows as his own right and title until he shall become relieved from all indebtedness or obligation incurred as security, as aforesaid. In witness whereof, I hereunto set my hand and seal this 20th day of May, 1854, Anno Domini eighteen hundred and fifty-

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four. (Signed) *Jane J. McKnight—witness, A. Isaac McKnight." At that time Bill was in possession of A. Isaac McKnight, to whom he had been hired by his mother, in January or February previous, to work by the year. James (the slave in controversy) was an apprentice in the blacksmith's shop of Mrs. McKnight. Dr. Bradley testified that "in March or April, 1855, he bargained with Mrs. McKnight and hired from her two slaves, Augustus and Bill; that one of the conditions was that the plaintiff, William G. McKnight, (who lived between his mother's and the place where the negroes were to work,) was to attend to them, and that she, Mrs. McKnight, was to feed the negroes. When the negroes came, James was with them. Witness asked plaintiff why James came? He replied, he had no work in the blacksmith's shop, and they thought they would put him with the carpenters." James continued to work there till October of that year, (1855,) when he was levied upon by the Sheriff, as

the property of Mrs. Jane J. McKnight. He was advertised for sale on the sales-day of November, but on that day the sale was forbade by the plaintiff. He was again advertised for the sales-day in December, and was on that day bid off by the defendant for nine hundred and twenty dollars, to whom the Sheriff on the same day executed a bill of sale. On the 18th January, 1856, these proceedings were instituted by the plaintiff for the recovery of the slave, James, under the paper of May 20, 1854.

At the time of the levy by the Sheriff in October, 1855, there were in his office several executions to a large amount against Mrs. Jane J. McKnight. One of these executions, to wit, that of Thomas McCants, was entered in the Sheriff's office 26th April, 1854, and was consequently an existing lien at the time of the transaction of May 20th, 1854. The next eldest execution was that of the Bank of the State, 21 November, 1854, for \$2,124, and there were several others between

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that and the levy of 22 October, 1855. *The levy was indorsed on the execution in favor of Thomas McCants, on which an apparent balance was due of two hundred and ninety-nine dollars and fifty-five cents, and in the return of the Sheriff after the sale to the defendant in December, 1855, this case is credited with that sum, and the surplus to the execution in favor of the Bank of the State. It was suggested at a former hearing of this cause that nothing was in fact due on the execution of McCants at the time of the levy; and, upon an inquiry directed, the Commissioner has reported that the debt to McCants was the proper debt of A. Isaac McKnight, for which his mother, Mrs. Jane J. McKnight, was surety; that judgments had been entered against them severally, and executions therefor issued, under which sales of the property of both had been made, and that, upon a proper application of these sales, it appeared that McCants' execution was paid before the levy. But, as already stated, there were, at the time of the levy in October, 1855, other unsatisfied executions to a large amount in the Sheriff's hands against Mrs. Jane J. McKnight, although entered subsequent to 20 May, 1854. The instrument of that date given by Mrs. McKnight to the plaintiff the Court regards as a mortgage. See *Mosely v. Crockett*, 9 Rich. Eq. 339. Such is the obvious construction of the language of the paper. Nor does the Court perceive from the evidence that the possession was ever changed. Bill, one of the slaves included in it, was hired out by Mrs. McKnight to Dr. Bradley in 1855, as she had hired him to A. Isaac McKnight in 1854, and as she hired her other slave, Augustus. James, who had continued in the employment of his mistress in 1854, accompanied Bill and Augustus to Dr. Bradley's when they went to work for him

under his contract with Mrs. McKnight, and he was there when levied upon by the Sheriff.

By the A. A. 1843, (11 Stat. 256), it is declared that "no mortgage, or other instru-

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ment in writing in the nature *of a mortgage, of personal property, shall be valid so as to affect the rights of subsequent creditors or purchasers for valuable consideration, without notice, unless recorded," as therein prescribed. The defendant denies, by his answer, in the most explicit terms, any knowledge, or notice, of the existence of any claim to the property on the part of plaintiff at the time of his purchase at Sheriff's sales in December, 1855, and when he paid the purchase-money of nine hundred and twenty dollars, which he avers to be a full and fair consideration. Nor can this denial of the defendant be justly said to be impugned by the testimony. It is true that the plaintiff attended on the first Monday of November and forbade the sale, but there is no evidence that on that occasion he made known the character of his claim, and his witness says he produced no paper. Whether the defendant was present on the ground that day, or if so, whether he knew what passed, is uncertain. But the slave, James, though not then sold, was kept in the custody of the Sheriff, and was again advertised for sale at December sales. On that occasion the plaintiff was not present, nor did any one in his behalf interfere with the sale. To an inquiry made of the Sheriff whether this was not one of the negroes the sale of which was forbid in November, the Sheriff replied that no sale was forbid on that day, or words to that effect. Joseph E. McKnight, the brother of the plaintiff, and who attended the December sale, testified that he (witness) did not forbid the sale; that he told the defendant, on that occasion, "to make them pay for the negro." An uncle of the plaintiff (Samuel E. Graham) also "requested the defendant not to let the negro be sacrificed." This is in accordance with defendant's answer, that, so far from being put on his guard by any notice of the plaintiff's claim, he was stimulated and encouraged in his biddings by the solicitations of the plaintiff's connections.

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*It was objected to the defendant's title from the Sheriff, that the levy was indorsed on McCant's execution, although there were other executions then in the Sheriff's hands, and part of the proceeds of sale was applied to them. But, in *Giles v. Pratt*, 1 Hill, 239 [26 Am. Dec. 170], it was ruled that a purchaser at Sheriff's sales is only bound to inquire whether the Sheriff has authority to sell. And if he has the authority, the purchaser is entitled to have his act referred to his proper authority. See also *McElwee v. Sutton*, 2 Hall. 361.

It is ordered and decreed that the bill be dismissed.

The plaintiff appealed, and now moved this Court to reverse the decree, on the grounds:

1. Because, it is respectfully submitted, the instrument of 20th May, 1854, when followed as in this case by a delivery of the property, amounted to an absolute transfer of title, with a condition subsequent which never arose.

2. Because, if regarded as an unrecorded mortgage, it is submitted that the evidence, as reported by his Honor, clearly shows a previous notice to the defendant—at all events, it clearly reveals such circumstances as should have put the defendant upon inquiry.

3. Because the delivery of the slave to the plaintiff upon full consideration, independently of the instrument of 20th May, 1854, was a complete transfer of title, and good against the whole world, except creditors who may at the time of delivery have had special or general liens.

4. Because the execution under which the Sheriff levied upon and sold the slave was, at the time, fully paid, and there being no other execution in his office senior in date to the instrument of 20th May, 1854, the levy and sale were void, and the purchaser took nothing.

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*5. Because the purchaser's position cannot be better than the plaintiff's, to whose executions the Chancellor referred as authorizing the levy and sale.

6. Because the Act of 1843, in regard to the recording of mortgages, is not applicable to the case.

Dozier, for appellant.

Porter, contra.

The opinion of the Court was delivered by

INGLIS, A. J. The appeal in this case renews the question made on the circuit, as to the legal operation and effect of the deed of May 20th, 1854, from Jane J. McKnight to the present appellant. Is that deed "a mortgage or instrument of writing, in the nature of a mortgage," as the circuit decree affirms, or is it "an absolute transfer of title, with a condition subsequent which never arose," as is contended in the first ground of appeal? The bill alleges that "it was understood and intended, at the time of its execution, to be an absolute sale," and the chattels thereby conveyed were then delivered into the plaintiff's possession; that "the clause of defeasance was added only for the purpose of enabling the grantor, at some future time, if able and desiring so to do, by repayment of what the plaintiff should pay for her, to reclaim the property."

The terms of this deed, and the circumstances which induced and followed its execution, taken alone, very clearly evince that the transaction, thereby consummated and evidenced, was intended by the parties to be, and is in fact, only a mortgage, and was not

a sale, transferring finally and absolutely the property in the chattels, which are the subject thereof, to the present plaintiff, or even

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one qualified *by a limitation upon an event which was to determine it, or by an agreement for leave to the vendor to repurchase.

The purpose is declared in terms to be, "for the full and better securing William G. McKnight" (i. e. the present plaintiff) "from all liability for which he may become indebted as my" (i. e. Jane J. McKnight's) "security on any notes," &c., and the estate in the chattels which is conveyed to him for this purpose is thus described: "to have and to hold, &c., as his own right and title, until he shall become relieved from all indebtedness or obligation incurred as security as aforesaid." Thus the purpose avowed is, to indemnify and save harmless the plaintiff from and against liabilities incurred as the grantor's surety, and he is accordingly to hold only while such liabilities and their consequences endure. It would be difficult to impress upon the face of an instrument, more clearly than is done in these words, "the character of a security," or more plainly to evince, by language, that the transaction between the parties was a mere loan of the plaintiff's credit, and security for repayment, or protection against consequent loss; and not a purchase and conveyance of the maker's title and estate. To this view the circumstances of the transaction exactly conform. There is no payment of a price, or even transfer to and assumption by the plaintiff, of the grantor's liability to third persons, so as to relieve and discharge the latter, as the consideration for the conveyance. There is an undertaking for the performance of the grantor's engagements, entered into or contemplated, but for this performance the grantor continues, as before, equally with the plaintiff, and as between themselves, primarily liable. The relation of debtor and creditor, or rather principal and surety, had been constituted the day before, was then subsisting, and afterwards continued. It is the fair result of the evidence, that there was no cotemporaneous delivery in fact of the chattel, as the third ground of appeal as-

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sumes. *The plaintiff, William G. McKnight, was then living separately from his mother, Jane J. McKnight. The negro Bill, one of those conveyed, was in the possession of A. Isaac McKnight, under a contract of hiring for the year, and so remained until the completion of the term of hiring. It does not appear that the security for his hire, if any, or the right to receive it, was ever transferred to the plaintiff. The other negro, James, was then learning his trade, in the blacksmith shop of his mistress, the grantor in the deed, and so continued. In the spring of 1855 Jane J. McKnight, the grantor, and not William G. McKnight, the grantee and present plaintiff, in the exercise of the right

of ownership, let the negro Bill, on hire, to the witness, Bradley, to work as a carpenter, and the other negro, James, accompanied him, and they continued in the possession of this bailee of the grantor until seized by the Sheriff. She, not the plaintiff, undertook to supply these negroes with food during the engagement with Bradley, and she stipulated for the plaintiff's oversight of them. There is not wanting some testimony looking the contrary way, but altogether the safest and most satisfactory conclusion from the whole is, that the possession was not and was not intended to be changed. Against this import of the terms of the deed, and the circumstances of its execution, there is no evidence aliunde to support the allegation of an intention other than these evince. If there were, it would avail little. "If the character of a security is once impressed on the conveyance, it is a rule never departed from that no cotemporaneous stipulation can clog the right of redemption, or entitle the creditor to more than repayment of his principal, interest and costs. This rule is expressed in the maxim, 'Once a mortgage, always a mortgage,' and stipulations repugnant to this maxim have often been set aside. Such, for example, are agreements for entitling the mortgagee, after default, to purchase, at a specific

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sum." Adam's *Eq. 112. It is the judgment of this Court, that the deed of May 20th, 1854, was intended to be, and is a mortgage, or, at least, it is "an instrument of writing in the nature of a mortgage," and that, in this particular, therefore, there is no such error in the circuit decree as the appellant in his first and third grounds assigns.

This mortgage has never been recorded. Eighteen months after its execution, the defendant, Gordon, purchased the negro James, one of the two conveyed therein, for valuable consideration, as the property of the mortgagor, Jane J. McKnight, at a sale by the Sheriff, under execution against her, and under this purchase took possession. And the precise issue made by the residue of the present controversy is, Can he maintain this possession, and the title acquired by his purchase, against the plaintiff's prior mortgage and discharged from its lien? The Act of 1843—"To amend the law in relation to recording mortgages," &c., sec. 2—provides, that no "mortgage, or other instrument of writing in the nature of a mortgage, of personal property, shall be valid, so as to affect the rights of subsequent creditors or purchasers for valuable consideration, without notice, unless the same shall be recorded, &c., within sixty days from the execution thereof." 11 Stat. 256. The defendant claims to be a "purchaser" within the protection of this statute.

Recording is not an element in the due execution of a mortgage, and therefore is not essential to its validity. Under the general law regulating the operation and effect of

mortgages, an instrument of this kind, though unrecorded, must necessarily take precedence of the lien of a subsequent execution or of a subsequent sale, whether made by the Sheriff under such execution, or immediately by the mortgagor himself. For having divested himself, for the time, at least, of the estate in the chattel, &c., put in pledge by the mort-

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gage, he of course has no power in law *to dispose a second time of the same estate, until the purpose of the first disposition is satisfied, nor can a subsequent execution confer any authority upon the Sheriff to sell such estate for its satisfaction. But the positive rule of law established by this statute (1843) precludes the mortgagee, who has omitted to put his mortgage on record within the time limited, from interposing the estate which he acquired by it, in bar or derogation of the estate or claim for which one, who is within the term of its protection, has paid. As against such an one, he is, by his omission to record, estopped from asserting his title. The present defendant is, as has been stated, a purchaser "for valuable consideration." The bill avers that he "purchased with full and explicit notice of the plaintiff's claim and right." And the appellant, in his second ground of exception, complains that the circuit decree does not so affirm. The answer of the defendant directly and positively denies that, "at the time of purchase, the defendant was aware of the existence of any such claim as is set up by the plaintiff, or had any notice whatever of his title, if he has any;" denies "that he ever had notice of the existence of the mortgage, or of any claim whatever by the plaintiff to the property therein mentioned;" and affirms that "he paid the purchase-money in good faith, without notice of the plaintiff's claim." No witness clearly contradicts this denial of notice. The testimony which at all touches the point of notice is conflicting, vague and unsatisfactory, nowhere discloses any production of, or reference to the mortgage, or any statement or intimation of the nature of the plaintiff's claim, and is wholly insufficient to impair the effect of the defendant's distinct and positive denial, on oath, in response to the allegation of the bill. It is considered, that upon the case made by the pleadings and evidence, that defendant is a subsequent "purchaser of the mortgaged chattel, for valuable consideration, without notice," of the

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prior unrecorded *mortgage. He fulfils, therefore, in all particulars, the terms of the statute. Why then may he not maintain his purchase against the mortgagee?

It is contended that, though within the terms, the defendant is not within the intention, and therefore not within the protection of the rule of priority established by this statute. The two conflicting titles, between which the law here proposes to decide, are such, it is said, as are both derived im-

mediately from the same grantor. Such is understood to be the affirmation of the sixth ground of appeal, as interpreted by the argument at the bar. Certainly, it can only be a title derived from the mortgagor that can be affected by, and need protection against, the mortgage. Whether a purchaser, for valuable consideration without notice, who holds by title derived from the mortgagor, through mesne purchasers, can merely, upon his own merit as such purchaser, claim the protection of this statute against the mortgage, need not now be discussed. The purchaser at Sheriff's sale under execution against the mortgagor is not considered to be in this position. He takes by his purchase and holds the estate, interest and title, of the mortgagor immediately, without the intervention of any intermediate holder. The judgment and execution are said to constitute a link in his chain of title, to connect him with the mortgagor, defendant in execution. And they do so, just as the power of a vendor's attorney-in-fact constitutes a part of the title of the vendee to whom he has conveyed his principal's title, as creating and evidencing his authority so to do. The sheriff does not, in any proper sense, become the owner or proprietor of the property which he takes in execution, though his possession, taken by virtue of a power coupled with an interest, (being the creditor's interest represented by him,) is protected by the law even against the owner, defendant in execution, until that interest is satisfied.

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*When controversies affecting the civil rights of individuals arise, they may adjust and settle them for themselves. If they distrust their own judgment upon the merits of their dispute, or cannot concur in judgment as to its proper composition, they may refer it for adjustment and settlement to disinterested third parties, and agree to abide their judgments. If they will not do either, they must resort to those tribunals which the law, because it is the interest of the commonwealth that controversies shall cease, has provided for their final and complete determination. In any of these cases the parties are concluded by the result of the particular mode of adjustment they have selected, if there has been no legal defect in the proceeding. The great distinction in effectiveness is, that the tribunals provided by the law execute their own awards; but when the parties select these tribunals, they adopt the whole machinery of adjustment and actual settlements which belong to them. The Courts decide only those controversies which parties bring to them for adjudication. The officer of the law then becomes, in a sense, the agent of the parties—the extent of his powers as such and the mode of their execution being prescribed by the law; and, while acting within the scope of his authority, binds each of them, and represents their respective rights and obligations in the matter. His

deed, under such circumstances, conveying the property of the defendant in execution sold under process for the satisfaction or settlement of the plaintiff's recovery by the judgment of the Court adjusting their controversy, is as the deed of the defendant himself, but without warranty, and concludes the defendant to the same extent that his own deed, similarly qualified, would. The "valuable consideration" paid by a purchaser at Sheriff's sale for a mortgaged chattel sold under execution against the mortgagor, ensures not to the benefit of the Sheriff, but of the mortgagor, to whom, or to whose relief,

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it passes. Having previously procured an advance of money or other value upon it from the mortgagee, he now takes, a second time, its value from the innocent purchaser, who, deluded by the show of ownership which, by the contrivance or connivance of mortgagor and mortgagee, the former maintains, falls, if this statute does not rescue him, into the pit they have joined to dig for him, or, at least, have left exposed to his footsteps without warning.

The mischief, for the suppression of which recording laws have been contrived, consists in the fraud which "knavish and necessitous persons" practice, in selling or mortgaging their lands or chattels for money or other valuable consideration, and, after they have thus divested themselves of all lawful power of disposition, availing themselves of the possession, or other apparent ownership, continued or acquired by them, to obtain, by a second sale, or mortgage, or other equally unwarrantable use of the same property, money, or other value, from those who deal with them in ignorance of the former transaction, and of their consequent want or defect of title, and take either nothing whatever, or, at least, not what they bargained or were induced to look for by their dealing, but, on the contrary, in the language of the old statutes, "do often lose their money and are put to great charges in suits of law and otherwise." The language of the statutes everywhere, and especially in their preambles, sufficiently evince this. The early laws sought to deter men from these practices by punishing, as for a misdemeanor, him who, having once sold any kind of property, or had the benefit of its sale, sold or offered to sell the same property a second time, (A. A. 1791, sec. 1, 5 Stat. 177;) and by depriving of all equity of redemption the mortgagor, who fails to give written notice to his mortgagee of the existence and terms of any prior subsisting mortgage, or other encumbrance, or charge upon the property mortgaged. (4 & 5 W. & M. C.

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16; 2 Stat. 535.) *But the recording laws supply a more effectual correction, by either rendering the consummation of the knavish purpose impracticable, or turning its mischief upon the head of him who, if he does not actually participate in it, by his negligence con-

tributes to its accomplishment. The second purchaser's ignorance of the former sale, &c., is that which alone exposes him to the designs of the "knave," and the advantage taken of that ignorance constitutes the gist of the fraud. The remedy provided, therefore, consists in giving notice, so far as the law can effect this, to all persons of every such mortgage, sale, &c., by requiring of the first purchaser, &c., under pain of the defeat or postponement of his estate, that the deed or other instrument by which his purchase has been consummated, or an abstract of it, shall be recorded within a reasonable time in public books, kept in a public office provided for the purpose, to which office and books all persons may have free access, and to which ordinary prudence will always resort before incurring a risk. Such public registry may not bring actual knowledge of the fact registered to every one, but it is the utmost, so far as the first purchaser &c. is to be affected, that the law can reasonably do, in order to accomplish this result. It is, no doubt, notice in fact to the vigilant, and is, therefore, notice in law to all. When the ignorance, which the recording laws propose to enlighten, does not in fact exist, the fraud, which they would prevent, cannot be perpetrated, and therefore it is that, however peremptory in its terms may be their requisition of registration and their denunciation of the penalties of its neglect, and however absolute the silence of some of them, as to the effect of actual knowledge, the Courts have uniformly, in their construction of these laws, come to hold, that registration, being but a substitute for actual notice and intended to secure this, is not essential when the party intended to be protected has such ac-

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tual notice. Using the law for its *only legitimate end, to suppress the mischief and advance the remedy, they have given it no place where the mischief could not exist and the remedy was not needed. Acting upon a like reason, if those only have been allowed the remedy who are in the mischief to be suppressed, all such as are within this mischief, and not excluded from the terms of the rule, must be admitted to the remedy. Is not he who, without notice of the mortgage, purchases the mortgaged chattel for valuable consideration as the property of, and at a sale under execution against, the mortgagor, equally within the mischief with him who so purchases by immediate negotiation with the mortgagor himself? The damage and the guiltless inability to guard against it are the same; the same outward show of ownership, or lack of notice of its change, beguiles the victim of craft in each case, the same parties contribute by design or neglect to the production of the damage, and the same party enjoys the fruit of the wrong. He who, after his property has once been sold by the Sheriff for his benefit or to his

relief, again, by private bargain, sells it to a purchaser for value, or gets other benefits on the faith of it, without giving notice of the previous sale, or he who, having himself, by private contract, already sold it for value, permits it to be sold under execution as his property to such a purchaser, without making known his previous sale, is certainly likely to be quite as "necessitous" and, ordinarily, quite as "knavish," as he who himself makes two successive sales, &c., for value, without notice of the first, to the second purchaser. And there seems quite as much reason to impute his conduct, in the former case as in the latter, to these properties of his condition and character. To the consummation of the knavery in fact or in law, as the case may be, the silent mortgagee, who fails to put his mortgage upon the public records, contributes equally in the two cases. No doubt the actual harm will be, and often is,

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the *result of mere neglect, without "knavish" purpose on the part of any one concerned, as may be well believed to be the case in the present instance. But the law can only frame general rules having respect to external acts, badges, and results. It would be vain, in administering these, to undertake exploring the secret motives of parties for a test of their application.

Except *Massey v. Thompson*, 2 N. & McC. 105, referred to below, no reported case has been found in which counsel seem to have pressed in argument, or the Court to have discussed in its judgment, with any such special earnestness as would import thorough examination, the inquiry whether, under the several recording laws, or any of them, of the two successive instruments of conveyance, or the deed, mortgage, &c., and subsequent credit, between which the order of priority and preference is, by the laws, regulated, one may be a Sheriff's deed made in pursuance of a sale under execution against the grantor in the other deed, the debtor, &c. But uniformly, and almost without question, this seems to have been assumed.

The Act of 1698, 2 Stat. 137—"To prevent deceits by double mortgages," &c.—provides, that the sale or mortgage of land or chattels, which shall be first recorded as is therein directed, shall be taken to be the first. Nothing is expressed indicating from whom the deeds, &c., are to proceed, any more than the property to be conveyed by them or its identity. These are left to be inferred by necessary implication from the subject-matter and purpose of the Act. In *Barnwell v. Porteus*, 2 Hill Eq. 219, mortgaged land was sold by the Sheriff, under an execution against the mortgagor junior to the mortgage, and the Sheriff's deed, having been recorded, was held entitled, under the Act of 1698, to priority over the mortgage which had not been recorded. In *Youngblood v. Keadle*, 1 Strob. 121, Judge O'Neill, on the circuit and in the

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Appeal Court, insists that the Act *of 1698 was intended to guard against double sales, mortgages, &c., by the same person, of the same goods, &c.; and that, therefore, one who held under the mortgagor, indeed, but through several mesne purchases, the first of which, however, was subsequent to the mortgage, could not, by recording his bill of sale from his immediate vendor, acquire a priority over the mortgage which had not been recorded. Whether the majority of the Court are to be understood as concurring in that opinion does not seem entirely clear, as it was not perhaps necessary to the judgment in the case to maintain it. But, referring to *Barnwell v. Porteus*, the Judge says: "The distinction to which I have adverted was not considered in that case. Still it may be, and I think is, rightly decided, on the ground that the Sheriff's deed was the same as a second conveyance from the mortgagor himself."

The Act of 1785, sec. 45, 7 Stat. 232, enacts that no conveyance of land, &c., shall pass any estate, &c., unless recorded as there prescribed, but shall, in such case, be valid only between the parties and their heirs, and void in favor of creditors or subsequent purchasers. Here, as in the former case, there is an utter silence as to the person from whom the deeds are to proceed, and as to the property to be conveyed. In *Massey v. Thompson*, (ut supra,) the two deeds between which the contest for priority was maintained under the provision of this Act, were deeds made by the Sheriff at two successive sales under execution against the same defendants. The later deed having been only recorded, and the earlier not, the former was held entitled to the priority. The point was made directly in this case as a ground of appeal, that "Sheriffs' deeds are not embraced in the recording Act." But the Court held that the "Act embraces Sheriffs' deeds as well as others." With regard to the relation of the defendant in execution to the Sheriff's deed, Colcock, J., in another part of the opin-

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ion *says: "The defendant ought not to be permitted to oppose the title of a purchaser. The Sheriff's deed is his. He has received the consideration. It has been applied to the payment of his debts. He should be estopped; no more should he be permitted to oppose the recovery of the plaintiff than if he had signed the conveyance with his own hand." In *McFall v. Sherrard*, Harp. 295, the contest was between a Sheriff's deed to the purchaser at a sale under execution, duly recorded, and a prior deed from the defendant in the execution himself to another, not recorded within time. The grantee, under the later recorded deed, had notice of the other deed before he purchased, and this notice excluded him from the precedence he would otherwise have had. In *Steele v. Mansell*, 6 Rich. 437, the later of the two deeds was a

Sheriff's deed to a purchaser under execution, recorded within time; the earlier, a deed from the defendant in the execution himself, recorded not within the prescribed time, but before the later purchase. This earlier deed was preferred because first recorded, under the provisions of the Act of 1698, it being considered that our recording law applicable to such a case is the result of the combined operation of the two statutes of 1698 and 1785. In this case Wardlaw, (D. L.) J., says: "The Sheriff's deed to Haggood is the same as if it had been made by Corbin—a second deed from the same grantor to a subsequent purchaser without notice." Corbin was the defendant in the execution under which the land had been sold. In *Leger v. Doyle*, 11 Rich. 109 [70 Am. Dec. 240], both the deeds, between which the contests for priority was, were Sheriff's deeds to different purchasers, at two successive sales under execution against the same tenant. The earlier deed, though not recorded for many years, was recorded between the second Sheriff's sale and the execution of the Sheriff's deed to the purchaser thereat, and was held entitled to priority over the later deed.

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*The scheme of each of these two early statutes, and of the late Act, (1843,) under the terms of which the present question is made, is the same: simply to postpone an earlier deed, not recorded as required, to a later deed held by one who bought for value, without actual notice of the former deed. All three are alike silent as to the identity of the source from which the several deeds, among which they propose respectively to settle the precedence, must proceed. In the construction of the former, and the administration of the rule of priority, established by each, no distinction has been heretofore made between deeds made by the Sheriff to the purchaser at his sale under execution, and deeds made directly by the defendant himself, in such execution. Both have been practically treated as proceeding from the same source, the deeds of the same grantor, and the Sheriff regarded in his deed, *pro hac vice*, the agent or attorney-in-fact of the defendant in execution. And the Act of 1785, as construed by the Courts, has a provision in favor of subsequent creditors, similar in substance to that contained in the Act of 1843, which is now to be adverted to.

The statute (1843) proposes to protect the subsequent creditors of mortgagor without notice of the mortgage, as well as subsequent purchasers for value without such notice. If the general language of description used must be interpreted to embrace purchasers at Sheriffs' sales, so that such purchaser, if without notice, shall be within its protection, then, it is supposed by the plaintiff here, in order to exclude from its benefits such a purchaser at Sheriffs' sale, it is only neces-

sary to affect him with such notice. No one, who is not in one or other of the two classes described in the statute as within its exception to the general rule regulating the operation and effect of chattel mortgages, can claim the benefit thereof. And, therefore, against every other person, the mortgage must prevail according to its common law efficacy. Such being the case, it is argued,

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the mortgagor and mortgagee, or either of them, may at will wholly defeat the protection intended for the subsequent creditor without notice. When such creditor, having pursued his privileged demand to judgment and execution, proceeds to avail himself of the promised protection by seizure and sale of the mortgaged chattel, for the satisfaction to which the law declares it liable, it needs only to make the fact of the mortgage notorious, in order to arrest all bidding and prevent a sale. It avails the creditor nothing, that, as against him, the whole legal estate in the mortgaged chattel continues, notwithstanding the mortgage, in the mortgagor, if it is left or put in the power of him who by his fraud or neglect seduced him into the credit, and against the consummation of whose design the statutory privilege was intended to secure him, thus to disappoint him of its fruition, by destroying the salable value of the chattel. To guarantee to one a right to sell, and deny to all others a right to buy, would be a solecism in law. It would be imputing folly, as well as mischief, to the law under such circumstances, to say that it either permitted the creditor alone to buy, or precluded him also as a purchaser with, though a creditor without, notice. As a construction of the statute which would thus defeat one of its chief purposes is wholly inadmissible, it is urged that purchasers at Sheriffs' sales under execution against the mortgagor are not in the character of purchasers within the meaning of the statute, but must stand in all cases, whether with, or without notice, upon the right of the creditors, under and for the satisfaction of whose executions they buy, and as they may not fall below, must not rise above, the level of their rights. If, when they purchase under the execution of a creditor who is protected by the statute, they may maintain their purchase against the mortgagee, notwithstanding they bought with notice, it is insisted that it would be an inconsistency to hold that, when, on the other hand, they

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purchase, though without notice of the mortgage, under the execution of a creditor not within the protection of the statute, they can likewise maintain their purchase.

It would be safe to say, that, if this Act of 1843 had, like the old Act of 1698, provided for the protection of purchasers only, its application to purchasers at subsequent Sheriffs' sales under execution against the

mortgagor, would never have been doubted. The purchaser at Sheriffs' sale in *Barnwell v. Porteus*, who, by recording, obtained the precedence over the prior unrecorded mortgage, was himself the creditor, plaintiff in the execution under which he bought, and his debt was entitled to no favor as against the mortgage, having been contracted prior to its execution. But if the general description, "purchasers," when used alone in the earlier Act, *ex vi termini*, included a purchaser at Sheriffs' sale, regarded as a purchaser from the defendant in execution, how can the addition of protection to a certain class of the mortgagor's creditors, so restrict the import of "purchaser" as to exclude him? Yet it is only this additional protection which creates the apparent inconsistency urged as an argument against this larger interpretation of the word. Let it be borne in mind, then, that there are two classes of persons protected against the damage to be apprehended from these undisclosed mortgages: 1. Subsequent creditors of the mortgagor without notice of the mortgage; and 2. Purchasers for valuable consideration without such notice. In order to make the rule effectual for the defence of the former class, it is necessary to insure a good title to purchasers at sales under their executions, whether such purchasers have or have not notice. It cannot matter whether the purchaser know of the mortgage or not, if, notwithstanding the mortgage, the chattel is liable for the satisfaction of the creditor under whose execution it is sold. For all the purposes of such a sale, it is as if the mortgage did not exist, or as if the lien

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of the execution *preceded it in time. The creditor's right to sell cures the infirmity there would else be in the purchaser's title, and, as mortgagor and mortgagee are estopped from disputing the sale, they are, therefore, universally estopped from denying the purchase. In such case the purchase is supported, not for its own sake, or because of the merit of the purchaser, but in order to and as a necessary means of the protection of the creditor. The shield of the statute defends the Sheriffs' vendee, but it is held in the hands of the creditor. But when the purchaser at Sheriffs' sale is without notice, whether the creditor was entitled to subject the chattel to his satisfaction or not, the purchaser may, in his own right, and on the ground of his own merit, interpose the statute between his purchase and the mortgage. Such an administration of this statutory rule as this admits to its protection, under certain circumstances, purchasers at Sheriffs' sale with notice, as, under all circumstances, it does those without notice; and though seeming to the superficial observer to work an inconsistency, is exactly analogous to that in chancery of the defence, against a concealed equity, of "purchase for

valuable consideration without notice," from which system of jurisprudence the rule seems to have been borrowed and applied to the recording Acts, as a defence against legal titles. There a purchaser with notice from a purchaser without notice is protected equally with his vendor—the latter on his own merit and by immediate title, the former on the merit of his particular vendor and as the indispensable means of his security. It may perhaps be inferred from the language of Judge Johnson in *Segurs v. Powers*, (see a brief report of it embraced in the opinion in *Steele v. Mansell*, 6 Rich. 460,) that he would in like manner administer the statutory defence supplied by the recording Acts. Both parties claimed from Kelly, each through mesne holders. The defendant's immediate vendor, Harrall, and the immediate

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predecessor, Jones, of *that vendor, being the purchaser directly from Kelly, both had notice of the deed from Kelly, under which the plaintiff claimed, but the defendant himself bought without notice. The Judge considered that notice to Jones and Harrall could not affect the defendant, Powers. If it did, "the Act requiring the recording of deeds would be nugatory, for he who makes a double conveyance must necessarily know it, and the very object of the Act is to guard against this fraud." This surely means that a purchaser himself, without notice of a prior unrecorded deed from one to whom his own title is traced, may protect himself against it under the recording laws, although those through whom he claims—the mesne holders—could not have protected themselves, and, as against the prior deed, had no title and no estate to convey. It will not of course be questioned, that an immediate purchaser from the original vendor, if without notice of a previous conveyance by such vendor, having thereby a good title, can convey the same, secure against the possibility of successful dispute in the hands of his vendee, to another who knows all about the prior deed. But this is exactly the supposed inconsistency which is considered as resulting from the construction and application of the Act of 1843, which is affirmed by the circuit decree and is here maintained. It is the judgment of this Court, that a purchaser at Sheriffs' sale under execution, is a purchaser from the defendant in such execution, within the meaning and protection of the rule of precedence established by this Act of 1843.

The fourth and fifth grounds of appeal make it a distinct matter of exception to the circuit decree, that the Sheriff, when he made the levy and sale of the negro James, had no authority so to do in his hands. The *fi. fa.* of McCants, lodged before the execution of the plaintiff's mortgage, and at that time still subsisting and unsatisfied in the office, constituted a superior lien, and the

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mortgagee could take *the estate conveyed to him by his mortgage only subject to this lien. If this lien had continued until and at the time of the seizure and sale, profess- edly made only under its authority and chiefly for its satisfaction, the defendant's title would, of course, have been beyond ex- ception, and this controversy could not have arisen. But the McCants' fi. fa., although appearing on its face to be still open and un- satisfied, had been, in fact, wholly paid, and thereby its lien had been finally extinguished before the levy of James. The Sheriff could therefore, at the time of seizure and sale, derive no authority from this execution. *Hunter v. Stevenson*, 1 Hill, 415; *Thrower v. Vaughan*, 1 Rich. 18; *Mouchat v. Brown*, 3 Rich. 117.

But there were in the Sheriff's hands, at the time of levy and sale, sundry other ex- ecutions against the mortgagor, Jane J. Mc- Knight. The Sheriff's official acts in the levy and sale, and the deed made in pursu- ance thereof, will not be made void by his referring them to a power and authority which he has not, if they can be supported by any power and authority which he in fact has. To such actual power and author- ity the law will refer them. *Gist v. Mc- Junkin*, 1 McM. 342. The levy and sale of the negro James must therefore be regarded as made under the several executions of the bank, Wilson, &c., or some of them, to the satisfaction of which, in part, the purchase- money, proceeds of the sale, was in fact ap- plied. But these executions were all lodged subsequently to the date of the plaintiff's mortgage, and therefore constituted no lien upon this negro, the whole legal estate in which, theretofore held by the defendant in execution, Jane J. McKnight, had by the mortgage been transferred to and vested in the present plaintiff, under the general law regulating the operation and effect of chattel mortgages. And the plaintiffs in these ex- ecutions were not subsequent creditors of the mortgagor, and entitled, in this character,

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to the benefit of the excep- tion to the gen- eral law created by the Act of 1843. Their debts had all been contracted before the ex- ecution of the mortgage. These executions, therefore, it is said, conferred upon the Sher- iff no power and authority to levy upon and sell James, as he was not subject to their liens. And various authorities supposed to support this proposition are cited from our own reports. *Bank v. Gourdin*, Sp. Eq. 439; *Spriggs v. Camp*, 2 Sp. 181; *Bellune v. Wal- lace*, 2 Rich. 80; *Payne v. Kershaw*, Harp. 275; *Trescott v. Smyth*, 1 McC. Eq. 486. Whether there is not, under our law, such a legal estate still remaining in the mort- gagor of a chattel, at least until condition broken, as is the proper subject of levy and sale under execution against him, is not per-

haps clearly ascertained by our cases. Cer- tainly his own right to the continued posses- sion and use of the chattel until that event, unless expressly denied to him by special terms in the instrument, would be recognized and maintained even at law. It is equally sure that, by long established and universal usage among us, mortgaged chattels have been and are constantly seized and sold un- der execution against the mortgagor as well after as before condition broken, subject cer- tainly, prima facie, to the lien of the mort- gage. And it would seem more in accord- ance with the present advanced state of the law, that the estate in the mortgagor should be regarded as the legal estate, subject in his hands, and, prima facie, in the hands of all claiming under him by subsequent title, to the charge or encumbrance of the mortgage. In the present case, so far as the Court is informed, the condition of the mortgage was yet unbroken at the date of levy and sale— the note to Eady, on which the plaintiff was surety, having then yet some eighteen months to run before maturity. But let it be con- ceded that this proposition affirmed by the appeal is true. What then? Is the defend- ant's purchase, therefore, void as against the mortgage? It will be observed that the

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*question is not now, whether the plaintiff has any remedy, for the invasion of his rights, against the Sheriff, or against the plaintiffs in execution, who received the pro- ceeds of sale, to which perhaps he was en- titled, and they were not. But has he a rem- edy against the purchaser, Gordon, to avoid or postpone his purchase? It has been shown that purchasers at Sheriffs' sales are in the character of purchasers within the intention, and so within the protection of this Act of 1843. But they can never need that protec- tion except in cases where the Sheriff has no authority to sell. In all others the rights of the execution creditors sufficiently shield them against the mortgagee. Moreover, pur- chasers in general have no need of the pro- tection of the statute, except when and be- cause those from whom they buy have other- wise no lawful authority and power to sell. The mortgagor having, by the execution of the mortgage, parted with the legal estate conveyed by the mortgage, has, of course, no power of disposition over that legal estate left to him, and cannot, proprio vigore, by his conveyance of the chattel, a second time pass the same estate, or discharge the chat- tel from the encumbrance. But because he was the absolute owner of the chattel, and the world knew him as such, and there has been no outward change in the indicia of proprietorship, and no information of the fact of any such change has been given or made accessible to those who are liable to deal with him upon the faith and legal pre- sumption that in this respect things continue as they were, and strangers have been de-

luded by these external badges of ownership into credit or purchase, those who have contributed to the delusion by their culpable design or negligence are estopped from averring to the contrary of that of which the outward show has induced the belief, on setting up their secret conveyance of title to defeat the transactions that have proceeded upon such a belief. The same considera-

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tions which entitle a conveyance, &c., directly from the former owner himself, to protection and support, in spite of his other want of power to convey and forbid the denial of that power, set up and establish a conveyance from the Sheriff upon a sale under execution against such former owner, although the chattel was not liable to the lien of the execution, and the Sheriff, therefore, had no authority to sell it. He had authority to sell the property of the defendant. The defendant is not permitted to deny that the chattel thus apparently his, and to which he is found exercising some right of possession, is his, and the statute extends the prohibition and estoppel to the mortgagee, as participator in the fraud which would otherwise result. In *Barnwell v. Porteus*, (et supra,) the execution under which the land was sold had been lodged, as the judgment, to be enforced by it, had been entered, after the execution of the mortgage, and the debt, which had been the cause of action therein, had been contracted before the making of the mortgage. It was expressly decided that the *fi. fa.* in the Sheriff's hands against the mortgagor, conferred upon the officer no power and authority to levy upon and sell the whole absolute estate in the land. Yet the purchaser, although he was himself the creditor, was permitted, as a purchaser who had first recorded his deed, to hold against and over the mortgage.

It is the judgment of this Court that the grounds of appeal present no just exception to the circuit decree, and that this decree should therefore be affirmed. And so it is ordered.

DUNKIN, Ch. J., and WARDLAW, A. J., concurred.

Decree affirmed.

13 Rich. Eq. *250

*EZEKIEL F. HYDE v. ELIJAH M. COOPER.

(Columbia. Nov. and Dec. Term, 1867.)

[*Frauds, Statute of* § 110.]

A written memorandum of an agreement for the sale of land, which does not describe the land, but refers for its identity to a verbal agreement between the parties, either subsisting or afterwards to be made, does not satisfy the requirement of the Statute of Frauds, and

cannot therefore be enforced on bill for specific performance.

[Ed. Note.—Cited in *Humbert v. Brisbane*, 25 S. C. 510; *Boozar v. Teague*, 27 S. C. 357, 363, 3 S. E. 551; *Kennedy v. Gramling*, 33 S. C. 383, 11 S. E. 1081, 26 Am. St. Rep. 676; *Peay v. Seigler*, 48 S. C. 496, 507, 510, 26 S. E. 885, 50 Am. St. Rep. 731.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 225; Dec. Dig. § 110.]

Before Johnson, Ch., at Laurens, June, 1866.

The decree of his Honor, the Chancellor, is as follows:

Johnson, Ch. About the first of June, 1864, the complainant and defendant entered into an agreement, by which the complainant was to convey to the defendant a small piece of land, with a dwelling-house and some other houses upon it—which was very near the residence of the latter—and to pay to him the sum of \$1,300; and the defendant was to convey to the complainant two separate pieces of land—one supposed to contain thirty-five or forty acres. These pieces of land had not been separated from the main body of the defendant's land.

The complainant, in the bill, alleges that the two small pieces of land were, by the agreement, to be exchanged, and that he was to pay the \$1,300 to the defendant for the larger piece.

The defendant, in his answer, denies that that was the agreement, and alleges that he was to receive the small piece of land and the \$1,300 as the consideration for his two pieces of land; and that the small piece of land of the complainant was the principal inducement with him in entering into the agreement, in order that he might have the control of the settlement upon it.

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*On the 3d day of June, 1864, the complainant paid the defendant \$100, and took from him the following receipt, to wit:

"This is to certify that E. F. Hyde has this day paid to E. M. Cooper \$100, in part payment of the purchase-money of a tract of land to be defined according to lines and corners previously agreed upon, being a part of the sum of \$1,300, the price of said land; and I do hereby certify that I will give titles immediately.

(Signed)

"E. M. Cooper.

"June 3, 1864."

Some time during the month of June of the same year, the parties procured Reuben Martin, a surveyor, to go upon the premises and run out the several parcels of land; which he did by corners which were agreed upon by the parties—by which it was ascertained that the larger tract to be conveyed by this defendant contained seventy-seven acres, and that the smaller one contained three and one-half acres, and that the tract to be conveyed by the complainant contained two and one-half acres.

The defendant, in his answer, admits sign-

ing the receipt, but states that, when the complainant wrote and read the same to him, that he "remarked to complainant that it was not full and complete, inasmuch as the defendant was alone bound therein to make titles, and that the quantity of land to be conveyed was left entirely out;" to which complainant rejoined that "it was a memorandum, showing the amount of money mentioned therein had been paid upon the contract, and was not intended to embrace the whole contract; and that he (the complainant) would do right—would carry out the whole contract, and would convey to defendant the lot which he had contracted to convey," and upon which statement the defendant signed the receipt, and delivered it back to the complainant—and also, that the num-

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ber of *acres had been increased by the surveyor running one line, at the request of the complainant, differently from that which had previously been agreed upon, with the understanding that he would pay for the additional number of acres what they were reasonably worth.

The defendant further stated, in his answer, that soon after the survey, Mrs. Hyde, the wife of the complainant, informed him and her husband that she objected to the sale of the lot of land that was to be conveyed by the complainant, saying, "that it had been the homestead of her father, or some of the family, and that she could not give her consent that it should be sold off." The defendant then said to the complainant, that, unless that portion of the agreement was carried out, he was unwilling that any portion should be carried out; and understanding that the complainant had no titles to the land, it being the inheritance of his wife, he announced to the complainant that the contract was at an end, and tendered back to him the \$100 which he had paid, which was refused. These allegations of the answer are not supported by other evidence, and consequently can have no bearing on the decision of the case, except so far as they are responsive to the statements of the bill.

On the seventh day of July, 1864, the complainant sent by Mrs. Hunter, in a letter, (a copy of which was offered in evidence,) \$1,200 in Confederate money, to the defendant, in payment of the balance due on the land trade, but made no offer to give titles for the two and one-half acres of land to him. The money was refused by him.

Reuben Martin, the surveyor, testified that the defendant told him, after the survey, that he supposed there would be thirty-five or forty acres in the large tract to be conveyed by him, and that he inferred, from a conversation with Mr. Hyde, if he did not say so to him expressly, that he got so much more land than he expected, that he pro-

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*posed as a matter of compromise, to pay

Cooper \$600 more than he agreed to pay. He also testified, that "the understanding I had was, that the exchange of the two lots was the agreement," without stating from whom he received his information.

The said lot of land, containing two and one-half acres, at the time the agreement was entered into, belonged to the estate of Mrs. Mary Hunter, the mother of Mrs. Hyde; but since that time, it had been set apart, by proceedings in partition, to Mrs. Hyde, subject to the following provisions in the will of Mrs. Hunter, to wit: "The balance of Nancy A. Hyde's share shall pass into the hands of M. M. Hunter—giving her power to use the same in any way that he may think best for her interest and comfort, always consulting her."

The bill was filed on the thirteenth day of October, 1864, and prays, amongst other things, that the defendant may be decreed "to execute" to the complainant "titles for said lands, according to the true intent and meaning of said agreement, and surrender possession of said lands" to the complainant.

The defendant, in his answer, submits that the contract, of which the complainant seeks the specific performance, is a verbal one—never reduced to writing, or any sufficient memorandum thereof—and that it is, therefore, void, under the Statute of Frauds, which is pleaded; and that the complainant had not performed, and was not in a condition to perform, his part of the contract, at the time of filing the bill, and that it should, therefore, be dismissed.

It is admitted by the bill and answer that there was but one agreement. And although the terms of the receipt might imply that there were two separate and distinct parts of the same, I am of the opinion, both from the direct and positive allegations of the answer in response to the bill, and from the fact that the small lot of two and one-half acres had valuable improvements on it, and

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from the further fact that the larger lot of land of the defendant was worth from six to ten dollars per acre in good money, before the commencement of the war, that the agreement was an entire one, without any independent facts.

In *Neufville v. Stuart*, 1 Hill, Eq. Rep. 166, Judge O'Neill states that, "so the consideration to be paid, the time of payment, and a description of the property to be sold, appear from any written memorandum, signed by the party to be charged, sufficiently certain to enable the Court to decree a specific performance, it is all that is necessary." The written memorandum must contain all the terms of the agreement in it, and resort cannot be had to parol evidence to help it out, or to extrinsic evidence. *Hatcher et al. v. Hatcher et al.*, McM. Eq. 318. Are all the terms of the agreement to be found in the receipt of the 3d June? Had the lines and

corners been agreed upon before that time, or were they to be agreed upon before they were run out by a surveyor? Which of the two tracts is referred to in this receipt? Does it cover the whole agreement, or only a part of it? Before the Court would be justified in decreeing specific performance, the agreement should be unambiguous and definitely ascertained, and nothing should be taken by conjecture.

The opinion of the Court is, that the complainant has not brought himself within the prescribed rules, and that the plea of the Statute of Frauds must prevail. I am also of the opinion that there was no such part performance of the contract as would take the case from under the provisions of the statute.

At the trial of the case, the complainant did not have a good marketable title to the little lot of land that was to be conveyed by him to the defendant, and I think the prayer of his bill must be refused on that account also.

It is ordered and decreed that the bill be dismissed with costs.

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*The complainant appealed, and now moved this Court to reverse the decree, on the following grounds:

1. Because the memorandum in writing was sufficiently comprehensive and definite in its terms to take the case out of the Statute of Frauds, and entitle the complainant to specific performance. And that the surveyor had no difficulty in locating the lands according to the corners previously agreed upon by the parties, and pointed out by them to him as those referred to in the memorandum.

2. Because the complainant complied, as far as defendant would permit him, with his part of the contract, and was always ready and willing to do so fully; and that what he did was sufficient to entitle him to a decree for specific performance.

3. Because the trustee of complainant's wife, Dr. M. M. Hunter, was before the Court, and swore that he approved the contract made by complainant, to exchange the small piece of land with defendant, and would make titles to the same, so that there was no deficiency in the title, and defendant was bound to take it.

4. Because, from the testimony of the whole case, the complainant was entitled to a decree for specific performance.

Sullivan, for the motion.

Young, Simpson, contra.

The opinion of the Court was delivered by

WARDLAW, A. J. The bill states the defendant's agreement to convey to the complainant a tract defined by lines and corners, and by survey found to contain seventy-seven acres, in consideration of \$1,300, and,

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speaks of this as part *of an entire agreement, whereby there was also to be exchange between the parties of two smaller tracts. It exhibits a memorandum signed by the defendant, by which he acknowledged the receipt from the complainant of \$100, "in part payment of the purchase-money of a tract of land to be defined according to lines and corners previously agreed upon, being part of the sum of \$1,300, the price of said land, and I do hereby certify that I will give titles immediately." And further, the bill states that, soon after the receipt was signed, a surveyor did, in the presence of the parties, survey the larger tract according to lines and corners shown by the parties, in conformity with their previous agreement, and made a plat which shows that the tract contains seventy-seven acres, and further, that the complainant has tendered to the defendant \$1,200, the balance of the purchase-money, and is ready to make to the defendant titles for the small tract which complainant was to give in exchange, and to execute the whole agreement in full.

The answer avers that the defendant's agreement was to convey two tracts in consideration of \$1,300, and also of a third tract which was important to the defendant, and the principal object in his view; does not admit that, before the survey, the defendant had definitely agreed upon any lines for the larger tract, but sets forth that, for their mutual accommodation, the parties had agreed concerning three parcels, which were to be taken from the tracts upon which they respectively resided, and as to the larger parcel, had spoken of thirty-five or forty acres, to be contained in lines which were vaguely pointed out as likely to run in certain directions, and that, when the surveyor came, he was permitted to run certain lines experimentally for ascertaining what they would contain, but the quantity and delineations of his plat never were assented to by the defendant, who claims the benefit of the Statute of Frauds.

It is manifest that here is such discrep-

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cy of statement *that no mere verbal agreement as to the land to be conveyed can be enforced upon the ground of defendant's acknowledgment in his answer, and the case depends upon the written memorandum.

The memorandum contains no description but by reference to a verbal agreement, and however precise that may have been, however exactly the survey corresponded with it, the question at last is, how the Statute of Frauds has been satisfied. "A tract of land to be defined," shows something essential subsequently to be done. "According to lines and corners previously agreed upon," seems to imply particulars which the parties shall agree upon previously to the defining. But even if the meaning is, a tract to be rep-

resented by a plat, which shall be made according to a scheme upon which the parties have agreed, here is a contract partly in writing, and partly in parol, and the parol relates to the very important particular, the description of the thing to be conveyed. In a contract in writing, upon a matter to which the Statute of Frauds does not extend, reference to a verbal agreement might avail, as in such case a new contract, superseding the written one, might be shown by parol. But where the Statute of Frauds requires writing, even another instrument of writing referred to in the memorandum must be, by the memorandum, so described, that, by the description, it may be identified, and thus become part of the contract; and the instrument referred to must be in existence at the time when the memorandum was signed, otherwise the connection can of course be established only by parol. Phil. Ev. pt. 2, ch. 8, § 2; Clayton v. Nugent, 13 M. & W. 200. Much less can the requisitions of the statute be complied with by a writing, which refers to a verbal agreement, whether that agreement is subsisting or afterwards to be made. The memorandum here mentions a tract of land, but a tract altogether uncertain. What tract? One that shall be defined

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—say surveyed *and represented by a plat; that plat is to be made according to the defendant's agreement, but there had been no agreement except by words, and the case is no better than if the defendant had promised, by the memorandum, to convey such quantity as afterwards it should please him to convey.

The order made by the Chancellor for dismissal of the bill with costs is affirmed.

Motion dismissed.

DUNKIN, Ch. J., and INGLIS, A. J., concurred.

Appeal dismissed.

13 Rich. Eq. *259

*V. V. AUSTIN v. WARREN KINSMAN.

(Columbia. Nov. and Dec. Term, 1867.)

[Bills and Notes ⇨131, 511.]

Where a promissory note was executed in this State in 1862, payable in "dollars," two years after date: *Held*, that proof of the state of the currency, and of what it consisted at the time, and that part payments, at different times, were made in Confederate treasury notes, was insufficient to show that by "dollars" the parties meant such notes, and thus vary or add to the terms of the contract.

[Ed. Note.—For other cases, see Bills and Notes. Cent. Dig. §§ 313, 1760; Dec. Dig. ⇨131, 511.]

[Payment ⇨14.]

A creditor who received part payments in Confederate treasury notes is not entitled, under

the Ordinance of 1865, to have the amounts reduced.

[Ed. Note.—Cited in *Fluitt v. Nelson*, 15 Rich. 11; *Mayer v. Mordecai*, 1 S. C. 398; *McKeegan v. McSwiney*, 2 S. C. 197; *Johnstone v. Crooks*, 3 S. C. 203; *Geigers v. Kaigler*, 9 S. C. 429; *Black v. Rose*, 14 S. C. 280; *Hyatt v. McBurney*, 18 S. C. 220.

For other cases, see Payment, Cent. Dig. §§ 91-98; Dec. Dig. ⇨14.]

[Evidence ⇨419.]

In a bill to enforce payment of a note made in this State in October, 1862, and payable in "dollars," the defendant, for the purpose of obtaining a reduction of the amount, may, under the Ordinance of 1865, show "the true value and real character of the consideration."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1925; Dec. Dig. ⇨419.]

[Payment ⇨14.]

The mode of applying the relief intended by the Ordinance, in a case where there had been payment before the Ordinance was adopted, stated.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 91-98; Dec. Dig. ⇨14.]

Before Johnson, Ch., at Orangeburg, February, 1867.

The decree of his Honor, the Chancellor, is as follows:

Johnson, Ch. On the 2d day of October, 1862, the complainant sold and conveyed to the defendant a tract of land containing two hundred and ninety acres, lying in the district aforesaid, together with certain negroes, cattle, horses, &c., thereon for the prices stated in the schedule, filed with the bill and marked "A," amounting in the aggregate to the sum of seven thousand seven hundred dollars, two thousand dollars of which was paid, at the time, in Confederate Treasury notes, and for the balance of the purchase-money the defendant gave his two promissory notes, each for the sum of two thousand eight hundred and fifty dollars, with interest on the same from the time aforesaid, one payable in one year, and the

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other in two years after the *date thereof; and for the purpose of securing the payment of the notes, the defendant executed a mortgage to the complainant for the land and other property included in the trade.

When the first note became due the defendant paid it with Confederate treasury notes, and the complainant received one thousand dollars of the second in part payment, but refused to receive the balance.

The bill in this cause was filed for the purpose of foreclosing the mortgage, to enforce the payment of the balance due on the second note. The defendant, in his answer, insists "that the default of payment does not lie with him, and he denies that he owes any thing upon the claims except the sum of eighteen hundred and fifty dollars in Confederate currency, and of date October the second, eighteen hundred and sixty-four, and that this sum he is and always has been

ready to pay over to the complainant whenever he has been or is ready to receive it."

The tender of Confederate treasury notes cannot be regarded as a legal tender of money, and the counsel for the defendant do not claim that it should be so regarded, but insist that, inasmuch as such notes constituted the only currency that existed at the time the trade was made, and from the further fact that the payments, at different times, were made in such notes, that there was at least an implied contract between the parties that the promissory notes were to be paid in Confederate treasury notes, and that payment in no other currency can be demanded.

The opinion of the Court is, that no implied contract can be set up and sustained so as to defeat the express terms of the papers executed to pay so many dollars and cents, and that the most that can be inferred from the facts is, that the property was sold on the basis of the value of Confederate treasury notes at the time the sale was made, and that the defendant can claim

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nothing more than to reduce the balance due on the unpaid note, under the provisions of the ordinance of the Convention. The complainant contended that if the fact that the property was sold on the basis of the value of Confederate money, renders it proper to measure the balance due by the real value of the property sold, the same rule should apply to the payments in Confederate notes; but as the complainant received them as so much money, they must be so considered, without regard to the depreciation.

It is ordered and decreed that the above opinion be taken as the judgment of the Court, and that it be referred to the Commissioner to ascertain and report the amount really due on said note, and that in so doing he do regard the provisions of said ordinance.

The complainant appealed, on the grounds:

1. That as the Chancellor ruled that the complainant was bound to credit the payments in Confederate treasury notes, at par, because he had accepted them, he should, on the same principle, have ruled that defendant was bound to take the property at its inflated value.

2. Because on no principle can a different rule be applied to the inflation of property (or value) and the inflation of its representative.

3. Because the decree should have directed that the property sold be estimated at its real value, and the cash payment in treasury notes, at time of sale, credited, reduced in the ratio of the real estimated value of the property to the price agreed on, and the after payments credited with the treasury notes at their purchasing capacity at the time of payment, and the balance left, after fixing the value as indicated, and deducting

the payments on the same principle, be paid to complainant.

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*The defendant also appealed, on the ground:

Because the circumstances of the transaction, as developed in the pleadings, prove that the trade was in Confederate currency, and that the credit portion of the purchase was to be paid in Confederate currency; so that when the defendant tendered Confederate treasury notes for the last note due, whilst such money was current and had value, he fulfilled the terms of his contract, and satisfied the mortgage.

[For subsequent opinion, see 1 S. C. 97.]

Hutson and Legare, for complainant.
Simonton and Glover, contra.

The opinion of the Court was delivered by

INGLIS, A. J. The defendant, Kinsman, by his promissory note, to enforce the mortgage security for the payment of which note this suit has been brought, undertook to pay to the plaintiff on the 1st October, 1864, two thousand eight hundred and fifty dollars. "Dollar" has a known legal meaning ascertained by statute, as much so as any other word or form of expression designating or having reference to a standard of measurement prescribed and established by law. (Vide *Hockin v. Cooke*, 4 Ter. Rep. 314.) It is a silver coin of a fixed weight and fineness, issued and made current by the authority of Congress, in the exercise of its constitutional power to that end. By the same authority other gold and silver coins are issued and made current, each as the legal equivalent of an ascertained number of dollars or fractions of a dollar, and made a legal tender in satisfaction of debts or obligations to pay any sum of money or any number of dollars. These coins constitute the lawful money of the country, and, at least, *prima facie*, the only lawful money.

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Performance of such an undertaking as the present can be effected in law only by the delivery and acceptance of the sum promised in such lawful money, unless the creditor shall consent to receive some substitute therefor. The State Government is expressly restrained from making any thing else than such gold and silver coins lawful money, and so a legal tender. If the Confederate government, which, for the time during which this contract was made and to be performed, occupied, at least, *de facto*, that relation to the State in this behalf which the Federal government of the United States previously had occupied and now does occupy, had the power to make any thing else than such coins "lawful money," it did not do so, nor attempt it. The treasury notes, which from time to time were issued by the authority of that government, were never made, nor

were any of those issues made, a legal tender in payment of debts.

Undoubtedly the word "dollar" may be used in a contract in a sense other than this, its statute definition, and effect will be given to it accordingly, if the intention to use it in such modified sense is so evidenced that the law can take cognizance of it. Qualifying or explanatory terms superadded in immediate connection or for the specific purpose in the contract, or other express terms and provisions therein, necessarily implying such intention, would be competent evidence for this purpose. But when the contract is reduced to writing and does not itself contain such evidence, it would be very difficult, if possible, in law, to show by parol that the term was used in some other than its technical sense, and that the intention of the parties was other than what that sense of the term imports. (Vide 1 Greenl. Ev., sec. 280, at end of the section.) Certainly parol evidence could not be heard, detailing the declarations of the parties themselves contemporaneous or otherwise, for this purpose. Whether such evidence might be heard disclosing extrinsic facts constituting the

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situation or "surroundings" of the parties at the time of contracting, calculated to induce a conviction that such special sense must have been intended, it is not necessary now to decide. For if it were conceded that a departure, in the intention of the parties, from the strict legal meaning of the word "dollar" could thus be shown, the present defendant could take nothing by the concession, since he has not, either in this or any other mode of proof, in the judgment of this Court, demonstrated such departure.

He alleges that his promise to pay "two thousand eight hundred and fifty dollars" was intended and understood by the plaintiff and himself, as a promise to pay Confederate treasury notes to that amount, according to their nominal value. The intention and understanding are to be inferred, he says, from the surroundings of the parties at the time of the contract. There was then in actual use no currency other than these treasury notes; they constituted the only medium of exchange in the use of which the internal commerce of the country was carried on, the only standard of values; the value put upon the plaintiff's property, sold to the defendant, was estimated with reference to this standard; payment of the cash portion of the purchase-money, of the earlier to mature of the two promissory notes given to secure the credit portion, and of a considerable part of the second note, was actually accepted in such currency.

The value of these treasury notes, like that of all mere paper substitutes for money, compared with coin, was necessarily unstable. Besides this common infirmity, they had the further peculiar defect that they

were redeemable only on a contingency, and at a future day thereafter. The evidence ought to be very clear and urgent that would induce the belief that a party intended to bind himself to accept such a currency in payment for his property sold upon a credit of one and two years. That the price at

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*which this property was sold was, to some extent, enhanced by the depreciation of this currency, is not only probable, but almost certain, but to what extent is not by any means so manifest. Wherever bank notes or other such paper substitutes for money constitute practically the currency of a country, by means of which its exchanges are in fact effected, the prices of commodities will necessarily be more or less influenced by the comparative value of such currency, as affected by expansion or contraction, by the greater or less prevalence of confidence or distrust in the solvency of the banks, etc., issuing such notes or otherwise. The argument would go to the length of maintaining that, in all such cases, the agreement of the parties to a contract for the payment of money, must be understood to be for payment in such currency, and that the creditor is in law bound to receive the same in satisfaction, without reference to its subsequent depreciation. To give the effect, which the defendant's argument claims for them, to such circumstances, would work great injustice to individuals, and practically nullify the laws of legal tender.

A creditor, though entitled to demand payment in lawful money, may waive his right, and accept any substitute he pleases, and his voluntary acceptance of such substitute as payment makes it so. When the paper substitute for money, circulating in a commercial country, is not materially depreciated, it will, for convenience and out of a spirit of accommodation, be almost universally so accepted. But such acceptance cannot justify an inference, that the party intended to bind himself originally, that the engagement to him might be so satisfied. Experience, which teaches that in this matter men do not generally exact their strict legal rights, contradicts such an inference. The fact that a creditor has consented to receive such substitute for money, in payment of part of his demand, cannot warrant a judgment that he

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shall receive the residue in the same form. The affirmation, by the Court, of such a proposition as this argument involves, would not only, like the former, contribute largely to the practical nullification of the laws of legal tender, but, in its working, be most unfortunate for debtors. Payment in gold and silver, or other legal tender, if other there be, would then always be insisted on where it was only in part satisfaction of the demand.

The circumstances relied on by the defend-

ant, as evincing that it was the intention of the parties to this undertaking that it should be satisfied by payment of the sum stipulated, in Confederate treasury notes, are not sufficient, in the judgment of this Court, to induce the belief of such intention, and there is, therefore, no such error in the circuit decree as the defendant's appeal assigns.

The plaintiff was, then, not bound in law to accept any thing in satisfaction, wholly or in part, of the defendant's engagement, other than lawful money, or what, by competent authority, had been duly constituted a legal tender. If, however, he has voluntarily accepted as payment any substitute for such lawful money, to whatever extent he has done so, his acceptance makes it payment in law. Here the whole sum due under the original contract of the parties, except eighteen hundred and fifty dollars, with the interest accrued thereon, according to the tenor of the second note, was, in several parcels, paid in Confederate treasury notes, which the plaintiff voluntarily, without any compulsion of law, accepted as so much money. The great depreciation of such notes, in the intervals between the date of the contract and the respective dates of the two subsequent payments, constituted a very sufficient reason why neither fairness towards the defendant, nor patriotism towards the Government that issued them, required the plaintiff to receive them as money. He, however, chose so to take them, and to that extent, therefore, in law, the debt is paid.

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*The agreement between the parties is, and, before the date of the ordinance of the Convention, was, thus far, executed by the defendant, as it had in the beginning been in full by the plaintiff. All that was wanting to its complete and final execution, was the payment of the balance of eighteen hundred and fifty dollars, and to this extent it was still executory.

The Convention did not design to go back through all the transactions of the period covered by the terms of its ordinance, and undo such of them as the parties had consummated. Only so far as agreements yet remained executory, and could be the subject of "actions" to enforce them—because, so far only in such still uncompleted contracts as execution remained to be done, it must be, under circumstances widely changed from those under which they were made—did the Convention propose to interfere. Its ordinance does not authorize any disturbance or reopening of so much of the contract as had been performed.

The plaintiff's bill, admitting the payment of the whole debt, except a balance of eighteen hundred and fifty dollars, seeks to compel the payment of this balance only, and for the insuring of this alone, asks that the specific lien of the mortgage may be enforced. Under the terms of the ordinance the defendant is entitled to the inquiry, whether, in order to "effect substantial justice between the parties," it is not necessary that less than eighteen hundred and fifty dollars in lawful money shall be accepted by the plaintiff, in satisfaction of this balance, and, that this inquiry may be rightly determined, to "introduce testimony showing the true value and real character of the consideration." Prices were undoubtedly, and beyond the control and often against the purpose and desire of parties, so largely affected by the abnormal and extraordinary condition of the practical currency, during the period embraced within the terms of the ordinance, that the en-

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forcement of *contracts then made according to the literal import of their terms, though but for this ordinance strict law might perhaps have so required, would have been in a high degree inequitable and against conscience. The proper mode of applying the relief intended by the ordinance, to the present case, is indicated by the judgment below. What sum in lawful money will, under the particular circumstances of the case, be a just representative of the value, falsely expressed by the exaggerated price named in the contract, is the first inquiry to be solved. When this shall have been ascertained, then a sum, bearing the same proportion to that so ascertained as this nominal balance of eighteen hundred and fifty dollars bears to the whole nominal price of seven thousand seven hundred dollars, will be the quantity sought, and will correctly express the sum which, with interest from the day from which the eighteen hundred and fifty dollars would, by the terms of the second note bear interest, the plaintiff is entitled to recover. For the satisfaction of this recovery he is further entitled to an order for the sale of the mortgaged premises, and consequent foreclosure of the mortgage.

The circuit decree exactly conformed to this view, and, being, therefore, not liable to the plaintiff's exceptions, is affirmed.

The appeals are dismissed.

DUNKIN, Ch. J., and WARDLAW, A. J., concurred.

Decree affirmed.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

COURT OF ERRORS

AT COLUMBIA—DECEMBER TERM, 1867.

JUSTICES PRESENT:

HON. BENJAMIN F. DUNKIN, *Chief Justice*.
" DAVID L. WARDLAW, *Associate Justice*.
" THOMAS W. GLOVER, *Circuit Judge*.
" ROBERT MUNRO, *Circuit Judge*.
" JAMES P. CARROLL, *Chancellor*.
" JOHN A. INGLIS, *Associate Justice*.
" FRANKLIN J. MOSES, *Circuit Judge*.
" THOMAS N. DAWKINS, *Circuit Judge*.
" HENRY D. LESESNE, *Chancellor*.
" WILLIAM D. JOHNSON, *Chancellor*.

13 Rich. Eq. *269

*LEVI F. RHAME v. WILLIAM LEWIS,
JOHN R. POLLARD and Others.
(Columbia. Dec. Term, 1867.)

[*Executors and Administrators* ⇐115.]

An administrator, who held single bills, which he had taken for chattels of his intestate sold by him by leave of the Ordinary, and which, on their face, were payable to him as administrator, wishing to raise money for his private purposes, purchased negroes on credit, intending

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to sell them for *cash, and in that way raise the money he wanted, and, to induce P. to become his surety for the purchase-money of the negroes, offered to transfer the single bills to him as indemnity, representing that they were his own property, that he was in advance to his intestate's estate, and that when it was wound up the distributees would be in debt to him. P. became his surety on the terms proposed, and the single bills were transferred to him. It turned out that, instead of being in advance, the administrator was at the time largely indebted to his intestate's estate, and a decree was shortly afterwards rendered against him for a larger balance due the distributees: *Held*, that the single bills were, in P.'s hands, unadministered assets of the estate of the intestate, and that P. could not hold them, nor any money he had collected on them, as against a surety on the administration bond for whose indemnity it was necessary that they should be restored to the estate.

[*Ed. Note.*—Cited in *Gary v. People's Nat. Bank*, 26 S. C. 548, 549, 2 S. E. 568, 4 Am. St. Rep. 733; *Redlearn v. Craig*, 57 S. C. 545, 35 S. E. 1024.

For other cases, see *Executors and Administrators*, Cent. Dig. § 468; Dec. Dig. ⇐115.]

[*Executors and Administrators* ⇐158.]

No valid alienation of an intestate's personal chattels, or visible effects, can be made

by an administrator without a previous order of the Court of Equity or Ordinary.

[*Ed. Note.*—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635; Dec. Dig. ⇐158.]

[*Executors and Administrators* ⇐158, 167.]

A valid alienation by way either of sale or pledge of the choses in action belonging to the intestate estate may be made by the administrator of his own motion, to any one who takes them bona fide and for full value, not grossly inadequate, and upon such alienation will be discharged of all equities which attach upon them merely as assets.

[*Ed. Note.*—Cited in *Reynolds v. Rees*, 23 S. C. 446, 447; *Henderson v. Kinard*, 29 S. C. 17, 6 S. E. 853; *Chapman v. City Council of Charleston*, 30 S. C. 559, 9 S. E. 591, 3 L. R. A. 311.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 634, 635, 644; Dec. Dig. ⇐158, 167.]

[*Executors and Administrators* ⇐167.]

An appropriation by an administrator of the assets of his intestate to his own private use is, prima facie, a breach of trust, and a fraud upon the rights of those interested in the estate, and he who, knowing the purpose of the administrator so to appropriate them, purchases them from him, or advances him money upon their pledge, whereby the fraud is actually consummated, takes them mala fide.

[*Ed. Note.*—For other cases, see *Executors and Administrators*, Cent. Dig. § 644; Dec. Dig. ⇐167.]

[*Executors and Administrators* ⇐172.]

The securities taken by an administrator at a sale by him of the intestate's estate, for the assets sold, payable to himself, are equally, with the choses in action which the intestate

held at his death, under the protection of this restriction on his power of alienation.

[Ed. Note.—Cited in Haynsworth v. Bischoff, 6 S. C. 165; Rosborough v. McAliley, 10 S. C. 246.]

For other cases, see Executors and Administrators, Cent. Dig. § 650½; Dec. Dig. ⚡172.]

[Executors and Administrators ⚡115.]

The creditors and distributees of the intestate have an equity, as against the administrator, that the assets shall be applied exclusively to the purposes of the administration, which in the Court of Equity will be specifically enforced when necessary for their protection, and this equity follows the assets, or their value, into the hands of any one who takes them from the administrator mala fide, or without valuable consideration.

[Ed. Note.—Cited in Haynsworth v. Bischoff, 6 S. C. 164; Geigers v. Kaigler, 9 S. C. 427; McDuffie v. McIntyre, 11 S. C. 564, 32 Am. Rep. 500; Alsobrook v. Alsobrook, 14 S. C. 175; Gary v. People's Nat. Bank, 26 S. C. 549, 2 S. E. 568, 4 Am. St. Rep. 733.]

For other cases, see Executors and Administrators, Cent. Dig. § 468; Dec. Dig. ⚡115.]

[Subrogation ⚡7.]

The surety of an administrator who has been compelled to answer to the creditors and distributees, or either, for the default of the administrator resulting from his misapplication of the assets, is entitled to be subrogated to this equity, and have it enforced, for his indemnity, against one who has knowingly contributed to the default, by taking from the administrator the assets mala fide, or without value.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17, 92; Dec. Dig. ⚡7.]

[Executors and Administrators ⚡107.]

When once it appears that the purchaser, &c., knew that the administrator was applying the assets to his own use, he is prima facie concurring in a breach of his trust and a fraud upon the creditors and distributees, and if

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*there is any thing in the facts which justifies such a use of the assets, the burden is on such purchaser, &c., to show it. He takes the risk of the truth of any representations made by the administrator of the existence of such facts, and if those representations prove false, he must bear the consequences.

[Ed. Note.—Cited in Bass v. Lucas, 7 S. C. 118.]

For other cases, see Executors and Administrators, Cent. Dig. § 1613; Dec. Dig. ⚡107.]

[Executors and Administrators ⚡475.]

The ratio decidendi of the judgment in Thackum v. Longworth, 2 Hill Ch. 267, to wit, that an executor, or administrator, accounts, not for the moneys collected by him from time to time on the securities taken at a sale on credit of his decedent's estate, but for the amount of the sale-bill as so much cash received at the time of the sale, being no longer, if it ever was, the rule, the decision itself is not evidence of what the law now is; and the case is overruled.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2061; Dec. Dig. ⚡475.]

Before Carroll, Ch., at Sumter, June, 1866.

Leonard White, being in his lifetime and at the time of his death seized and possessed of a large estate, real and personal, died intestate in May, 1853, leaving as his heirs and distributees his son, William N. White, his daughter, Mrs. Bartlett, wife of the Rev. J. L. Bartlett, and ten grandchildren, issue of

his pre-deceased daughter, Mrs. Dick, who had been the wife of Thomas M. Dick. The defendant, William Lewis, soon afterwards administered on the personal estate, and the plaintiff, Levi F. Rhame, and two others became the sureties on his administration bond, which, as Lewis was Ordinary of the district, was taken by the Clerk of the Court. In December of the same year, Lewis, by leave of the Clerk acting as Ordinary, sold the personal estate, on a credit of one year, for the aggregate sum of about \$64,000. Thomas M. Dick was a purchaser at the sale to the amount of \$10,275, to secure the payment of which he gave his three single bills, with Robert J. Dick, one of the intestate's grandchildren, as his surety. They all bore date April 20th, 1854, and were made payable, "on or before the 26th December next," to "William Lewis, administrator of the estate of Leonard White, deceased," "with interest from the 26th December last." In April, 1854, Bartlett and wife filed a bill for

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partition and account *against Lewis, making William N. White and the Dicks, most of whom were infants, parties defendants. Some inconsiderable payments were made to Lewis on the three single bills of Thomas M. Dick before January, 1859, at which time he, Lewis, pledged or transferred them to the defendant, John R. Pollard, for the consideration and under the circumstances, as stated by Pollard in his answer, as follows:

"Some time anterior to January, 1859, William Lewis called upon him, near his residence, at Providence, and represented that he desired to raise money, but that he could not borrow it out of the banks, and had tried private individuals and could not get it, and he said his plans were to purchase negroes on credit at some estate sales, which were to take place in January ensuing, and send them to the West and sell them for cash, and solicited this respondent to go his security, and said that he had certain notes on the late Thomas M. Dick and Robert J. Dick, for about twelve thousand dollars, and that he would place them in respondent's hands as indemnity, and that respondent could have these notes collected and applied to the payment and discharge of the proposed purchases before they became due, and if there should be any amount over it should be returned to him, Lewis; and this respondent, having full faith in the representations of the said Lewis, and no notice of insolvency, either individually or as administrator, assented to go his security upon the proposed purchases; at this interview the notes referred to were not produced.

"At a subsequent day, after the purchases were made, Lewis called again upon this respondent and produced the three notes of Thomas M. Dick and Robert J. Dick, set forth in complainant's bill of complaint, and

mentioned that he had made such large payments to the distributees of Leonard White out of his own funds, that when the estate was wound up the distributees would fall in

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debt to *him. Lewis then delivered the three notes to this respondent, and this respondent signed with him a bond to John J. Ingram, administrator of S. E. Plowden, conditioned for the payment of five thousand and six hundred dollars; and likewise signed a promissory note to Thomas H. Connors, administrator of E. S. Connors, for four thousand and thirty dollars. This respondent had, anterior to this interview last recited, and subsequent to the first interview, in which Lewis had explained his plans and intentions, signed another note with Lewis, (under the recited arrangement,) to Isaac N. Lenoir, for two thousand and five hundred dollars.

"William Lewis then told this respondent that at some subsequent day he would take a receipt for the notes of the Messrs. Dicks, when he, respondent, should visit the town of Sumter. And this respondent alleges that, on a subsequent day, he thinks some time in the month of February afterwards, he called at the office of William Lewis, and he, Lewis, wrote out a receipt for him to sign, which he did, and left the same with him, Lewis; that he has applied to Lewis for the production of that receipt, and to obtain a copy; that he has not obtained a copy, as Lewis alleges that he has searched through all his papers and cannot find it, but this defendant is assured, from his recollection, that it was to the effect as follows: 'Received of William Lewis two notes on Thomas M. Dick and Robert J. Dick, for two thousand five hundred and seventy-two dollars each, and one note on same for five thousand dollars, with credits indorsed of about three thousand dollars—the same are to be applied, when collected, to one note to Isaac N. Lenoir for about two thousand dollars, to one note to the administrator of Connors for about four thousand dollars, and to a bond to Ingram, executor of Plowden, for between four and five thousand dollars. The above notes and bond due by William Lewis, with John R.

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Pollard security.' That *this deponent was, at the time of receiving the notes from Lewis, and for three years anterior, and to the present time, deprived of eyesight sufficient for the perusal of any document either printed or written, and in all transactions involving writing has to rely upon the fidelity of those with whom he deals."

After Pollard received the single bills, payments thereon, to a large amount in the aggregate, were made to his attorney, in whose hands he had placed them for collection, and, at November Term, 1860, of the Law Court for Sumter, separate judgments for the balance due, then amounting to \$3,944.82, were recovered in the name of William Lewis "for

another," against William Edward Dick, administrator of Thomas M. Dick, deceased, and Robert J. Dick, and shortly after the recovery a further payment of \$1,134.38 was made on the judgments to the attorney of Pollard. All these payments, with the exception of a small amount which Lewis got, were immediately applied to the demands of Ingram, Connors and Lenoir, mentioned in the above extract from Pollard's answer.

Under the bill of Bartlett and wife against Lewis and others, the final accounting took place in 1860. The Commissioner's report showed that there was a balance due by the administrator, on the 1st January, 1854, of over \$2,600; that the annual balances afterwards were always against him—no one being ever less than \$6,000; that the balance against him on 1st January, 1858, was \$6,601.52; that the amounts received by and charged against him during that year were, in the aggregate, \$18,252.17; that the balance against him on the 1st January, 1859, was \$18,684.74; that he afterwards paid out \$3,526.17 and received \$219.27; and that, after deducting his commissions, there was due by him on his accounts on the 30th May, 1860, the sum of \$16,086.27, of which \$1,733.04 were applicable to three unsatisfied judgments against him, as administrator, in favor

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*of certain creditors of the intestate, leaving a balance of \$14,533.23 in favor of the distributees. Exceptions were taken to the report by Lewis, but they were overruled and the report confirmed, on the 18th October, 1860, by a decree of his Honor, Chancellor Inglis.

At Spring Term, 1861, of the Law Court, an action was commenced on the administration bond against the plaintiff, Rhame, to recover from him the amount due the distributees on the report of the Commissioner; and on the 2d April, 1862, this bill was filed setting forth the facts, substantially, as above stated, alleging that at the time of the said arrangement Lewis was embarrassed and straightened in his circumstances, oppressed with a large load of debt, and without the ability and means of paying, and that this was well known to Pollard, who, with notice that said single bills were held by Lewis, as administrator of Leonard White, and of right should be applied, as assets of his estate in the hands of the said administrator, for the benefit of, and distribution among, the distributees of White, and who had paid no money, or other value, for the same, and never paid any thing as surety for the said Lewis, except what he may have paid out of the money received on the said bills, combined and confederated with the said Lewis to convert them to a purpose foreign from his trust and to their personal advantage and benefit; to the prejudice of the rights and equities of the distributees and creditors of White, and against the rights and equities of the plain-

tiff as a surety on the said administration bond; and praying, in substance, for an injunction to restrain the collection by Pollard, and payment to him, of the balance due on the judgments aforesaid; that Pollard may be decreed to account for the moneys collected by, or for him, on the said single bills; that said judgments and moneys may be declared to be unadministered assets of the es-

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tate of the intestate, and be now *applied, under the order of the Court, in due course of administration.

On the 2d June, 1862, the defendants, Lewis and Pollard, filed separate answers. The facts, as hereinbefore stated, were admitted, except the allegation in reference to Lewis' insolvency. Pollard's account of the circumstances under which he got possession of the single bills has been already stated. Lewis' account of the same transaction, as given in his answer, is as follows: After stating that Pollard became his surety to Ingram, Connors and Lenoir, as stated by Pollard in his answer, he proceeded as follows: "Previous to said suretyship this defendant promised the said Pollard to transfer to him the three single bills of T. M. Dick and R. J. Dick, set forth in the said bill, to indemnify him, the said Pollard, against all loss as such surety; that he then exhibited to the said Pollard a full statement in writing of his account as administrator of the estate of Leonard White, by which he showed that the indebtedness of W. N. White and others of the distributees to him as administrator, over and above the said three bills, was amply sufficient to meet the liabilities of this defendant to the other distributees of said estate; that this defendant had paid with his own proper funds over seven thousand dollars for said estate, and that this amount, together with his commissions, entitled him to the use of the said three bills as his own proper goods; that he had shown said statement of his account to some of the distributees, who appeared satisfied that the same was correct; all of which facts he communicated to the said Pollard. And this defendant was then, and still is, satisfied and fully assured, that the account then exhibited to the said Pollard, and since exhibited before the Commissioner of this Court, and forming part of the brief in the suit referred to in said bill, is substantially correct and proper, and the only just and equitable mode of settlement of

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said estate. That on the day of *February, A. D. 1859, this defendant, in pursuance of said promise, did assign and transfer the said three bills to the said Pollard for the purpose above set forth. That it is true the said Pollard received through his attorney all the payments made on said bills on and after 27th December, 1859, as also the payment made on said judgment, and applied the same to the extinguishment of

the obligations of this defendant to Ingram, Connors and Lenoir, on which the said Pollard was surety. It is true that at the time of said transfer this defendant was involved with heavy debt, but he hoped and believed, and still hopes and believes, not without the means, however, of satisfying the same."

At the trial, the plaintiff gave in evidence the administration bond—the inventory and sale-bill—the writ against the plaintiff on the administration bond—the record in Bartlett and wife against Lewis and others—a judgment by confession, and *fi. fa.* thereon, entered in March, 1855, of Jabez Norton against William Lewis, for \$8,280, with interest from 20th May, 1854, payable annually, which was still unsatisfied—a list of one hundred and twenty-nine judgments at law, (verified by the clerk,) the Norton judgment being one of them, which had been entered against Lewis between the years 1847 and 1861, and proved by the Commissioner payment by Rhame, in 1863, of the decree, in favor of the distributees, in Bartlett and wife against Lewis and others.

For the defendants it was shown, that the debt due Norton was for the purchase-money of land, and that he (Norton) held a mortgage of the land from Lewis to secure its payment. They further proved that, in January, 1859, Lewis gave a promissory note, for \$14,000, to O. M. Crane, and a mortgage of six hundred acres of land and 21 negroes, to secure its payment; that, in October, 1860, Lewis gave his bond, with eleven sureties,

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to Crane, for the same *debt, and that Crane thereupon assigned the note and mortgage to them, as indemnity.

Lewis was a harness-maker by trade. In 1836, he was elected Ordinary of Sumter District, and he continued to hold that office until 1860. A witness testified, that he was poor when first elected. Upon the question as to his insolvency, a number of witnesses was examined on both sides. Some testified that, as early as 1858, they regarded him as insolvent; others said they did not so regard him until 1860, when the decree in Bartlett and wife against him was rendered. Thomas D. Frierson, who had been Sheriff of Sumter District from 1856 to 1860, said he had known Lewis since 1837; there were a great number of executions of large amount against him in the Sheriff's office during witness' term of office; Lewis was greatly involved, and witness considered him insolvent; thinks there is no question now of his insolvency; he owns a tract of land, said to be mortgaged for a large sum. J. M. Wilder, the present Sheriff, said: there are thirty odd executions, now in the Sheriff's office, against Lewis; some few of them are satisfied; a large number unsatisfied still. J. W. Stuckey, tax-collector, said: according to the tax returns, Lewis was the owner of

seventy or seventy-five negroes and a large body of land. O. M. Crane said, in 1858, he (witness) purchased from Lewis the three single bills mentioned in the bill. In January, 1859, by arrangement with Lewis, he gave them up to him, and took from him his individual note, secured by a mortgage of twenty-one negroes and six hundred acres of land, being all the property "Lewis was supposed to own. He had in possession other negroes, some belonging to his wife, and some to his children." The Norton debt witness understood to be secured by a mortgage of another tract of land, being the land for which the debt was contracted, and the security was supposed to be ample. "In October, 1860,

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Lewis tendered to witness the *bond of himself and eleven sureties offered in evidence, for above debt, payable in five years, he (witness) agreeing with sureties that he would transfer to them the note and mortgage first mentioned, and, as to such sureties, remove all liens on the property of Wm. Lewis older than the mortgage, except the judgment of Jabez Norton v. W. Lewis. He (witness) did make a thorough examination of the office, and found all liens of said Lewis, prior to the mortgage, satisfied, except \$13,000 of judgments and the Norton debt. Of this amount Lewis paid \$5,000, and witness paid the balance, amounting to \$8,000, which he kept open for his benefit, and still holds open against all persons except the said sureties. Witness then took the bond of Lewis and eleven sureties, and assigned to them the note and mortgage of Lewis first mentioned. The three single bills of T. M. Dick and R. J. Dick were returned by witness to Lewis because of the trusts appearing on the face of them, witness being doubtful as to Lewis' right to transfer them."

Wm. Lewis, defendant, said, the bond and two notes, signed by himself and Pollard as his surety, were for purchase of negroes, and the purchases were made with a view to raise money. These securities, bond and notes, are exhibited in Pollard's answer. Witness told Pollard before he signed as his surety that the notes transferred to him by witness were his property; that he had shown his accounts to some of the distributees, (Bartlett and Dick among them,) and they were satisfied with his statement and showing. Witness still believes that he owes nothing upon his administration of White's estate. There were three sets of distributees: Bartlett, W. Ed. Dick, White. Witness also exhibited his account, before securities were signed by Pollard to the latter. The sum found due, by Commissioner's report, destroyed witness' credit. When witness gave bond to Crane, he could have given bond for \$50,000, and given one hundred of

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best men as his sureties. Pollard *was his surety upon one of his official bonds. Pol-

lard was quite infirm for several years before the war.

Cross-examined. Some of the Dicks interested were minors. Account shown by witness to distributees was a statement. Witness kept no books, but made returns. After report of Commissioner was made, time was allowed witness to point out errors. Witness' scheme was to raise money by buying negroes and selling them again. Witness wanted money for various purpose, among them on account of Leonard White's estate.

Evidence was also introduced, on behalf of defendant, Pollard, to the effect that he was old and infirm; that he was now entirely blind; that he commenced losing his sight about 1858; though his signature to the securities given in January, 1859, was about as good as it ever had been; and that for some time before 1860, and since, he had remained much at home.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. At the common law the assets of a deceased person, in the absence of fraud, might be disposed of absolutely by his executor, or administrator, and could not be followed by creditors, legatees, or next of kin, into the hands of the alienee. The legal representative of the decedent is not a trustee technically. Ordinarily, at law, there is no direct trust affecting the assets, specifically at least, or imposing any lien upon them. Adams Eq. 251. In this respect it is said "that there is a manifest difference between the case of an ordinary trust, where notice takes away the protection of a bona fide purchase from the party, and this peculiar sort of trust mixed up in some measure with general ownership." 1 Story Eq. § 580. The ample powers of disposition, thus confided to an executor, or administrator, over the personal estate of the decedent, seem to be required by the very nature of his office, and

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the *duties attached to it. He is bound primarily to satisfy all just debts and charges out of the estate in his custody; a duty which he could not perform, if purchasers or mortgagees of the assets were not protected from an "after-reckoning," at the instance of creditors or other parties interested in the estate. "It is of great consequence," says Lord Thurlow, "that no rule should be laid down which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to a purchaser." Scott v. Tyler, 2 Dick. 275. The doctrine of the Court seems to be that a mere secret intention of the executor to misapply the funds, unknown to the other party dealing with him, or subsequent unconnected misapplication of them, will not affect the purchaser. He must be cognizant of such intention, and designedly aid or assist in its execution. 1 Story, § 580, and authorities cited.

That the party dealing with the executor, or administrator, has knowledge or notice of his intended misapplication of the assets, may be shown, however, otherwise than by direct and positive proof. It may be brought home to him by the very nature of the transaction between them. This is illustrated most frequently by the class of cases in which an executor, or administrator, disposes of the assets in his charge for the satisfaction of his individual debt. It may well be doubted whether the decisions referred to are applicable to the present case. They relate to transactions involving the extinguishment of a precedent debt, not the creation of a new one; to dealings in which the executor, or administrator, parts with the assets, for the purpose of satisfying an antecedent debt of his own, and receives no other or further consideration whatever, where all that is done is payment on the one side and receipt on the other. Such is not the character of the transaction between the administrator, Wm. Lewis, and his co-defendant, John R. Pollard, which is here sought to be impeached.

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*The obligations in writing or single bills of Thomas M. and Robert J. Dick were transferred and pledged by Lewis to Pollard, as counter security against the liability, as surety of Lewis upon his obligation and notes to John J. Ingram and others, the vendors, for the price of certain negro slaves sold to him. It will be assumed that if the pledge or transfer of the obligations of Thomas M. and Robert J. Dick would have been valid, had it been made directly to the vendors of the negro slaves, as security for the purchase-money, so also must it be held valid when made to Pollard, as indemnity against his liability as surety for the same debt. A pledge by an executor, or administrator, of any part of the personal assets, for monev advanced at the time, if no more appears, will be sustained, because such pledge is *prima facie* consistent with his duties. *Kane v. Roberts*, 4 Mad. 357; 1 Story, § 581. But suppose, instead of receiving money, the executor, or administrator, accept as an equivalent, and at a fair valuation, visible chattels, readily convertible into money, declaring at the time his purpose to sell them for cash, and afterwards actually so disposing of them. The real nature of the transaction, it is apprehended, would not be varied by this modification. The purpose of the executor, or administrator, in either case, is the same—to raise money—and to accomplish it in both and substantially by the same means, directly in the one case, indirectly in the other. The actual results of the transaction are, that Lewis, the administrator, parts with the securities against Thomas M. and Robert J. Dick, the proceeds of which pass to the vendors of the slaves, and are appropriated by them, and that Lewis, in exchange and com-

pensation for such proceeds, acquires the possession and ownership of the slaves referred to.

Practically the results seem to be scarcely distinguishable from what would have occurred had the securities referred to been sold at

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their par value, and payment been made, *not in money, but in negro slaves at a fair valuation. Had the transaction between Lewis and the owners of the slaves been not indirectly and in effect merely, but directly and in form, a sale of the securities against Thomas M. and R. J. Dick, such sale, it is conceived, must have been sustained. "If no more is done," says Lord Eldon, "than a sale of part of the assets for money advanced at the time, the vendee can never be affected by proving the executor's intention, at the time, to misapply the produce; or if he had it not originally, that, afterwards taking up that intention, he did actually misapply the produce. A third person, if there is no more in the transaction, would be fully justified in assuming that the sale was for those purposes for which the law gives an executor the power of sale." *McLeod v. Drummond*, 17 Ves. 154. That the mere form of the consideration, or the mere mode of payment, should change the character of the transaction, cannot be admitted.

It is argued, on behalf of the plaintiff, that the securities against Thomas M. and R. J. Dick were made payable to "William Lewis, administrator of the estate of Leonard White," and upon their very face gave information that they were held by him as assets of his intestate; that Lewis, at that very time, was in a state of insolvency or on the very verge of it, and his pecuniary condition notorious, and well known to J. R. Pollard; that the effect of the transfer of the securities to Pollard was in substance an appropriation of them to satisfy the personal debt of Lewis; that the very plan of raising money by purchase upon credit and sale for cash was most significant of Lewis' condition, being the ordinary expedient of persons oppressed by debt to obtain temporary relief, and was, of itself, sufficient to put Pollard upon his guard, and that therefore Pollard must be held to have concurred and aided designedly in the misapplication of the assets by the administrator. For the reason already indicated, it does not appear to be material

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whether *Lewis, at the date of the transfer to Pollard, was or was not solvent. The debt secured by the obligations transferred was not an antecedent debt, but a contemporaneous debt then incurred, and, as must be assumed, upon fair and full consideration, then moving from the other contracting parties. Whether solvent or otherwise, it was the duty of Lewis to proceed with the administration of Leonard White's estate, and to complete it. How does it appear that Pol-

lard was advertised of Lewis' intention to misapply the negro slaves, or the proceeds of their proposed sale? Certainly the latter avowed no such purpose to Pollard. On the contrary, he claimed to be in advance to his intestate's estate, to the full amount of the securities in question, and exhibited an abstract of his accounts with the estate, at the same time stating that certain of the distributees had seen and were satisfied with it. How could Pollard know that there were no debts still subsisting against that estate? "It is not reasonable," remarks the Master of the Rolls, "to put every purchaser from an executor to take an account of the testator's debts, nor has he any means to discover them." *Ewer v. Corbett*, 2 P. Wms. 149.

If what Lewis said was true, there were then debts in effect existing against his intestate's estate to the full amount of the securities transferred, and Lewis himself was the creditor. Indeed, among the executions then in existence against Lewis, there seems to have been one or more against him as administrator of Leonard White. If the money to be raised was intended by Lewis to be used in satisfaction of such indebtedness, it cannot be said that he then contemplated any misapplication of the assets. Instead of being in advance to Leonard White's estate, it turned out that Lewis was in arrear, and indebted to it in an amount exceeding \$14,000. His accounts were in great confusion, and he seems to have been astounded at their result, but whether he designed or not a misappli-

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cation of the assets *of his intestate, the circumstances disclosed do not suffice to bring home to Pollard the knowledge or notice of such purpose on the part of Lewis.

The mode of raising money adopted by Lewis may have been highly inexpedient or eminently judicious, according to the circumstances in which he stood. Whether it was attended with satisfactory results, or otherwise, we are not informed by the evidence. But a party dealing with an executor or administrator, in respect of the assets in his charge, is not bound to ascertain whether, in the particular instance, the latter is discreetly exercising his power. It is sufficient if the purchaser be not privy to a breach of trust, nor engage in a transaction with the executor or administrator which is, in its nature, incompatible with a legitimate administration of the decedent's estate. 1 *Roper*, 434-5.

Thus far the case has been considered as if Lewis, the administrator, had no larger power of disposition over the securities, against Thomas M. and R. J. Dick, than would have belonged to him had they been drawn payable to his intestate, and been held by him as owner in his lifetime. In *Thackum v. Longworth*, 2 Hill Eq. R. 267, the Court distinguishes between the chattels or bonds or securities for money, belonging

to the deceased in his lifetime, and such bonds or securities as were acquired after his death by the administrator for the proceeds of the personality sold. It is there held, that the administrator's power of disposition over the latter is more large and ample than in respect to the former. "When," say the Court, "the goods and chattels of the deceased are sold, the liability of the executor or administrator to account for the proceeds to all parties interested is generally that to which they must look. The right to use the fund as his own is also a necessary consequence from his liability to account. If he was not allowed to alien the notes or bonds taken for the proceeds of the sale, (without any other restriction than that it

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should *be done without fraud,) it would subject him to the consequences of general liability for the proceeds of the sale without any corresponding advantage." It was, accordingly, there adjudged that the Court would not disturb a transfer of bonds for payment of his personal debt made by an executor, solvent at the time, though such bonds were for personal property of his testator sold; and being made payable to him, as such executor, thus gave notice upon their face of the real nature of his interest in them. The very ground of the judgment is that an appropriation of assets in such form, though to purposes wholly foreign to the administration, constitutes of itself no breach of trust. It results that the transfer or pledge, by Lewis, of the securities against Thomas M. and R. J. Dick, in order to assure payment of his debt for the negro slaves, does not, of itself, furnish evidence of any purpose to misapply the assets of his intestate, and still less of any knowledge of that purpose on the part of Pollard, the defendant. Such proof must be sought for elsewhere; and it has not been discovered in any of the circumstances disclosed.

Certainly, the defendant, Pollard, could not have been influenced in that transaction by any motive of private gain. He was to derive no profit or advantage from the purchase made by Lewis. If any accrued it was to belong wholly to the latter, and not to Pollard. He seems to have been influenced simply by kindness and good-will towards Lewis, assuming, at his request, and as his mere surety, a serious liability, and receiving, by way of indemnity, certain securities, which have proved insufficient to protect him.

It is also contended, on the part of the plaintiff, who was one of the sureties of Lewis as administrator, that the interest of Pollard in the securities transferred to him is not a legal but a merely equitable interest; that the plaintiff in this proceeding is entitled to all the rights and remedies of the persons beneficially interested in Leonard

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White's *estate; and that the equities of

such persons, being prior in time, have priority of right to that of Pollard, in respect of those securities. From considerations of public policy, the inclination of the Court is to afford all proper facilities to executors and administrators, in their disposition of the effects of their decedents, in a due course of administration. It is to be observed that Pollard is in possession with the consent and by the act of the legal owner. He is not seeking the aid of the Court to give effect, in anywise, to his rights by virtue of the pledge or transfer; but asks merely that the Court shall be passive. "Mere defect of title," it has been well said, "is not a ground for the interference of the Court." In *McLeod v. Drummond*, 14 Ves. 360, a case, in some of its circumstances, very similar to this, the Master of the Rolls remarks: "I do not find that any difference has been made between the power of an executor to dispose in any manner of equitable assets and his power to dispose of legal assets." In *Scott v. Tyler*, the bonds, though capable of assignment, were not in fact assigned; and therefore the bankers had not the legal interest; yet it was held that the pledge could be taken from them only upon the ground of implied fraud. "It is objected," says Lord Hardwicke, "that these were the equitable assets of Sir Richard Billings, and that the plaintiff purchased nothing but an equitable interest, burdened with all the equity in the hands of the person from whom he purchased. But that is a rule only when there is a lien on the thing itself; and I know no difference, in this Court, between the power of an executor to dispose of equitable and legal assets." *Nugent v. Gifford*, 1 Atk. 464. Upon appeal to the Lord Chancellor, in the case of *McLeod v. Drummond*, 17 Ves. 167, Lord Eldon, after citing certain portions of the judgment of Lord Thurlow, in *Scott v. Tyler*, thus proceeds: "These passages imply that, upon the pledge of a bond, an assignable chose in action, by one executor, the Court

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must *have found the means of making it effectual against all, if there was no fraud; but there is a great difference between an instrument to be delivered up, when, upon the circumstances under which it was deposited, that would be too much, and in equity calling upon that person and others to make it effectual. In the case before me, the Court is required to order the bonds to be delivered up." It is to be added that such order was not pronounced.

The case presented by the bill is certainly one of great hardship, but no sufficient ground has been discovered, upon which the Court feels warranted to set aside or impeach the transfer or pledge of securities made to J. R. Pollard by the defendant, Lewis.

It is ordered and adjudged that the bill be dismissed, but without costs.

The plaintiff appealed, and moved the Court of Appeals to reverse the decree, on the following grounds and for the following reasons:

1. In this State, the following duties and regulations, in addition to those found in the common law, are prescribed for the administration of the estates of intestates: The administrator can sell the property of his intestate only by order of Court, (a sale otherwise made being void,) and the Court in granting the order is required to regulate "the time, place and credit to be given;" he, the administrator, must return a sale-bill, and make annual returns of his receipts and expenditures; and, where he sells on credit, he accounts, not for the sale-bill, as so much cash received, but for the moneys collected on the securities taken at the sale. It follows, from these additional provisions of the law, that an administrator, in this State, holds the securities taken at a sale on credit in trust, for the purpose of collecting, paying debts, and distributing the surplus; that a sale or pledge by him of such securities, be-

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fore he has fully administered the estate, especially if such sale or pledge be made for his own private purposes, as was the case here, is a clear breach of trust, for which the party taking the security is responsible, unless he can protect himself by showing a purchase for valuable consideration without notice, which Pollard utterly failed to do.

2. But, if the case be regarded as standing upon the principles of the common law, then it is submitted that where an administrator sells the property of his intestate on credit, and takes the securities, payable to himself, as administrator, it is, according to the doctrine of equity, a conversion; the securities are held in the place of the property, and are assets; and if the administrator, before he has fully administered the estate, pledges the securities, to indemnify one who becomes his surety on a purchase of property for his own private purposes, it is a devastavit, and the surety receiving the securities, with the knowledge that they are assets and that the estate has not been "wound up," is equally guilty; and this whether he knew the purpose to which the administrator intended to apply the property purchased by him or not. A purchase of property by an administrator being entirely outside of his duties, the surety should assume it to be for his own purposes.

3. The securities were payable on their face to Lewis, administrator of Leonard White. This is a proof of notice that they were assets, and of the trust.

4. Neither Pollard, in his answer, nor Lewis, who was examined as a witness, deny that Pollard had notice that Lewis intended to apply the proceeds of the negroes purchased by him to his private purposes; and Pollard's statement, in his answer, that Lewis mentioned "that he had made such

large payments to the distributees of Leonard

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*White, out of his own funds—that when the estate was wound up, the distributees would fall in debt to him,” together with the intrinsic evidence furnished by the unusual and ruinous shifts and expedients to which Lewis was resorting for the purpose of raising money—shows that Pollard did know that Lewis wanted the money for his private purposes. The circumstances were at least sufficient to put Pollard on the inquiry, and make him stay his hand.

5. If Pollard acted on the faith of Lewis' representations, he was guilty of gross negligence. He should have required full proof that the representations were true.

6. There was no assignment of the securities to Pollard, and for the balance yet unpaid on the judgments, recovered in the name of Lewis, the plaintiff is, in any view, entitled to a decree, the legal title being in Lewis, and Pollard, now at any rate, having notice not only of the trust, but of the misapplication of the proceeds of the sale of the negroes.

7. In the transaction between Lewis and Pollard, there was actual fraud—*dolus malus*—and each party is responsible to the full extent of the value of the assets that were misapplied.

8. The plaintiff has paid the distributees of Leonard White over \$13,000, and it is further liable to creditors yet unpaid for over \$2,000. His equity, therefore, is superior to that of one who assisted the administrator in making a gross and fraudulent misapplication of securities which otherwise might have gone to pay the very demands the plaintiff has paid.

9. Lewis' insolvency at the time of the pledge was most abundantly shown.

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*The case was argued in the Court of Appeals in December, 1866, by J. S. G. Richardson, for appellant, and W. F. De Saussure and Blanding, contra; and was kept under consideration until May, 1867, when it was ordered to this Court, where it was now heard.

J. S. G. Richardson, for appellant.

Blanding, contra.

The principal authorities cited, besides some of those mentioned in the decree, and in the judgment of this Court, are: Act 1798, 5 Stat. 109; Act 1824, 6 Stat. 238; Act 1839, 11 Stat. 43; 2 Wms. on Exors. 672-3; Ram on Assets, 490; Shep. Touch, 496; Downes v. Power, 2 B. & B. 491; Watkins v. Check, 2 Sim. & Stuart, 199; Cabbage v. Boatwright, 1 Russ. Ch. C. 549; Shipbrook v. Hinchinbrook, 11 Ves. 252; 16 Ves. 477; Wilson v. Moore, 1 M. & K. 126; Bassett v. Noseworthy, 2 W. & T. Lead. Cas. Eq. 44, 59; Bush v. Bush, 3 Strob. Eq. 131; Leneve v. Leneve, 2 W. & T. Lead. Cas. Eq. 31-2; Row v. Daw-

son, 2 W. & T. Lead. Cas. Eq. 534; Waite v. Whorewood, 2 Atk. 159.

The opinion of the Court was delivered by

INGLIS, A. J. An administrator holds his intestate's title to all the personality which he left at his death. He holds it, however, not in his personal right, as he holds the property which, by purchase, gift, or otherwise, he has acquired for his own use, but in an official capacity only. The title is, by the law, annexed inseparably to the office until aliened in due course of administration. Upon the determination of a particular incumbent's tenure, by revocation or by death, the title passes with the office to his successor, and is not, in the latter of these two

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events, devolved, as is the title to *his own property, upon his personal representatives. And, further, while his tenure endures, he holds the title not in anywise for his own use and benefit, but wholly for the uses of the office, as the means wherewith to fulfil its duties: first, in paying the debts of the intestate, and, then, in distributing the residue as directed by the law. His estate is, therefore, according to the strictest definition, a special trust; he holds “for the execution of a purpose particularly pointed out,” and “is called upon to exert himself actively in the fulfilment of the settlor's intention”—the law of the land, which has created his office and prescribed its duties, furnishing the definition of that intention. Lewin on Trusts, 4.

These essential attributes of an administrator's tenure of his intestate's title are, in various respects, recognized and regarded even by the Courts of common law. Thus, for example, the individual, after revocation, will not be permitted to institute, or to continue, proceedings there, founded only upon the title which, as administrator, he had held, to his intestate's personality; nor, after his death, will his personal representatives. Again: the property which he holds as administrator, and that which he holds in his own right, are not equally and indifferently liable to the satisfaction of judgments at law, recovered against him individually, and in his representative capacity; but, on the contrary, the judgment for the recovery of a debt of his intestate, merely as such, is so framed as to restrict the levy of execution to the goods, &c., of the intestate in his hands, and independently of any effect wrought herein by our peculiar statutes, is certainly entitled to satisfaction out of these goods, &c., at least, in preference to a prior execution for his own personal debt, (Farr et al. v. Newman et al., 4 Term Rep. 621,) if the latter, as against creditors and distributees of the intestate, could be levied out of them at all. Whale v. Booth, 4 Term Rep. 625, note (a); Quick v. Stains, 1 Bos. & Pul. 293. So, also, upon the bankruptcy of the administra-

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tor, *these goods, &c., are not distributable, under the commission, as his property—their inclusion, specifically, in a schedule of “his whole estate and effects,” upon an application for the benefit of the Insolvent Laws, would not be a necessary condition to his discharge; and a judgment recovered by him in his representative capacity, on a cause of action constituting part of the assets of his intestate, will not be set off against a judgment which the defendant therein holds against him in his individual capacity. *Tolbert's Exors. v. Harrison*, 1 Bail. 599. But the Courts of Equity, because it is within their peculiar jurisdiction so to do, recognize to its utmost extent, and in all respects, this special character of an administrator's tenure of his intestate's title—enforce upon him, and all others liable thereto, the obligations thence resulting, and fully protect the interests of those for whose use alone he holds. *Story Eq. Jur.* § 579.

The first duty of an administrator, in the execution of his trust, as to the disposition of the assets come to his hands, is the payment of funeral and other expenses and of his intestate's debts, and in order to do this, the conversion of the assets into money is indispensable. In the early periods of legal history, when the administration of the intestate's effects was a prerogative of the Crown or a privilege of the Church, and often became a largess to the favorites of either, the residue, after payment of debts, or even without such payment, was by defect of law retained by the administrator without account. Personal property then constituted but a small part of a decedent's estate, was of comparatively little pecuniary value, often of a perishable nature, and rarely of such a kind as to make its preservation in specie important. It is not surprising that under such circumstances the conversion of the whole assets became the uniform custom, and so, ultimately, the rule. The necessities of the trust and the interest of the trustee combined to work such a result. The

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conversion of the assets into *money, by sale or collection, therefore, and even the procuring an advance of money by their mortgage or pledge, while, to the technical mind of the common law, it was no more than an exercise of that power of disposition which is inherent in legal ownership, was also, apparently, a strict execution of the administrator's duty, and part of a due course of administration.

When the advance of arts and commerce had greatly enlarged the comparative importance and enhanced the value of personal estates, the preservation of the assets in specie doubtless came to be of far more interest to those who had the best claim to the succession, and their right was recognized, and, gradually, more and more clearly defin-

ed and securely guarded, by successive statutory modifications of the law. Still, for the execution of the principal purpose of the trust, the conversion of the assets to the extent of such purpose was necessary, and, even when not so necessary, might, under special circumstances affecting the interests of the parties, be highly proper. The responsibility of determining beforehand the existence of such necessity or propriety was not yet imposed upon any judicial tribunal, but left still to the judgment and conscience of the administrator. As, therefore, the condition of the estate might be such as to render a conversion of the assets or of a part of them proper and even necessary—as no provision was made for ascertaining the fact of such condition by the judgment of a competent Court—as an authorized basis of action on the part of strangers, as these could have no means of information whereby they might review the administrator's judgment in this behalf, except such as he chose to furnish them—and as his honesty and integrity were in law reasonably presumable—his conversion by sale or pledge was still regarded as *prima facie* in a due course of administration, and in execution of the purposes of the trust. To have required, in order to the

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validity of his alienation, the *fact, instead of the presumption, that the alienation was for the purposes of the trust, or to have exacted from every purchaser a guarantee of the administrator's fidelity, by making the soundness of his title depend upon the subsequent application of the purchase-money, would have invested the necessary and proper alienations of administrators with heavy impediments, have greatly embarrassed them in the faithful execution of their trusts, and seriously damaged the interests of all persons beneficially concerned. It hence came to be the well-established rule, as well in equity as at law, that the administrator might “go freely to market” with his intestate's assets, and the mere fact that they were assets and were known so to be, affected with no infirmity the title of the purchaser or mortgagee for value. Every such purchaser, &c., was justified by the law, as administered in either forum, in entertaining and proceeding upon the reasonable presumption, that the administrator was acting honestly, and was converting, and would apply, the assets for legitimate purposes.

But, as has been seen, the administrator holds the assets upon trust “for the execution of a purpose particularly pointed out” by the law which creates his office, and for this and no other end annexes to it the title of the intestate, to wit, the payment therewith of his intestate's debts, and the distribution of the residue. The creditors and distributees, therefore, while they have no specific lien which will necessarily override the title of a purchaser from the administra-

tor who buys with notice that he is dealing with assets, undoubtedly have an equity, as against the administrator, that the assets shall be applied strictly to the purposes of the trust. And all who claim under the administrator, otherwise than bona fide and for value, take subject to this equity. If, contrary to the authorized presumption, the administrator is in fact, in any particular instance of conversion, diverting the assets from their legiti-

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mate purposes, and *applying them to his own use, he is, in so doing, guilty of a breach of trust, and his alienation is in fraud of the equitable rights of the creditors and distributees. He who, knowing of his intended diversion and misapplication, enables him to consummate the fraud by purchasing the assets or advancing money upon their pledge, makes himself particeps criminis; and so becomes a mala fide purchaser, &c. He takes his purchase not (as he otherwise would) discharged by the sale from, but continuing subject to, the equity of the creditors and distributees. He buys at his peril, and the creditors and distributees may, if their interest requires, or they choose, follow the assets in his hands and enforce upon him their equity.

They have not lost their character of assets by the alienation, and he is, quoad hoc, trustee to apply them to the purposes of the trust. So long as he knew no more than that they are assets, he might have freely bought, nor concerned himself to inquire with what intention they were sold, or to what use their proceeds were applied; for the administrator had the power of sale, and the necessities and uses of the trust require that he shall exercise it; and when he does so, the presumption ought to be, and is, that he is in the way of his duty and selling in the execution of his trust. But the fact being contrary, and being known to the purchaser to be so, the presumption cannot have place, and his justification, which rested solely upon the presumption, ceases. If, under such circumstances, the creditors and distributees of the intestate prefer to resort to the direct legal responsibility of sureties for the administrator's fidelity in his trust, and exact of them satisfaction for the loss resulting from his breach of duty, according to familiar principles of equity jurisprudence, the sureties have a right to be subrogated to the equity of their principal's creditors, and to enforce it for their own indemnity. In *McNeill v. Morrow*, (Rich. Eq. Cas. 172,) it was held,

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that where a guardian takes *a conveyance of property to himself in satisfaction of a debt due to his ward, or to himself as guardian, and of other debts, the ward may treat it as so much money received, if he chooses, but he has also an equity to have satisfaction of his debt out of the property itself; and if he elects to treat it as a receipt by his

guardian of so much money, and upon the default of the guardian exacts payment thereof from his surety, the latter is entitled to be subrogated to the ward's rights against the guardian, and may set up for his indemnity "the claim which the ward had from the receipt of the property in satisfaction of a debt belonging to him," and to enforce it against the guardian and his individual creditors.

In this State, as early as 1789, the vastly enlarged importance of personal estates, and the peculiar value of the specific form in which, to a large extent, they existed—rendering their transmission without conversion to the distributees, and their continuance in the intestate's family, in the highest degree desirable—induced an attempt on the part of the General Assembly to subject the administrator's power of disposition by sale to some control and restriction. A. A. 1789, sec. 19, 5 Stat. 109. The regulation then devised for this end seems to have been shorn of much of its efficiency by judicial construction. *Harth's Exors. v. Heddlestone*, 2 Bay, 321. In order to remedy this disappointment of the legislative purpose, or from an increased sense of the need of the restraint, in 1824, in language too plain to permit misapprehension, the previous permission of the Court of Equity, or of the Court of Ordinary, was made indispensable to the validity of any sale by an administrator "of the personal property." A. A. 1824, sec. 6, 6 Stat. 238. The effect of our legislation on this subject is to take from the administrator and refer to the judgment of the Court the determination of the necessity or propriety of a sale, whether "for division, payment of debts," or "to prevent the loss of perishable articles"

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and the regulation of the *details of such sale, if ordered, "with impartial regard to the just claims of all persons interested." The investigation into the condition of the estate and of the administrator's accounts, which the purchaser could not make, and by the previous law, as has been seen, was not required to make, is made for him by the Court; and until the judgment of the Court implies that this investigation has been made and has resulted in showing the necessity or propriety of the sale for the purposes of the trust, no one can acquire title by purchase from the administrator. In all cases to which this legislation is applicable, the presumption that the sale proposed by the administrator was in the due course of administration, which before sufficed for the security of the purchaser, is superseded by the positive judgment of the Court, that the sale is advisable for the purposes of the trust. The title of a purchaser is not hereby made any more safe, nor in any respect put on a better footing than before; but the interests of those beneficially concerned are protected against the mischiefs of a presumption, rea-

sonable in law, but often deceitful in fact, as well as of a discretion in the manner and terms of sale that was not likely always "to do impartial justice to all persons interested." But purchasers are not, by any thing in this legislation, discharged from the obligation of good faith, nor is a license given to fraud. A participation by the purchaser at a sale made under such an order of Court as is here required, in a purpose of the administrator to divert and misapply the proceeds, though difficult to be conceived, yet, if actually occurring, would not be sanctified by a compliance with all the prescribed solemnities.

This legislation cannot, however, be understood as intended to apply to all the assets of an intestate. The terms used—"personal estate," "personal property"—are certainly large enough to embrace every class. But choses in action, at least such as are merely

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securities for money due, are not *properly the subject of sale; their conversion is ordinarily by collection, and such conversion by public auction is an unusual proceeding. Many of the reasons which may be supposed to have induced this legislative restraint upon the administrator's power of sale are wholly inapplicable to them, and the sales contemplated by the Acts being, although not positively required, plainly assumed to be on credit, would result in a mere exchange of one chose in action for another. Yet, though the proper method of conversion in such case is by collection, circumstances may exist in which a more speedy conversion, by exchange, with a third person, for the money, or even by a pledge for advances, may be important to the interests of the administration. The administrator's power of disposition over his intestate's choses in action remains unaffected by this legislation, and continues as his power over the assets generally before the Acts has been described to have been. Any one may securely take them from him, either absolutely or conditionally, by any of the usual methods of legal or equitable transfer, for value and in good faith. He who takes them, knowing that their alienation is not for the purposes of the trust, but for the private purpose of the administrator, takes them in bad faith, and is liable to account for them. When the specific goods, &c., of the intestate, come to the hands of the administrator, have been by him sold on credit, are the securities taken from them payable to himself, his own absolute property in law and equity, or are they still, in the regard of both or either of these jurisdictions, the assets of the intestate, changed in form, but subject to the same restraint upon alienation, and the same equity? Certainly, the legal relations of the administrator to such securities is not the same as it was to the specific chattels which have been converted into them. He holds the title to

these, not merely in his representative capacity, and by virtue of his office, but in his

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*personal right, and by the terms of the contract. In form, and in law, he is personally the creditor of the obligor in each bond, and the maker of each note. The legal title thus vested in him is not divested by a mere revocation of the Ordinary's grant. At his death it passes not to his official successor, but to his personal representative. Actions for the recovery of the amounts secured by such bonds, &c., can be maintained at law only in his own name while living, or in that of his personal representative after his death, unless the title has been transferred by the act of the one or the other. Yet, in point of fact, these securities are but the representatives of the specific assets, which have been converted into them by the order of the law; they stand in their place. They are the materials with which the legal duties of his office are yet to be fulfilled. His fulfilment of these duties may be the subject of inquiry, under his plea of plene administravit, in a Court of law; *Johnson v. Johnson*, 1 Bail. 601; or even the subject of enforcement there in an action on his bond; *Ordinary v. Hunt*, 1 McMull. 382; *Wiley v. Johnsey*, 6 Rich. 358. In such a proceeding, does the Court of law wholly ignore the fact of the real character of such securities—because the legal title is in the administrator personally, refuse to regard and treat them as substantially and truly the assets—and, considering the administrator as by his sale himself become the purchaser at the same or any other price, in favor of the creditors of the intestate, charge him absolutely with the proceeds? Let it be supposed that in such a proceeding the creditor claims to charge the administrator with the aggregate amount of his sales of the intestate's goods, &c., and thereby show a residue of assets in his hands, to satisfy the debt sought to be recovered, after a due administration of all except such residue, and the administrator proposes to prove that certain of the securities taken at his sale, just sufficient in

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amount to *cover this residue, had, without any fault on his part, become valueless, will the Court of law not entertain the excuse, and, if it be established, discharge the administrator? And if so, how can it do this, except on the ground that these securities are in truth and substance the assets, and that for them specifically, and not for the amount of the sale-bill, as so much money received at its maturity, the administrator is bound to account, and that only according to the ordinary rule of fiduciary responsibility? *Dixon, Admr., v. Hunter*, 3 Hill, 206; *Bryan v. Mulligan*, 2 Hill Eq. 361; *Mikell v. Mikell*, 5 Rich. Eq. 225. Or if in such a proceeding at law the creditor claims to charge the administrator with the securities taken at the

sale, as principal and interest due on each has been from time [to time] collected by him, (as under possible circumstances might be for his interest,) will it be supposed that the Court would forbid this, and require him to abide by the sales-bill? If in an action brought upon such a security litigation arise and expenses are incurred, will the Court of law not admit the administrator's payment of these expenses as a fair and proper charge against the estate in his accounts? It is quite manifest, from the opinion in *Dixon, Admr., v. Hunter*, (ut supra,) that in the regard of a Court of law even the securities taken by an administrator at his sale of his intestate's goods, &c., are really the assets changed only in form, and that for these specifically and in detail the administrator ought to be held liable; that in his annual returns and in his final account he should charge himself with the aggregate of principal and interest due and received on each of them when actually collected; and if his omission to collect them all has been prudent and consistent with his duty—as where they constitute a good investment of the funds—he may fairly bring the uncollected residue of them specifically in for distribution; and that, only when the administrator fails thus to keep and settle his accounts,

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*he may be charged with the sale-bill in gross, as the necessity of so doing is imposed upon the parties by his failure to furnish them the means of more exact information. "The former method," says the Court, "is according to the truth of the facts." The sale-bill is resorted to, not as the matter, but as the measure of accountability, because he who only can supply a better does not, and this, as matter of public custody, is accessible and convenient. In *Tolbert, Exor., v. Harrison*, 1 Bail. 599, the judgment which the plaintiff had recovered against the defendant was on a note given by the latter to the plaintiff for purchases at a sale of the testator's effects, and the Court of law refused, in the exercise of its discretion, to make an order setting off against it a judgment which the defendant held against the plaintiff for his individual debt. "There can be no doubt," says O'Neill, J., "that technically the judgments are in the same right. The note given to the executor for a contract made with him must be treated and considered as his own. In a legal point of view it was the note of Harrison to Tolbert. It is, however, unquestionable that in fact it was a part of the assets of the estate of his testator, and the executor might and ought to have treated it as such. He on the present occasion claims that it shall be treated as assets of the estate." It will be observed that here it was the executor himself who interposed the objection that the note on which he had recovered judgment was assets of his testator's estate, yet it was entertain-

ed. It would seem, therefore, that the form of these securities does not conceal their real nature from the eye even of the law Court, nor prevent the conformity of its judgment thereto, in all controversies there cognizable between the administrator and those for whose use he holds the legal title.

But this is a cause on the equity side of the Court, and the pertinent inquiry, therefore, is as to how these securities are regarded and treated in that jurisdiction. The

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fact that *the legal title is vested in the administrator personally, cannot embarrass a forum, one of whose principal functions it is to compel the legal title in one person to support and serve the beneficial interest in others, and more especially when, as is usual, the trust upon which the administrator holds the legal title, is declared on the face of the security, under the description of the official character in which the promise is made to him. In *Glass v. Baxter*, (1811.) 4 Des. 153, a note was taken by an administrator, payable to himself individually, (without any official description,) partly for assets of his intestate, purchased by the maker at a sale by the administrator, and partly for goods of the administrator, personally sold to him at the same time, and included in the note as security for purchases of the intestate's goods to the same amount bought at the sale by the administrator himself. Upon a revocation of the administration, this note was given over to the administrator *de bonis non* as belonging to the estate of the intestate. Upon the payee—the original administrator—leaving the State, an attachment was sued out by his private creditor, and the maker of the note garnisheed. The attachment suit was enjoined in equity. This was a circuit decree only, not reviewed on appeal. But in *Tolbert, Exor., v. Harrison*, cited above, O'Neill, J., quoted it as authority for the proposition that "the Court of equity, in the exercise of the jurisdiction which legitimately belongs to it over trustees, will follow a note of hand as the property of an estate, if really taken for assets of the estate, sold by the administrator, though the note be taken in the private name of the administrator, and will enforce this by injunction against the private creditor of the administrator." The same Judge in *Thackum v. Longworth*, (1835,) 2 Hill Eq. 267, says: "It is true that the proceeds of such choses in action" (i. e. notes or bonds taken by an administrator at a sale of his intestate's estate) "are in equity regard-

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ed *as assets, and will be so treated and considered in the hands of the executor or administrator to whom they were made payable, or any of his immediate representatives. So, too, in all such cases they would be protected from being made liable by process of law for the debts of the executor or ad-

administrator; and, in all cases of fraudulent alienations, the Court would follow and treat them as assets of the estate;" and cites as authority, among others this case of *Glass v. Baxter*. In *Thomas v. Gage et al.*, (1824,) Harp. Eq. 197, G., indebted to the administrators by note for purchases at a sale of the estate, and holding a judgment against one of them individually, gave that one a receipt for the amount of his judgment, and a new note for the balance of his (G.'s) note to the administrators, and took that administrator's receipt against his note, which was then in the other administrator's hands. G. knew at the time there were outstanding debts of the intestate, and that the administrator with whom he dealt was in embarrassed circumstances. It was held that G. must account to the estate for the amount of the assets he took in payment of his judgment against the administrator individually, if such administrator should be unable to pay it.

In *Miller v. Alexander*, (1833,) 1 Hill Eq. 26, at a sale of A. M.'s estate by his administrator, the plaintiff was a purchaser, and gave her note, with surety, payable to the administrator as such. Upon the death of the administrator, plaintiff took out administration de bonis non of A. M.'s estate, and possessed herself, in some way, of her own note, still unpaid. The executors of the first administrator, to whom plaintiff's note was, by its terms, payable, sued at law, and recovered judgment against her on the note. Plaintiff thereupon brought her bill in equity, as administrator de bonis non, against the defendants, as executors, for an account of their testator's administration, and to enjoin the collection of the judgment at law,

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on the ground that the *note and its proceeds belonged to her intestate's estate, and that she, as the representative of that estate, was entitled to it and its proceeds. Upon the account taken, the first administrator was found indebted to his intestate's estate, in a balance exceeding the note and interest, and the enforcement of the judgment at law against the plaintiff on the note was perpetually enjoined, and she was required to charge herself in her administration account with the amount of the note and interest. O'Neill, J., for the Court, says: "The balance reported against the administrator was the money of the intestate still in his hands to be administered. Upon his death, his legal right to retain it ceased, and upon the grant of administration de bonis non, it passed as the goods, chattels and credits of the deceased, unadministered by the first administrator to the plaintiff. This legal right to receive the unadministered balance of the money did not make her the legal owner of the note; that, legally, belonged to the administrator, to whom it was payable, and at his death the right of action upon it passed to his executors." "This is the extent of the

doctrine of *Williams v. Seabrook*, 3 McC. 371. It never was intended to be said, in that case, that, because an administrator de bonis non could not sue on a note given to the first administrator, he would not be entitled to recover in equity any unadministered balance in the hands of the first administrator." And the particular view taken is, that, in equity, the plaintiff would be entitled to have the decree against the executors of the first administrator, for the balance, set off against the judgment held by them, at law, against her, on the note. If the plaintiff's note had been given to the first administrator for a consideration personal to himself, and not moving from the intestate's estate, it would not have been set off. Vide *Tolbert v. Harrison*, ut supra. But the money secured by her note was, in equity, assets of her intestate's estate yet unadmin-

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istered, and she had a right to *follow and claim it as such. The defendants, instead of suing upon it at law, might have turned it over to her, as administratrix de bonis non, as assets to be by her administered, and to that extent thereby reduced the balance found due upon the account of their testator's administration. For this was exactly what the judgment of the Court, in effect did.

Field v. Schieffelin, 7 Johns. Ch. 150, is a well-considered case, in which Chancellor Kent carefully examines the subject of the liability of a purchaser of a testator's assets from his executor. Having passed the English cases in review, he states the result thus: "They all agree in this, that the purchaser is safe, if he is no party to any fraud in the executor, and has no knowledge or proof that the executor intended to misapply the proceeds, or was in fact, by the very transaction, applying them to the extinguishing of his own private debt. The great difficulty has been to determine how far the purchaser dealt at his peril when he knew, from the very face of the proceeding that the executor was applying the assets to his own private purposes, as the payment of his own debt. The later and the better doctrine is that, in such case, he does buy at his peril, but that, if he has no such proof or knowledge, he is not bound to inquire into the state of the trust, because he has no means to support the inquiry, and he may safely rely upon the general presumption that the executor is in the due exercise of his trust." And he applied the rule in the case then before him to a purchase from a guardian, but refused the relief on the ground that the evidence did not satisfy him of the purchaser's knowledge of the guardian's misapplication. But the important point in this particular connection is that the subject of alienation there was a bond, not received by the guardian originally as part of his ward's estate, but made and payable to him as guardian for a considera-

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tion moving from himself in *that capacity. If, in the judgment of equity, there be any ground for a distinction in this regard between a chose in action payable to the intestate in his lifetime and come to the hands of the administrator as part of the original assets, and a security taken by an administrator for his intestate's goods, &c., at a sale thereof, in favor of the former, is it at all likely that the trained and practised mind of that great Equity Judge would have wholly overlooked it and committed such a capital error? But he is not singular. In *Petrie v. Clark*, 11 Serg. & R. 377, the right of creditors and legatees to follow assets that have been collusively parted with is examined, and the rule is stated to be, that he only can maintain his purchase against their equity who has given a valuable consideration, and is guiltless of fraud or collusion with the executor, &c. Gibson, J., says: "In regard of a pledge, there is a decisive difference between the pawning of a security for an antecedent debt and the pawning of it for money advanced at the time. As to the first, all the cases agree, that the interest of the pawnee is defeasible by creditors; and as to the second, the validity of the contract depends on all those considerations that would affect an absolute sale under like circumstances; that is, where it appears the pawnee knew that the money was obtained for purposes foreign to the executor's duty, the transaction is to be considered collusive." "The note on which suit is brought in this case," says he, "was indorsed to the executors in blank for goods purchased from them, which were part of the assets, and the note itself was consequently assets in their hands. The executor, who had this note in possession, was indebted to the plaintiff on his own promissory note, to nearly the same amount, and after his note became due, made arrangements with the plaintiff by which it was taken up, and a new note, at five months, substituted; and the note on which suit is brought was handed over, with

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the blank indorsement of *the payee, as collateral security for the payment of this debt, the other executor being no party to the transaction, and the plaintiff being entirely ignorant of the circumstances under which the note in question came into the hands of the executor. On this naked statement of facts it will be seen that collusion is altogether out of the case, and that the question is, whether the plaintiff is to be considered a holder for value. If the note had been delivered to him in discharge of the debt, there would be no difficulty in saying, in the absence of collusion, that, taking it, in the usual course of business, as an equivalent for a debt which is given up, would be a purchase of it for valuable considerations." From all which it is manifest that he considered "chose in action acquired by the executor or ad-

ministrator, with or given to him for the proceeds of the estate," subject to precisely the same equities, of creditors, legatees and distributees, as attach upon such as belonged to the deceased in his lifetime.

Thackum v. Longworth, 2 Hill Eq. 267, is in some respects a remarkable case. McNish was indebted to Longworth, by his bond given in 1818, for the purchase-money of a plantation sold to him by Longworth, as executor of another. Milliken died in 1819, leaving a will of which McNish was executor, and by the provisions of which he gave a life-estate to his widow in all the residue of the proceeds of his property after payment of debts, with remainder to the plaintiff, Mrs. Thackum. In the same year McNish sold, under a power in the will, all the estate of his testator, and took from the purchasers bonds payable to himself as executor, among them Hardee's and Cole's bonds. In 1820 he offered the last-named bonds to Longworth in payment of his own bond of 1818, which offer was refused. Then he delivered them to Longworth, indorsed in blank, to be collected, with instruction to apply the proceeds, when received, to the payment of his bond, if

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it should not have *been previously paid. Longworth received the money due on the bonds in January, 1823, and, in conformity with instructions repeated by McNish when advised of the collection, entered the amount as a credit upon McNish's private bond of 1818, and took the receipt of the latter for the money as paid to him thereby, which receipt stated the money to have been collected by Longworth for McNish from Hardee and Cole "on account of the estate of Milliken." It does not appear when the widow died, but the plaintiff entitled in remainder upon the widow's death sued the executor, McNish, in 1825, and, owing to his insolvency, had never recovered any part of her legacy. It is not stated when the bill against Longworth was filed, but it came on for a hearing in January, 1833. In the meantime Longworth had settled the estate of his testator, and paid over this money to the uses thereof. If the decided cases have not been altogether wrongly read, and the principle of liability wholly misconceived, it cannot be doubted that, if the bonds of Hardee and Cole had been original assets held by and payable to Milliken himself in his lifetime, the defendant, Longworth, would have been required by the Appeal Court to account for them to the residuary legatee, as the Chancellor (Harper) on the circuit had ordered him to do, unless protection had been found for him in the delay of the parties in interest, during the long period of twelve or thirteen years, to question his title to retain the money, and the fact that lulled into security by their apparent acquiescence, he had actually distributed the funds in the settlement of the estate to which they belonged. He knew that the bonds were the property of

the estate of Milliken, taken for the assets sold by the executor, held by McNish in trust for the purposes of that estate. He knew that, in the transaction between himself and McNish, the latter was diverting the proceeds of these bonds from the purposes of the trust in applying them to his own private use,

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and, by *accepting them for such purpose, instead of enforcing his own remedies against his debtor, he enabled him to consummate the misapplication, confederated with him to accomplish the breach of trust, and colluded with him to deprive of their rights, and the security for them which the specific property of the estate gave them, those beneficially entitled. This seems to be conceded; for the reversal of the Chancellor's decree, and the denial of the relief prayed, are rested on the distinction which the Judge, delivering the opinion, considered as existing "between alienations of the chattels or choses in action, belonging to the deceased in his lifetime, and of such as are acquired by the executor or administrator with, or given to him for, the proceeds of the estate," which distinction, he thought, Chancellor Kent had, in *Field v. Schieffelin*, failed to advert to. Yet these remarkable words, as already quoted, are used in the opinion of the Court: "It is true, that the proceeds of such choses in action are in equity regarded as assets, and will be so treated and considered in the hands of the administrator to whom they are made payable, or any of his immediate representatives. So, too, in all such cases, they would be protected from being made liable, by the process of law, for the debts of the administrator, and in all cases of fraudulent alienations, the Court would follow and treat them as assets of the estate." It would seem as if no larger concession than this could be asked or needed. Is not this applying to them in terms the same rule which fences round the original assets, "choses in action belonging to the deceased in his lifetime?" What is a "fraudulent alienation in" the sense of the rule? Does it require actual dishonesty of design, craft, circumvention combined? The administrator who wastes the assets by giving them away or selling at a gross undervalue, and thereby, to that extent, endangers the purposes of his trust, is guilty, in the regard of this rule, of a fraud upon the rights of those in interest, and the donee or pur-

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chaser is a *party to the fraud. The purpose of the administrator, tacit or declared, to make it up from his own means, however sincere, will not sanctify the transaction in law, or neutralize its viciousness. But the diversion of the assets, or their proceeds, from the legitimate ends of the trust, and the application of them to the administrator's private purposes of necessity, self-indulgence, or speculation, is no less a fraud upon those rights. And he who, with knowledge of the

wrong purpose, unites with him in the consummation of such a diversion by becoming a purchaser, is a fraudulent alienee in equity, let the actual intention be ever so innocent of injury to the parties interested in the estate. Such seems to have been the judgment of the late Court of Appeals in Equity, in *Spear v. Spear*, 9 Rich. Eq. 184, where the guardian was supposed to be using his ward's money in his mercantile business, and was deemed therein guilty of a breach of trust. So Lord Eldon evidently thought of such "a most inequitable transaction," as he calls it in *McLeod v. Drummond*, 17 Vesey, 153. "The Master of the Rolls truly observes," says he, "that there is a great difference between advancing money at the time upon securities, and taking a security in discharge of an antecedent debt; but this is, by no means, conclusive. The argument is carried nearly to this extent, that a person lending money at the time upon the deposit of the securities can hardly be supposed to mean fraud, as there is no temptation to fraud. Admitting, however, that the bankers had no other motive for the advance upon such a deposit than they generally have, if it appears in the transaction itself that the borrower is about to apply the money so raised upon the testator's property to objects with which his affairs have no connection, I should hesitate to say, that, as the temptation was so slight, the Court would not examine whether that was not a most inequitable transaction with reference to the persons entitled to that property." So Lord Thurlow,

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in *Scott v. Tyler*, *2 Dick. 712, adjudged: "But fraud and covin will vitiate any transaction, and turn it to a mere color. If one concert with an executor, by obtaining the testator's effects at a nominal price or fraudulent undervalue, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner contrary to the duty and office of executor, such concert will involve the seeming purchaser or pawnee, and make him liable for the full value." And so, certainly, concluded the careful and discriminating and accurate editor of the American edition of *White & Tudor's Leading Cases in Equity*, when, upon a full review of the English and American cases on the subject, he thus states the result: "Fraud will be presumed in equity, if not at law, whenever the purchaser knows, or has such notice as is equivalent to knowledge, that the property belongs to the estate, and that the executor is applying or means to apply the proceeds of sale to his own use." 1 Lead. Cas. Eq. 92, Am. Notes to *Elliot v. Merriman*.

Did not Longworth know that the bonds of Hardee and Cole belonged to Milliken's estate? Did he not know that, in the very transaction with him, the executor, McNish, was applying the proceeds to his own use?

If this was so, and he knew it, then it was in equity a "fraudulent alienation," and he was a party to it. And, according to the proposition of the opinion in respect to this very class of securities to which the bonds belonged, it would seem that they ought to have been "followed and treated as assets of the estate." This the Chancellor on the circuit had done, but the Court above reversed his decree. The purchaser who, having his debt well secured, had what Lord Eldon calls "so slight a temptation" to put in jeopardy the rights of the legatee, retained the fruit of his "most inequitable transaction," and the plaintiff "received not one cent of her father's estate." The Court, in giving its judg-

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ment by *O'Neill, J., says: "When the goods and chattels of the deceased are sold, or his choses in action collected, the liability of the executor, or administrator, to account for the proceeds to all parties interested, is generally that to which they must look. The right to collect these proceeds is indispensable to the executor's and administrator's own safety. The right to use the fund as his own is also a necessary consequence from his liability to account. For, after he sells he is not charged with the proceeds as he receives the money on the notes or bonds, but with the amount of the sales as cash received. *Davis v. Wright*, 2 Hill L. R. 560. Upon this sum (the amount of the sale-bill) he is chargeable with interest, which shows that, in contemplation of law, he is regarded as in the use of the money. He cannot be discharged from his liability to account for the proceeds of sale but by showing that, without any fault of his own, he has been unable to make them available. If he was not allowed to alien the notes or bonds taken for the proceeds of sale, (without any other restriction than that it should be done without fraud,) it would subject him to the consequences of general liability for the proceeds of sale, without any corresponding advantage. For, after he made a sale, and charged himself in the sale-bill with the value of the goods, yet he would stand in relation to the proceeds as if they were the goods and chattels and credits of the deceased. Such cannot be the case. If it was, the executor or administrator ought to return to the Ordinary the bonds or notes so taken by him. There is no difference, in respect to this question, between an administrator and an executor, yet, if it be true that, when an administrator transfers the bonds taken by him for the goods of the deceased in payment of his own debt, such transfer would be void, it would follow that his sureties for the administration would, as well as creditors, legatees or distributees,

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have the right to follow the fund, *yet I apprehend that such a consequence ought not generally to be allowed. I have already said that an alienation of the bonds or notes pay-

able to an executor or administrator ought not to be overreached but by a superior equity or by fraud." Is this reasoning as convincing now as it was when it conducted to the startling result of that litigation? Have not subsequent adjudications knocked away the premises which support it? Upon a sale by an administrator of the intestate's assets, does the law immediately charge him with the aggregate amount of the sale-bill as so much cash then received, without reference to the actual terms of sale, whether for cash or on credit? Is the whole estate of the intestate thereby converted into one single chose in action, to wit, the claim against the administrator for an account, and he turned into a debtor to the creditors and distributees for the proceeds as cash? Under the old law, administrators were "accountable and chargeable for the true value" of the intestate's personality come to their hands, (A. A. 1745, sec. 3, 3 Stat. 667.) According to the general rule, independently of our statutes restraining the power of disposition, the administrator sells or not at his own discretion, and in such manner, whether by private negotiation or at public outcry, and on such terms, whether of cash or credit, as he pleases. He is chargeable with the assets, and not having them to produce in specie, he is accountable for their true value, and, having taken upon himself the responsibility of converting them upon such terms as suited himself, it is not surprising that the actual sale-bill should have been frequently adopted, by the parties calling him to account, as the standard of the true value, until it ultimately became the uniform custom, and acquired almost the force of a rule. There might have been, in that condition of things, some show of reason in charging him with the sale when made, and throwing the responsibility of collecting or making good the securities he took

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upon his own judgment, *on himself. Yet, it is supposed, such a course was never conclusive upon either party. The persons interested in the estate could have surcharged by showing that the true value was more, and that the sale was depressed by his want of diligence or good faith. And the administrator could have shown that he sold judiciously and in good faith, on credit, and that, without fault on his part, the security taken had proved worthless. But now, when the whole discretion has been withdrawn from him, as is done by our statutes on the subject, and his office in the sale is ministerial only—when the conversion of the assets is the act of the Court, upon its own judgment of the necessities or interests of the estate, and "the time, place, and credit to be given" are by it regulated "with impartial reference to the interests of all concerned," and he is merely the agent of the Court to execute its instructions—there seems to be little propriety in charging him any otherwise than "according to the truth of the facts," and that is, by

treating the securities, taken in conformity with the order of the Court, as the assets by substitution, and charging him with them in detail as they are in fact collected at the times and in the exact amounts, as collected. If, as part of the law regulating the accountability of an administrator, he is, irrespective of his consent or fault, chargeable with the aggregate amount of his sale, as so much cash then received, and the securities taken by him are, as in such case it would seem they ought to be, his own absolute property, upon what ground of reason can, on the one hand, any fraud in his alienation of them affect its validity, or rather, how can there be any fraud, unless it be upon his own creditors as such, or upon the alienee; or, on the other, can he make reclamation upon the estate upon his subsequent failure, from whatever cause, to collect them? And, then, if these securities are his own absolute property, and not, in the judgment of equity, substantially the assets of the entire estate, or if

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*it be preferred so to call them, new investments of the trust funds, with their fiduciary character openly impressed on their face or otherwise disclosed, and so assets by substitution, the equities, which the creditors and distributees had for the protection of their interests against a fraudulent diversion of the trust property from its legitimate purposes by the administrator and his confederates, are finally gone.

The original assets are certainly, unless in particular cases of fraud or collusion already adverted to, discharged of such equities. If these equities are not transferred to, and do not attach upon, the securities into which they have been converted, then are the creditors and distributees in a worse condition than before the sale; and, if that has been, in fact, unnecessary and really wrong, as is undoubtedly sometimes the case, the one wrong, when successfully accomplished, is made to justify all that follow in its track. No defence whatever remains to them against the consequences of any subsequent misapplication of the proceeds of such sale, except the personal responsibility of the administrator and his bond. The next day after completing the sale of his intestate's whole assets, he may distribute the securities taken therefor among his own creditors, or make a voluntary assignment of them, with the rest of his property, for their benefit. Upon his death they go, in the mass of his personalty, and as part thereof, into the hands of his individual representative, and, in the event of his estate proving insufficient to satisfy all his debts and liabilities, the creditors and distributees of his intestate have no other claim upon them than for a pro rata share, in common with his private creditors. The mischiefs of such a doctrine to the parties beneficially interested in the estate of a decedent are more manifest when their inter-

ests are in the hands of an executor, without the security of a bond for fidelity. But the rule must be the same, whether the case be

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one of testacy *or intestacy. How can any or all of these results possibly be prevented, except on the ground that these securities are not the absolute property of the administrator, but are held by him in trust for the purposes of his administration, and that the equity of all interested in the accomplishment of those purposes to have them applied thereto as against himself, and all claiming under him, except such as have taken them for value and in good faith, attaches upon them and will be enforced by the Court? These securities can occupy no middle ground; they can be of no mongrel character. They are either the one thing or the other; either the legal title and the beneficial interest unite in the administrator, or else he holds the legal title in trust for the benefit of others. If the former be the case, there can be no special claim upon them acquired otherwise than can be on his property generally. If the latter, then they are in his hands, in the regard of equity, exactly as the original assets were, subject to the same restrictions upon the power of alienation and the same equity.

But what is administration? Does the mere conversion of the specific assets into money even consummate it? Expressions implying this have been used by Judges. But is not the application of the proceeds, according to law, in payment of debts and in distribution, also essential to its completion? Certainly the forms of oath and bond exacted of an administrator import this. If an administrator convert the whole of his intestate's assets into money by collection and sale, and die, leaving the money so received distinguished and separated from his own in a packet indorsed so as to indicate that it is the proceeds of such conversion, would not the parcel of money so marked and identified be assets of the original intestate to pass into the hands of him who shall be deputed to administer the yet unadministered estate? And would not equity enforce the right of such administrator *de bonis non* to the spe-

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cific pos*session? Or if, without having so distinguished it, he die, with the entire proceeds or any part thereof in his hands, having made no distribution, and leaving debts of his intestate unsatisfied, is not an administrator *de bonis non* entitled in equity to claim and have such proceeds from the personal representatives of his predecessor in the administration, as assets of his own intestate, to be by such administrator *de bonis non* administered? Such is understood to have been the concurrent opinion of three of the Chancellors and five of the Law Judges of this State, as announced "in the judgment of this Court" in *Villard v. Robert*, 1 Strob. Eq. 393. If, then, an administrator, under an order such as our law now requires,

sells the estate of his intestate on a credit, taking bonds or notes with sureties as directed, payable to him as administrator, and so distinguished from such as are his own, and die while the period of credit is yet unexpired, will not the administrator de bonis non of the original intestate be entitled in equity to a specific delivery of such securities, (subject, of course, to a right to retain for any balance of advances or charges,) to be by himself collected and applied in a due course of administration, and to a transfer if need be, of the legal title by the personal representatives of the deceased administrator, in order to enable him the more effectually to do this? If so, does he not receive them as assets of his intestate yet unadministered, and how can they be such, if they were not so in the hands of the first administrator?

If, when the account of an administrator is called for, the securities taken at a sale have been past due for a time long enough to have allowed their collection, and this has not been effected, and no sufficient cause is shown for the failure, this may be a very good reason for permitting the adverse parties, if they so choose, to charge the administrator with such as remain uncollected, and interest upon these to the time of accounting.

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*But this is a very different thing from regarding and treating them as his absolute property from the time of the sale, and considering him by reason of such sale as become forthwith a debtor for the aggregate amount of the sale-bill. The same course may be and has been pursued in reference to choses in action held by the intestate in his lifetime, and come to the hands of the administrator as part of the original assets, when he could have collected them, and neglected to do so. In *Davis v. Wright*, 2 Hill, 560, referred to in the opinion in *Thackum v. Longworth*, it is said, "the whole amount of the sale-bill is properly chargeable to the administrator as so much money received on the day when due." But if the bonds, &c., taken at the sale be his absolute property, the proper time for charging him must be the day of the sale, for he has then appropriated the assets. There is no more reason for waiting until the maturity of the securities, or, at least, the expiration of the time limited by the order of sale, than there is for waiting until he has had time enough, in the usual course of legal proceedings, to collect them. According to all the probabilities which result from actual experience, the latter is far the more reasonable, if reference is intended to be had to the likelihood that he has in fact received the money due on them. And if he has had a sufficient and satisfactory reason, with reference to the interests of the parties, for forbearing to collect them, though time has sufficed, it is quite as reasonable as either not to charge him with them until his final accounting, and not

then unless with his consent. But if this practice of charging the administrator with the sale-bill has been resorted to, as a method of approximating the "truth of things," when the administrator himself either cannot, from his defective mode of keeping his accounts, or will not, give the necessary information of that truth, then it is not difficult to see why

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the date of the maturity of the *bonds, &c., has been chosen as the time for making the charge.

But *Thackum v. Longworth* was decided in March, 1835, and the points made in the extract from the opinion which has been here introduced were brought again under review before a Court composed of Chancellors and Law Judges sitting together in December, 1836, in *Dixon, Admr., v. Hunter*, 3 Hill, 204, already cited. Upon that occasion conclusions were reached, and are stated in the judgment of the Court, wholly different from the propositions on the same points in *Thackum v. Longworth*, and entirely in accordance with the views which have been here urged, so far as these are applicable thereto. "But," says Evans, J., as the organ of the Court, "there is another question growing out of this case. The Ordinary, adopting the rule laid down in *Davis v. Wright*, charged the administrator with the gross amount of the sale-bill at the time it became due, and this, with the other items of receipts for the current year, deducting the payments, constituted the balance on the 1st January, 1835. In the case of *Davis v. Wright*, this mode of settling executors' accounts is adopted, as calculated to do justice in the great majority of cases. I subscribe most cheerfully to the general reasoning of that well-considered opinion, but it seems to me that the same desire to simplify, and thus render intelligible and practicable, the rules to be observed in settling trustees' accounts, has led to the same error as in *Jones v. West*, 2 Hill, 561. note. The error is in substituting a rule for a principle. The rule is inflexible, but the principle adapts itself to the infinite variety of the affairs of men. Can any good reason be assigned if an executor suffer the sale-bill to remain at interest, collecting so much as is necessary to meet the exigencies of the estate, rendering regular accounts of his transactions, showing when he collected the funds of the estate, and how and when he

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disposed of them, why his *accounts should not be settled according to the truth of the facts, rather than by reference to any artificial rule?

"The position here stated is illustrated by the case under consideration. The administrator appears to have rendered annually, accounts, (the correctness of which was not impeached,) of his transactions in relation to the estate. When he collected debts he charged himself with them, and when he paid a debt he entered it as a credit. The notes

and debts uncollected, with interest due thereon, he offered to bring into the final settlement, and thus account for all the trust funds which had come into his hands.

"This, it seems to me, was acting in good faith, and was doing in relation to the estate, exactly what a prudent man would do in relation to his own affairs. All that could be asked of him was, that he should show satisfactorily how he had disposed of the funds, and that he had not suffered them to be unnecessarily unproductive. If he had not made interest when he might have done so, he should be charged with the interest thus lost, and if it was necessary to keep the fund on hand to meet the debts or necessary expenses, then he ought not to be charged with interest. But, it is supposed, there is no difference between this mode of settling the accounts and that mode which charges the amount of the sale-bill in gross. This is not so. By this latter mode, interest is charged as if he had collected the whole sale-bill on the first of January, after it became due, and put it out to interest on that day, and the accruing interest is brought into the account at the beginning of each year, as if the executor had collected it precisely on the day it was due, which is requiring more than can be done by any man in relation to his own private affairs, and this is all that is expected or required of an executor. I am not to be understood as meaning to say, that every trustee is entitled to have his accounts so adjusted. If he acts fairly, if he renders his

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accounts according to law to the *Ordinary, and exhibits by his returns a full and satisfactory account of his transactions in relation to his trust, then his accounts are to be adjusted in the way herein directed. But if, as is too often the case, he renders no accounts, or such as he renders are irregular or imperfect, then the general rule, as in *Davis v. Wright*, and adopted by the Ordinary in this case, ought to be applied, of charging him with the gross amount of the sale-bill, and computing interest on the principal of annual balances, as herein set forth. Of this, if it works injustice, and subjects him to a greater amount of interest than he has made, he cannot complain. It is the effect of his own conduct, and of his neglect of the duties imposed on him by law, and the office which he has undertaken to execute. The office of an executor is one of great trust and importance, and every inducement should be held out to the honest and faithful discharge of its duties, and no favor should be shown to one who looks to his own gains rather than to the interest of his *cestui que trust*."

In *Bartlet and wife v. Lewis et al.*, heard at Sumter, June, 1860, the precise question, now under discussion, as to the correct mode of stating the accounts of administrators, &c., in this particular, was made by exceptions to the Master's report, which had adopted and

recommended the mode of statement which is here maintained. The Chancellor, who heard the cause, overruled the exceptions and confirmed the report in this particular. "There can be no difficulty," he says, "on the part of an administrator, or other trustee in so keeping a record of his receipts and payments as to enable a competent accountant readily to make up an account current of the whole administration of his trust. A receipt of money is a single fact, as is a payment. It is only necessary to record the date, amount, the person to or from whom, and on what account. The only strictly proper method of stating such an account is to charge each re-

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ceipt of payment *according to the truth—that is, the amount, and at the date at which it was actually made. All other methods, such as charging the sale-bill in gross, &c., are but occasional substitutes for this, recommended in particular instances, by considerations of convenience, or rendered necessary by the failure of the accounting parties to furnish the information requisite for the better method. The Commissioner, in conformity to the truth of things, as evidenced by the returns and vouchers produced by the administrator himself, charging not the sale-bill in gross at its maturity, but the proceeds of sales at the various times, and in the amounts as actually received, has stated the administration account upon correct principles." An appeal was taken, assigning error in the decree, in this and other particulars touching the statement of the accounts. It is stated at the bar, on the present occasion, and not denied or doubted, that the decree was affirmed. But the records of the Court of Appeals, of that date, have been destroyed.

The judgment in *Thackum v. Longworth* is understood to rest entirely upon the supposed distinction between choses in action which belonged to the intestate in his lifetime, and have come to the hands of the administrator as part of the original assets, and bonds, notes, &c., taken by the administrator, payable to himself, at a sale by him of the goods, &c., of his intestate. And this distinction is, in its turn, there rested on the proposition, that, upon a sale by the administrator of his intestate's goods, &c., the law charges him with the amount of the sale-bill in gross at its maturity, as so much money then received, and not with the securities taken by him as assets in a converted form yet to be administered. The securities, it is therefore argued, must be his own property, or, at the least, subject, much more than the original assets, to his power of disposition and alienation. And as the judgment in that case cannot stand with that to which this Court has

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come upon the present occasion, it has *been considered proper to discuss, even thus extensively, the propositions which thus seem to constitute its foundations.

It has been seen that, upon an offer by an administrator to sell or pledge the choses in action belonging to his intestate's estate, the party with whom he proposes to deal has the right to presume, in the absence of knowledge to the contrary, that the proposed alienation is for the purposes and in the due course of the administration. This presumption is founded, as has been stated, upon the nature of the trust and its consequent exigencies, and the impracticability of any successful investigation by third persons into the actual state of those exigencies. Representations of the administrator, concurring with this presumption, cannot add to its legal force, or constitute any independent security to the purchaser, &c., in his dealings. If the presumption were not fairly authorized by the nature of the case, and affirmed by the law, no such representations could, in themselves, constitute a protection to the purchaser, &c., against the equities of the parties in beneficial interest.

If the law could have regarded it as reasonable to attribute such effects to representations of this kind, there would have been no need of the presumption, and the rule could never have grown up. Let it be supposed that, instead of such presumption, there had been exacted by the law from every purchaser, &c., a diligent bona fide inquiry into the condition and necessities of the estate, with a view to ascertain whether the proposed alienation was required by its present wants. Would taking the mere representations and statements of the administrator satisfy such an exaction? Jealousy and doubt of the administrator would be the only foundation of such an exaction, and these could, of course, not be thus satisfied. For he who would violate his trust and deal dishonestly or unfairly with those for whose use he holds

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the property, would not hesitate to make the representations necessary to the success of his inequitable purpose. The impracticability of such inquiry—because, to make it of any value, it must be pursued through independent sources of information—is the very ground of the legal sufficiency of the presumption which takes its place. The security of the purchaser is therefore precisely the same, whether the administrator speak or be silent.

When it has once become known to the persons, to whom the offer of sale or pledge is made, that the immediate purpose of the administrator therein is to apply the money, to be paid or advanced, to his own private use, whether in payment of his individual debt, or otherwise for his personal necessity or profit, the burden of the peril is, eo instante, shifted. Up to this point the law imposed the risk of the administrator's fidelity upon the parties interested in the estate. But it is now, *prima facie*, ascertained that he is proposing a breach of his trust, and, if there be any facts in the condition of the

estate which can rebut this *prima facie*, the purchaser must take the onus of showing it. He assumes this risk. There is no presumption authorized by law, arising at any point of time, that the administrator is in advance for the estate, and, therefore, entitled to appropriate to his own use the assets for his reimbursement. Some expressions, apparently to this effect, may be found in the language of a few judicial opinions, but they are, in every instance, where observed, incidentally introduced, and do not represent any deliberate judgment upon a point made. No case has been found affirming such presumption as matter of law. If any such further presumption as this were adopted by the law, the last guard of the rights of the creditors and distributees, against the misdealing of the administrator, apart from his personal responsibility, would be almost wholly gone. Only in the most narrowly restricted class of exceptional cases would any

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responsibility, *on the part of the purchasers, &c., dealing with the administrator, remain. But there is no foundation, in the nature of things, for such a presumption. It would do violence to probability. A sale is, *prima facie*, a necessity for the purposes of the trust, and may be a duty for the interests of the parties beneficially concerned. There is, therefore, a probability that, when proposed, it is for the execution of the trust, and hence the presumption which the law recognizes and supports. But an advance, by the administrator, of his own money, is neither a necessity nor a duty.

Time is given him to ascertain and provide means for paying the debts. Nor is such an advance according to the ordinary course of human conduct in business affairs. But if a party, uniting with an administrator in a *prima facie* misapplication of the assets, can lean for his justification on no such presumption of law, still less can he find exemption from liability in any representations of the administrator as to the state of his accounts. He who permits himself to be seduced by the representations of a trustee, to engage with and aid him in what is, *prima facie*, a breach of his trust, must bear the risk of the trustee's truthfulness and accuracy. If the representations to which he listened turn out to be false, the consequences of his credulity ought to fall on himself who trusted them, and not to be thrown on those whose rights are independent of the trustee's title and not derived through him.

The credulity which accepts representations, and even written exhibitions, of the state of an account, as a foundation for confidence in venturing upon dealings otherwise of doubtful propriety, is the less excusable at this day when the world has grown familiar with the facility wherewith adepts in the science of accounts can successfully cover

up, under the magic of formal entries, the misappropriations of years, until, by the mere weight of their accumulations, they burst the bonds of concealment. The pres-

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ent state of *society furnishes a weighty admonition against any relaxation of the obligations of fiduciary responsibility, and a motive to strictness in the application of existing principles on this subject to conditions not heretofore expressly provided for by positive adjudications. And although this Court does not undertake the office of a reformer, it is eminently proper that all judicial tribunals should, in the exercise of their appropriate functions, exert a conservative, if possible, an elevating, influence upon the tone of public sentiment, the more effective because silent and incidental. A foreign essayist of the day, referring to the present moral tone of society, says: "The increase of dishonesty in all classes is appalling. This is true not only in the great banking system and in the railway companies, but among tradesmen and shopkeepers, with whom cheating is beginning to be the rule, and honesty the exception.

"The crime of society may be a scar upon its surface, but its commercial corruption is the rotteness of the bones. The fact that the offenders are not of the criminal class, not outcast wretches, born of races of thieves, but wealthy speculators, living in splendor, rich tradesmen, keeping up all the outward show of respectability, subscribing to charities and attending churches—this fact is what makes the matter so terrible." Happily for us, this is, as yet, no true picture of our society. But it may not be forgotten that most powerfully conservative elements are now disappearing, active principles of corruption are being imported and infused, and the process of disorganization is advancing with constantly accelerating speed. "It has become a crying evil in our times," says the late Ch. Wardlaw, in *Spear v. Spear*, 9 Rich. Eq. 184, "that persons seek trusts, especially administration and guardianship, not for the good of those beneficially interested, but for the accommodation of themselves and their sureties and other especial friends. This is in flagrant violation of the

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rules and doc*trines of equity concerning trusts." The true and proper policy of the Courts, in reference as well to the highest moral interests of society as to the material interests of the vast number of merely beneficial owners of property, whose protection constitutes so large a branch of equity jurisdiction, requires that, in moulding the system of doctrines which there obtained in respect to the rights and duties of fiduciary relations, any encouragement which the prospect of legal impunity gives to unfaithfulness or dishonesty shall be reduced to the lowest practicable limit, and that the powers

of those who have the rights and interests of such merely beneficial owners in their keeping shall be subjected to as strict restraints as can consist with the efficiency of such keeping.

In relation to the particular subject now under consideration, the insolvency of the administrator at the time of the dealing which is called in question in any case, seems to be important only in two points of view. It has been stated that he who would maintain his purchase of the assets from the administrator, must have given a valuable consideration, as well as bought bona fide. If the administrator is in fact insolvent, and his creditor takes from him assets of his intestate, in satisfaction of a debt which he could not otherwise collect, or could only in part collect, then he does not give value in exchange for the assets, and shall not keep them, even though he does not know them to be assets. And when, under such circumstances, the purchaser, mortgagor, &c., does know them to be assets, whether taken in satisfaction of a private debt of the administrator, or for full value in money paid at the time, to be used within the knowledge of such purchaser for the administrator's private purposes, this insolvency, if known to him, constitutes an aggravation of his mala fides, because it enhances the peril in which he puts the interests of the beneficiaries; but is not of its essence, for that

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consists in *his knowledge of the intended misapplication and his co-operation in the administrator's breach of trust.

The nature of an administrator's title or estate in the assets, as recognized both at law and in equity in its present shape, to which it has been gradually moulded by the process of statutory modifications of the common law; the rights and equities of those for whose benefit it is vested in him, against himself and strangers dealing with him, and through such beneficiaries, of those who are pledged to them for his fidelity; the origin and reason of the large power of disposition which the early law gave him; the gradually but steadily tightening restriction thereupon, which the progress of society, as affecting the reasons therefor, has produced, and the present exact definition of this power; the consequences, in the present state of the law, of a conversion of the specific assets by sale under competent authority, to this official responsibility; the relations of the administrator to and his power over the securities taken at such sale, if on credit; the grounds and the exact limit of the presumption which the law authorizes as to the purposes of his alienation, for the protection of those to whom he alien; and the relations of the whole subject to a sound social morality, have been thus patiently, doubtless to readers tediously, passed under examination, with a view to bring out distinctly the pre-

cise rule of the liability of strangers dealing with the administrator for the assets in his hands, even though it be in their converted form after sale. The examination and discussion are supposed to have established the following propositions:

1. No valid alienation of an intestate's personal chattels or visible effects can be made by an administrator without a previous order of the Court of Equity or of Ordinary.

2. A valid alienation, by way either of sale or pledge, of the choses in action belonging to the intestate's estate, may be made by the administrator, of his own motion, to

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*any one who takes them, bona fide and for full value, not grossly inadequate, and upon such alienation they will be discharged of all equities which attach upon them merely as assets.

3. An appropriation by an administrator of the assets of his intestate to his own private use is, prima facie, a breach of trust, and a fraud upon the rights of those interested in the estate; and he who, knowing the purpose of the administrator so to appropriate them, purchases them from him, or advances him money upon their pledge, whereby the fraud is actually consummated, takes them mala fide.

4. The securities taken by an administrator at a sale by him of the intestate's estate, for the assets sold, payable to himself, are, equally with the choses in action which the intestate held at his death, under the protection of this restriction on his power of alienation.

5. The creditors and distributees of the intestate have an equity as against the administrator, that the assets shall be applied exclusively to the purposes of the administration, which, in the Court of Equity, will be specifically enforced, when necessary, for their protection, and this equity follows the assets or their value into the hands of any one who takes them from the administrator mala fide, or without valuable consideration.

6. The surety of an administrator who has been compelled to answer to the creditors and distributees or either for the default of the administrator, resulting from his misapplication of the assets, is entitled to be subrogated to this equity, and have it enforced for his indemnity against one who has knowingly contributed to the default by taking from the administrator the assets mala fide, or without value.

7. When once it appears that the purchaser, &c., knew that the administrator was ap-

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plying the assets to his own *use, he is prima facie concurring in a breach of his trust and a fraud upon the creditors and distributees, and if there is anything in the facts which justifies such a use of the assets, the burden is on such purchaser, &c., to show it. He takes the risk of the truth of any represen-

tations, made by the administrator, of the existence of such facts, and if those representations prove false, he must bear the consequences.

The facts of the case before the Court which has occasioned this discussion, so far as necessary to be stated, in order to show the application of these principles to its disposition, may be thus summed up. Under an order of the Ordinary, the personal estate of Leonard White was on 26th December sold by the administrator, William Lewis, one of the present defendants, on a credit of twelve months, and notes under seal, payable "to William Lewis, administrator of the estate of Leonard White," were taken from the purchasers. Among the securities so taken, were the three sealed notes of Thomas M. Dick and others, mentioned in the pleadings, amounting in the aggregate to a principal sum of \$10,275, on which interest ran from the day of sale. In December, 1858, Lewis, desiring to purchase at certain estate-sales of negro slaves, which were to be made on credit, for bonds or notes with surety, in the beginning of the following year, applied to his present co-defendant, John R. Pollard, to become his surety on his bonds or notes to be given for such purchases as he would then make, and promised to transfer to or deposit with him, for his indemnity against loss by reason of such suretyship, these notes of Thomas M. Dick and others which he held as administrator. Pollard consenting to this arrangement, Lewis made sundry purchases of slaves, and executed these several securities to different persons, with Pollard as his surety on each, amounting in the whole to \$11,635, and, in fulfillment of his promise, delivered the three notes of Dick to Pollard.

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*for which the latter gave him a receipt, acknowledging that they were to be applied, when collected, to these bonds and notes on which Pollard had thus become Lewis' surety. Various payments were thereafter made to Pollard or to his use on these notes, until, at November Term, 1860, of the Court of Common Pleas, the aggregate of principal and interest remaining due on them had been reduced to \$3,944.82, for which sum judgment was rendered at that term, on said notes in favor of Wm. Lewis nominally, (but really intended for the use of Pollard,) and shortly afterward the sum of \$1,134.78, part of said recovery, was paid to Pollard. In October, 1860, a decree was rendered in a cause which had been long pending in the Court of Equity, for the settlement of the administration account of Lewis, and a distribution of the residue of the estate of his intestate, Leonard White, which decree found a balance of \$14,353.15 to be due by Lewis on his accounts to the distributees, besides some \$1,733.04 to judgment creditors of the estate. This balance continuing unpaid, suit was soon after instituted on Lewis' administration bond against the present plaintiff, Levi

F. Rhame, as surety. Rhame subsequently paid of the recovery against his principal, Lewis, in divers sums at various times, the aggregate sum, in all, of \$14,372.13. Pending the suit against him on the administration bond, he brought his present bill to set up and enforce, for his indemnity pro tanto, the equity of the creditors and distributees whom he was bound to pay against William Lewis, his principal, and John R. Pollard, as the alienee of Lewis, to have the Dick notes, which had been so transferred to Pollard, applied as assets of the estate of White for his relief to the satisfaction of the recovery of the distributees and creditors of White against Lewis on his administration account, or to the reimbursement of what he, (Rhame,) as surety, was liable to pay, and has now paid thereon.

At the time of the arrangement between

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Lewis and Pol*lard, in pursuance of which the Dick notes were transferred to, or deposited in pledge with the latter, Lewis told Pollard that he was in urgent want of the money, and had failed in his efforts to raise it, and that his purpose in purchasing the negroes was to supply this need by re-selling in the West for cash. The brief does not inform the Court (and the counsel on neither side was able at the argument to supply the omission) whether any such resale was ever made or attempted, or whether the negroes then purchased did not remain in Lewis' possession until emancipation set them at large. At the same time, Lewis also represented to Pollard that "he had made such large payments to the distributees of Leonard White out of his own funds, that, when the estate was wound up, the distributees would fall in debt to him;" in order to convince him that the Dick "notes were his own property," he exhibited a written statement of his administration account to Pollard, and told him that "he had shown his accounts to some of the distributees, and they were satisfied with his statement and showing." As his account was afterwards made up, it appeared that, from the end of the first year of his administration, (1853,) there had always been a balance against him, of never less than \$3,000, and generally from \$7,000 to \$8,000; that, at the time of these representations, (January, 1859,) there was due by him, to the estate of his intestate, over \$18,000, and that, having begun the preceding year (1858) with a balance against him, on the 1st January, of \$6,340.33, he had paid out during that year only \$6,297.48, and had received \$18,252.17.

Even if, as is probable, the Dick notes are in the account charged against him in the receipts of that year, and help to make this large aggregate, there was, over and above them, at the time of his statement to Pollard, a balance of about \$7,000 of the estate's money in his hands.

And in a little more than a year after-

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wards, when his *final account was made up in the Court, he was found to owe a balance of over \$16,000, including outstanding judgments.

In the interval between his representations to Pollard and his final accounting, his aggregate payments on account of his administration were only a little over \$3,000, being less than half the balance then in his hands, even if the Dick notes had not been charged to him, but had been retained for, and as part of, the unadministered assets for distribution.

From 1847 to 1861 there were entered, in the office of the Clerk of the Common Pleas for Sumter, 129 judgments against William Lewis, and during Frierson's sheriffalty, (from 1856 to 1860,) there were in his office "a great number of executions, against Lewis, of large amount." In January, 1859, the date of the transfer to Pollard, there were open and unsatisfied executions against him to the amount, in the aggregate, of \$23,000, including one for the enforcement of a judgment by confession to one Norton for \$8,280, with interest payable annually from May 20, 1854, which was also further secured by a mortgage of the land for the purchase of which the debt was contracted. Just before the transfer to Pollard, Lewis mortgaged to one Crane a tract of six hundred acres of land and twenty-one negroes—"constituting the whole Lewis was supposed to own not already under mortgage."

The other negroes he had in his possession belonged to his wife and children. It thus appears, that all his visible property was at this time under mortgage, and there were besides unsatisfied judgments to a large amount against him—and most, if not all, of this must have been matter of public record. He told Pollard "he desired to raise money, but that he could not borrow it out of the banks, and had tried private individuals and could not get it." He testifies that, "when he gave bond to Crane," (Jan-

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uary, 1859,) "he could *have given bond for \$50,000 and given one hundred of best men as his sureties. Pollard was his surety on one of his official bonds." On that occasion, so far as appears, and as indeed seems implied, although his official bond must have been for a large amount, no indemnity or counter security was exacted. But extraordinary efforts and urgent representations and offers of indemnity are in fact deemed by him necessary, at the very time of his arrangements with Crane, to induce one (of the "one hundred") to become his surety for \$12,000—and Pollard, advertised of the extraordinary straits he is in for want of money, and the unusual and hazardous shifts to which he is about to resort to raise it, thinks it important to be secured against so comparatively small a liability.

It is quite manifest, from this statement,

that the Dick notes were the property of the estate of Leonard White—assets in a converted form; that Pollard, at the time of their pledge to him, knew this, because it appeared on the face of the notes and was avowed, or necessarily implied, in the painstaking statements of Lewis; that Lewis, in the transfer of them, was in fact applying them to his private uses, and Pollard knew that he was so doing; for whether it be considered that they were employed in the purchase of slaves, this was plainly no part of the administration of Leonard White's estate, and so could not be in execution of his trust, but, on the contrary, was for an "object with which the intestate's affairs had no connection;" or, Lewis' declaration of his purpose in buying the negroes be accepted, he made it certain he was raising the money for his own private purposes, exclusively, by his zealous and careful effort to convince Pollard of his right to use the notes, which use would have needed no such labored justification as he tendered, if the money, to be thereby raised, was intended to be employed for any legitimate purpose of his trust.

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*The use made by the defendant, William Lewis, of the three notes of Thos. M. Dick and Robert J. Dick, mentioned in the pleadings, was a clear breach of his trust as administrator of the estate of Leonard White, and his co-defendant, John R. Pollard, knowing of his purpose so to misapply them, and aiding him in its consummation by taking the notes from him, acquired his possession of them, and of their proceeds since, so far as collected, mala fide. Had they been retained and applied, as they ought to have been in a due course of administration, the balance due by Lewis on his administration account would have been greatly less than it was found to be, and indeed comparatively trifling, and the liability of the plaintiff, as his surety, would have been correspondingly reduced. The large increase, thus resulting from this breach of trust, of Lewis' indebtedness to the distributees and creditors, for his default in payment of which the present plaintiff, Levi F. Rhame, has been or will be compelled to answer, is a damage against which he is entitled to be indemnified by recalling the misappropriated assets or their proceeds from those who wrongfully possessed themselves of them, and this is the relief he asks.

This Court is of opinion that the Chancellor below erred in dismissing the plaintiff's bill, and that his decree to this effect ought to be reversed, and so it is ordered and adjudged.

It is further ordered and decreed, that the defendants, William Lewis and John R. Pollard, their agents, attorneys, and servants, and each of them, and the agents, attorneys, and servants of each, be, and hereby are,

perpetually enjoined from collecting or receiving, by themselves or himself, or any other, for their or his use, any part of the balance remaining due on the judgments recovered in the Common Pleas, in the name of the said William Lewis, against William Edward Dick, as administrator of the estate of Thos. M. Dick, and against Robt. J. Dick, several-

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ly, *on the said three sealed notes (or any of them) of Thos. M. Dick and Robt. J. Dick, mentioned in the pleadings; and the said Robt. J. Dick and Wm. Ed. Dick, administrator, be in like manner enjoined from in anywise paying the same, or any part thereof, to the said Wm. Lewis, or Jno. R. Pollard, or any one for the use of them or either of them; that the said balance remaining due on the said judgments be paid into the hands of the Commissioner of the Court of Equity for Sumter District by the said Robt. J. Dick and Wm. Ed. Dick, administrator, and the officers or officer who shall collect the same; that the said Commissioner take an account of all moneys received by the defendant, John R. Pollard, in part payment of the said three sealed notes of Thos. M. Dick and Robt. J. Dick, mentioned in the pleadings, after their transfer to or deposit with him in January, 1859, or of the judgment recovered on the same, the times when received, and the currency in which, with interest on each sum so received from the date of its receipt, and the present value, in lawful money of the United States, of any of the said sums that were received, if any, in Confederate treasury notes, having respect, in estimating such value, to the provisions of the Ordinance of the Convention of September, 1865—"To declare in force the constitution and laws heretofore in force in this State," &c., in the first proviso in the fourth section thereof; that the said defendant, John R. Pollard, pay into the hands of the Commissioner aforesaid the aggregate sum of principal and interest which shall be so found to have been received by him when the same shall be finally ascertained by the confirmation of the Commissioner's report; that the said Commissioner also take an account of the payments heretofore made, or that shall be made, by the plaintiff, Levi F. Rhame, by reason of his liability, as surety, for the said William Lewis' administration of Leonard White's estate, the particular circumstances under which, the times when,

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and the currency in *which the said payments were made, and the present value, in lawful money of the United States, of any said payments that were made, if any, in Confederate treasury notes, respect being had to the provisions aforesaid of the Ordinance of the Convention of September, 1865, and also of any still outstanding liabilities of the said estate of Leonard White, or of the said William Lewis, as administrator thereof, to creditors or distributees; that out of

the funds, to be so paid into the hands of the said Commissioner, from the several sources herein mentioned, he pay, first, all such liabilities, of the said estate of Leonard White, to creditors or distributees, as shall be so found still outstanding, and, then, such amount as shall be found upon the account herein ordered, when finally adjusted, to be due to the plaintiff, Levi F. Rhame, for the payments, with interest on each from its date, that have been made or shall be made by him by reason of his liability, aforesaid, as surety for the said William Lewis' administration of the estate of Leonard White, and then the surplus, if any, to the defendant, John R. Pollard.

WARDLAW, A. J., MUNRO and DAWKINS, J. J., and LESESNE and JOHNSON, C. C., concurred.

DUNKIN, Ch. J., GLOVER, J., and CARROLL, C., dissented.

MOSES, J., having been of counsel, did not sit.

Decree reversed.

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*THE SOUTH CAROLINA RAILROAD COMPANY v. THE COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(Columbia. Dec. Term, 1867.)

[Railroads ⇌91.]

Bill by B, a railroad company which had existed many years, to enjoin C, another railroad company recently chartered, from the further construction of its road and from crossing B's track, on the ground that C's charter was a violation of B's. B's rights being regarded as, at least, doubtful, and it appearing that there had been great delay in its application for relief—that it had acquiesced, for a long time, in the building of C's road—that, during such delay and acquiescence, C had expended, and incurred liabilities for, large sums of money, and that the consequences to the stockholders of C, if it were enjoined, would be disastrous, the injunction was refused; but the bill was retained and special orders made in reference to the crossing of B's track and its right to compensation therefor.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 249-259; Dec. Dig. ⇌91.]

A, a railroad company, was chartered in 1828, with the exclusive right to "make, keep up and use" a railroad from Charleston to Hamburg, with branches to Columbia and Camden, and in 1833 its main trunk from Charleston to Hamburg was completed, but no branch was ever built. In 1835, another railroad company, B, was incorporated, whose charter authorized it to construct a railroad from Charleston to Cincinnati, with branches, and provided, with reference to the main trunk only, that the State shall not "authorize the construction of any other railroad within twenty miles of" the same, "which shall connect any points or places" thereon, "or which shall run in the general direction thereof." B purchased A's road from Charleston to Hamburg, and then constructed its own road from Branchville to Columbia, stop-

ping finally at the latter point. In 1843, by virtue of an Act of that year, "all the rights, privileges and property" of A became vested in B; and by charters granted in 1858, and 1863, C, another company, was authorized to construct a railroad from some point east of B's track, in or near Columbia, to or near Hamburg. *Semble*.

1. That C's charter was no violation of the corporate rights and privileges originally vested in A, by its charter of 1828, and by the Act of 1843, transferred to B;

2. That it was no violation of B's corporate rights and privileges, under its original charter of 1835, nor of those vested in it by virtue of the Act of 1843;

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*3. That after B's purchase of A's road, and the completion of its own track from Branchville to Columbia, the main trunk of B's road was the track from Charleston to Branchville and thence to Columbia;

4. That C had the right so to construct its road, that, from Graniteville to Hamburg, a distance of about twelve miles, it should run in close proximity to B's road and parallel with it.

[Railroads ⇌89.]

Held: that C had the right to cross B's road in or near Columbia, but that the Court had the power to fix the relative rights and duties of the parties in respect to the crossing, and to see that compensation was made; and that such power should in this case be exercised.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 234; Dec. Dig. ⇌89.]

Railroad charters are, it seems, to be strictly construed against the grantees, and in favor of the public.

Before Carroll, Ch., at Chambers, Columbia, April, 1867.

The decree of his Honor, the Chancellor, is as follows:

Carroll, Ch. In this cause there was first submitted, on behalf of the plaintiffs, a motion for an injunction until further orders. But pending the motion, by an agreement of counsel, and with consent of the Court, the cause was simultaneously brought to a hearing. No hazard of irreparable injury to the plaintiffs, or other exigency, has demanded an earlier decision of the motion, and any further reference to it is rendered unnecessary by the decree now to be pronounced.

By the terms of their charter, the South Carolina Canal and Railroad Company was empowered to construct a railroad from Charleston to the Savannah river, at or near Hamburg, and when such road should be completed, or before, if deemed practicable and advantageous, to "lay off and construct branches thereof" to the towns of Columbia and Camden. Their charter conferred upon that company "the exclusive right to make, keep up and use the railroad thereby authorized," for and during the term of thirty-six years, to be computed from the time when the said railroad from Charleston to the Savannah river at or near Hamburg should be completed for transportation. That railroad was completed and went into operation during the year 1833.

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*By virtue of an Act of the General As-

sembly, in 1835, the incorporation of the Cincinnati and Charleston Railroad Company was effected. In the succeeding year, 1836, by another Act of the State Legislature, its name was changed to that of the Louisville, Cincinnati and Charleston Railroad Company. Within two years afterwards, that company, after purchasing from the South Carolina Canal and Railroad Company the entire road from Charleston to Hamburg, proceeded to continue the railroad from Branchville to Columbia, and completed it in the summer of 1842. By a subsequent Act of the General Assembly, in 1843, the name of the Louisville, Cincinnati and Charleston Railroad Company was changed to that of the South Carolina Railroad Company, and it was enacted, that whenever the written consent of all the stockholders of the South Carolina Canal and Railroad Company should be obtained, that company should be merged into the said South Carolina Railroad Company, and, "thereupon and thereafter, all the rights, privileges and property belonging to the said South Carolina Canal and Railroad Company should be vested in the said South Carolina Railroad Company." The Act last mentioned also declared, in effect, that the charter of the South Carolina Railroad Company should not be subject to alteration, amendment or repeal by the General Assembly of this State.

The defendants became a body corporate under certain Acts of the General Assembly, passed respectively in the years 1858 and 1863. By the former Act, they were authorized to construct a railroad, on the most practicable route, from some point in or near the city of Columbia, in Richland District, to the Savannah river, at or near the town of Hamburg, in Edgefield District. By the Act of 1863, their corporate name was changed to that of the Columbia and Augusta Railroad Company, and they were empowered to construct a railroad from some point on the

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*Charlotte and South Carolina railroad, in or near the city of Columbia, to or near the town of Hamburg, in the State of South Carolina. Large progress has been made by the defendants, in building the road authorized by the Act last mentioned, and the purpose of the bill is to enjoin them from further proceeding in the work of constructing it.

It is contended that the projected road of the defendants, if completed and in operation would infringe the exclusive corporate privileges of the plaintiffs, and thereby impair the obligation of their contract with the State, as expressed in their charter. It is argued that the plaintiffs, for the prescribed term of thirty-six years, have undoubtedly the exclusive right to make, keep up and use a railway from Charleston to Hamburg, with a branch of the same to Columbia, and upon the faith that such exclusive right would be respected and upheld, have actually constructed such road and branch; that it was

physically impossible to construct them without connecting by railway Columbia and Hamburg, and that the Act of 1828 contains, therefore, an exclusive, express and positive authorization to make such connection. It is manifest that the Acts of 1827 and 1828 conferred upon the South Carolina Canal and Railroad Company no substantive or independent power to construct a railroad from Columbia to Hamburg. The formation of that company, as expressed by the former Act, was for the construction of a railroad or canal, or a railroad and canal from the city of Charleston, on the most practicable routes, to each of the towns of Columbia, Camden and Hamburg. The Act of 1828 empowered that company to establish railway communication between Charleston and the towns of Columbia and Camden, either by separate and independent roads, or by branches of the railroad to be constructed between Charleston and Hamburg; but it effected no further change or modification of the Act of

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*1827, as to the railroads between those places thereby authorized.

The grant of the exclusive privilege in question implies, of course, an inhibition of other railroads between the same points or places. But it is not left to implication to determine what roads are thus inhibited. To be informed on that point, we have but to refer to the plain and explicit words of the Acts of 1827 and 1828. In the sixth section of the former Act, it is declared that for the term of thirty-six years "no other persons or incorporations shall have the right of constructing any railroad or canal communication from the city of Charleston to either of the towns of Columbia, Camden or Hamburg." Equally distinct and unequivocal will be found the provision of the first section of the Act of 1828, that, for the term of time thereafter mentioned, "no other communication between Charleston and the Savannah river, at or near Hamburg, or the waters of the Savannah river, or the towns of Columbia and Camden, or to any points on the river, at or near the same, by other railroads or new constructed canals, shall be constructed, by or under the authority of this State." It is difficult to perceive how the projected road of the defendants can operate to the prejudice of the exclusive privilege belonging to the plaintiffs. The purpose of its grant to the South Carolina Canal and Railroad Company was undoubtedly to secure to them, for the prescribed period, the monopoly of all the profits to arise from transportation or travel by railway between the designated points in the interior and the great seaport of the State. But the proposed railroad between Columbia and Hamburg can, in no rational sense, be regarded as creating a railway communication from either of those points to the city of Charleston. On the contrary, the very ground of the plaintiffs' complaint is, that its effect will be the very op-

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posite: to divert and carry away at those points the trade and travel that would otherwise go to the city of Charleston.

The projected road of the defendants is clearly not within the terms of the inhibition contained in either of the Acts referred to. When those Acts conferred on the South Carolina Canal and Railroad Company the right to construct a railroad from Charleston to Hamburg, with a branch of that road to Columbia, they undoubtedly also conferred the right to establish a railway communication between Columbia and Hamburg. Such communication was inseparably incident to the conjunction of such road and branch—was, in truth, its necessary consequence and result. But, obviously, that communication could be accomplished lawfully only in the mode and by the means prescribed by such road and branch alone as the South Carolina Canal and Railroad Company were authorized to construct, and certainly not by another and independent road wholly unauthorized by their charter. Undoubtedly the inhibition of other roads, pronounced by the Acts of 1827 and 1828, is confined to such railways only as the South Carolina Canal and Railroad Company might have constructed by virtue of those Acts. But, as already shown, a railroad directly from Columbia to Hamburg is not authorized by the Acts referred to. Whether, therefore, the exclusive privilege conferred, or the inhibition imposed by the Acts in question, be considered, the result is the same; that the corporate rights of the plaintiffs, as derived from the charter of the South Carolina Canal and Railroad Company, will not be invaded by the projected road of the defendants.

By the 18th section of the Act to incorporate the Cincinnati and Charleston Railroad Company, it is provided that the State of South Carolina shall not, for thirty-six years from 1st January, 1836, "authorize the construction of any railroad within twenty miles of the railroad to be constructed by that com-

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pany, which shall connect any points *or places on their railroad, or which shall run in the general direction thereof, without the consent of the said company." The 19th section of the same Act provides that the said company may construct branches of their road, but that such branches shall be attended with no exclusive privileges except that of transporting thereon goods, produce and persons. It is urged that, in 1842, the project of the Louisville and Cincinnati railroad was finally abandoned; that the Act of 1843, by vesting in the plaintiffs all the rights, privileges and property belonging to the South Carolina Canal and Railroad Company, extended the charter of the Louisville, Cincinnati and Charleston Railroad Company over all the road possessed by the plaintiffs—that is, over the Charleston and Hamburg

track, and the Branchville track: that the plaintiffs are thereby invested, in respect of both and each of those tracks, with the exclusive privilege conferred by the 18th section of the Act of 1835, already referred to, and that such privilege must of necessity be infringed, if the defendants be permitted to construct their projected road, connecting important places on the railroad of the plaintiffs.

The Cincinnati and Charleston Railroad Company was incorporated for the purpose of establishing by railroad a communication between the cities of Cincinnati, in the State of Ohio, and Charleston, in the State of South Carolina. The charter of the company is in perpetuity, and it is invested with the amplest powers at any time to increase its capital to a sum sufficient to complete the projected road and its branches, and stock it with everything necessary to give it full operation and effect, either by opening books for new stock, or by borrowing money on the credit of the company and on mortgage of the charter and works. General commercial embarrassment, and the withdrawal of their subscriptions by the stockholders not resident within the State, disabled the company then

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bearing the name of the *Louisville, Cincinnati and Charleston Railroad Company, from extending the road from Branchville, as they had proposed, beyond Columbia towards Butt Mountain Gap. But there was nothing, save the lack of capital, to debar the plaintiffs, who had succeeded to all the chartered rights of the Louisville, Cincinnati and Charleston Railroad Company, from resuming that work immediately after the passage of the Act of 1843, had they chosen to do so. If, in the course of the succeeding year, the plaintiffs had resumed the work of construction, and within a reasonable time had extended their road from Columbia to the mountains, could there have been a moment's doubt as to the construction of the 18th section of the Act of 1835? Is it not palpable that the exclusive privilege which that section confers would, in that event, have been restricted to the road of the plaintiffs, exclusive of the road from Branchville to Hamburg? The section in question can mean, now, nothing else than it meant immediately after the ratification of the Act of 1843.

The effect of sections 18 and 19 of the Act of 1835 is, undoubtedly, to confine the exclusive privilege which it confers to the main trunk of the road which it authorized to be built. The road from Charleston to Augusta communicates, through the railroads in Georgia, with Knoxville, in Tennessee, and other points in the direction of Kentucky. But it cannot be said that that road has thereby now become the main trunk of the road authorized by the Act of 1835. It is directed by that Act that such road should "pass through the States of Kentucky, Tennessee, North Carolina and South Carolina, so as to

form a continuous line of railway between the cities of Charleston and Cincinnati." Georgia is not among the States that may be traversed by the projected road. If the road from Charleston to Augusta has become the main trunk, then the road from Branchville to Columbia is undoubtedly a branch of the road contemplated by the Act of 1835. But

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if this be so, then the *defendants' charter is no infringement on the exclusive privilege in question, since it will then result, that one of the places to be connected by the defendants' projected road is not upon the main trunk of the plaintiffs' road.

It is indisputable that the exclusive privilege in question operated, in respect to the Charleston and Hamburg road, when purchased by the Louisville, Cincinnati and Charleston Railroad Company, precisely as it would have done in regard to that road had it been built entirely by that company under its charter. In the address of the president of that company to the stockholders, soon after the purchase had been effected, it is said, in reference to it: "Running for sixty or seventy miles from Charleston in the general direction of our main road towards the mountains, we have so much of that road already made to our hands." In the first annual report of the president and directors of that company, and prior to their purchase of the Charleston and Hamburg road, but in contemplation of it, the projected road from Branchville is spoken of as destined to become, in that event, "our main trunk, leading by Columbia through the centre of South Carolina, and to be extended to the Western States through the valley of the French Broad." In their two succeeding annual reports, and after the location of the proposed road from Branchville to Columbia, it is again and again referred to as "our main trunk," and as "the first link in the main trunk of our road." Had the projected road from Charleston to Cincinnati been completed, the exclusive privilege referred to would have been confined to its main trunk extending from Charleston to Branchville and thence by Columbia to its western terminus. But the road has not been completed. Surely, no more in reason can be demanded, in right of that company, than that the privilege in question should be held not to have been withdrawn in respect of so much of the main trunk of their road as has been actual-

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ly established by *them. It is easy to apprehend that their failure to build the projected road may have diminished their chartered privileges, but how it could have enlarged them, is wholly unintelligible.

The Act of 1843 changed the name of the Louisville, Cincinnati and Charleston Railroad Company to the South Carolina Railroad Company, and under its provisions the South Carolina Canal and Railroad Company

became merged, and all its rights, privileges and property vested in the South Carolina Railroad Company. But the Act assuredly in nowise affected the rights or privileges of the plaintiffs under the charter to the Louisville, Cincinnati and Charleston Railroad Company, except by adding to them those of the South Carolina Canal and Railroad Company. Undoubtedly, the operation of the Act was to extend the charter of the Louisville, Cincinnati and Charleston Railroad Company over all the road possessed by the plaintiffs; that is, to extend it in the same sense, and with the same effect, as that charter would have been extended by its own operation over the road, had it been entirely constructed, instead of being purchased, by that company. All the rights and immunities conferred by that charter subsist unchanged, whether they refer to the trunk or the branch of the road. There is no displacement, diminution or enlargement of the one by the other. With what show of reason can it be said, that such interpretation repeals the 18th section of that charter? The Act of 1843, thus interpreted, retains and enforces that section to its fullest extent. It is the construction proposed by the plaintiffs which discards it and substitutes in effect another and distinct provision, by which a privilege restricted in terms to the main trunk of the road is extended to its branches also. Nothing can be found in the Act of 1843 which in the slightest degree suggests that co-equal and uniform privileges were designed to be conferred in

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respect to each and *every portion of the road, the branches as well as the trunk. The 19th section of the Act of 1835 materially qualifies the section immediately preceding it, the 18th. The argument on behalf of the plaintiffs may be most fairly and justly retorted. "What warrant is there for saying, that one section of that charter is repealed or modified? That the Legislature, extending the charter over all the road and property of the South Carolina Railroad Company, excepted the 19th section?"

Much argument was directed to the inquiry whether the charter under which the plaintiffs claim should be construed strictly against them, or fairly and liberally in their favor. The decisions of the English Courts, in regard to railway Acts, seem to establish the rule that their language is to be treated as the language of the promoters of them; that any ambiguity in the terms of the contract must operate against the grantees and in favor of the public; the former being entitled to claim nothing which is not clearly given to them. Broom's Maxs. 465, 466, and cases cited. In the American decisions, the great preponderance of authority is in favor of the same rule of construction. It is admitted to be so by Chancellor Kent, and this after having laid down the opposite doctrine in the text of his commentaries. Charles

River Bridge v. Warren Bridge, 11 Pet. 420 [9 L. Ed. 773]; 3 Kent, 495, notes (a) and 1. But it is not deemed necessary to consider when and under what conditions the rule in question may be resorted to. The construction which has been placed upon the Acts of the General Assembly commented on, is regarded as amply vindicated by the plain purport of the terms in which such Acts have been expressed.

It was made a prominent point in the argument, whether the portion of the plaintiffs' road from Branchville to Columbia was built under the charter of the South Carolina Canal and Railroad Company, or under

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that of the Louisville, Cincinnati and Charleston Railroad Company. The point is not deemed material, but, in deference to the argument submitted, will be briefly considered. That the road in question was constructed solely under the charter to the Louisville, Cincinnati and Charleston Railroad Company is apparent from the reports of the president and directors, and the proceedings of the stockholders of that company. If additional proof is requisite, it will be found in their action in the immediate and direct construction of that road. In the case of the Louisville, Cincinnati and Charleston Railroad Company v. Chappell, Rice, 383, it will be seen, that the company requiring certain lands for the track of the road from Branchville to Columbia, affirmed in that proceeding that they were entitled to take them because necessary to the road authorized by their charter as contained in the Act of 1835. They claimed the right to take these lands for such road, and no other. Their authority thus to appropriate them they referred to that charter, and to no other, and the prominent and leading question there considered and adjudged was the constitutionality of the 35th section of the Act last mentioned—the Act of 1835. The 6th section of the Act of 1827, incorporating the South Carolina Canal and Railroad Company, provided that, for the term prescribed, "no other person or incorporation shall have the right of constructing any railway communication from Charleston to Columbia without the consent of this company." That this exclusive privilege was inserted into their charter solely in favor of the South Carolina Canal and Railroad Company cannot be doubted, and it is quite as clear, upon general principles of law, and without reference to the special terms of the Act of 1827, that it was competent for that company to waive or renounce (as they certainly did, upon sufficient consideration) the benefit of that privilege in favor of an-

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other and like corporation, *created by the same legislative authority. Broom's Maxs. 574.

Whether, assuming the plaintiffs to have been originally entitled to the exclusive right

to establish and maintain railway communication directly between Columbia and Hamburg, such right has been lost by non user, needs not to be considered, nor yet the question discussed at the hearing, whether the plaintiffs are entitled to the exclusive privileges mentioned in the 18th section of the Act of 1835, they having completed but an inconsiderable part of the great work contemplated by that Act. These questions are not here considered, as the judgment of the Court rests entirely upon other grounds. The claim of the plaintiffs to the aid of the Court is placed upon yet another basis. Their road from Charleston passed to within a mile of Graniteville, and thence along the valley of Horse Creek to Hamburg. The line fixed by the defendants for their projected road passes likewise by Graniteville, and thence also along the same valley to Hamburg, parallel to the road of the plaintiffs, and in close proximity to it. It is contended, on behalf of the plaintiffs, that their exclusive privilege to establish and maintain railway communication between Charleston and Hamburg attaches to every foot of their road connecting those places, and that the construction of another road, side by side and parallel with their road from Graniteville to Hamburg, a distance of ten or twelve miles, cannot operate otherwise than as a palpable invasion of such exclusive privilege; that other routes than the one selected may be found by the defendants for their projected road, and that its location, as proposed by them, from Graniteville to Hamburg, is, therefore, unauthorized by their charter. A glance at the map will show that Graniteville is very nearly, if not altogether, in a direct course from Columbia to Hamburg. From Graniteville to Hamburg, it is conceded that the only prac-

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ticable route for a railway is that *by the valley of Horse Creek. Other routes for their road than that by Graniteville may be found, but they are attended with natural obstacles too formidable to be overcome, save by an outlay of capital wholly beyond the means and resources of the defendants. To deny them access to Hamburg by Graniteville, and the valley of Horse Creek, is to disable them utterly from completing their projected road. That route is therefore the only practicable route that remains to the defendants. Are they entitled to pursue it?

In proposing to adopt that route, it has not been shown that the defendants are acting otherwise than in good faith, and because they, in truth, regard that route as the most desirable and the best. Had the plaintiffs built their road in a direct course from Charleston to Hamburg, the coincidence in the tracks of the two roads from Graniteville to Hamburg could not have occurred. In carrying their road to Graniteville, or rather its immediate vicinity, the plaintiffs diverge considerably from the direct line between

Charleston and Hamburg. The coincidence referred to between the respective roads of the parties from Graniteville to Hamburg is the result of that very divergence. When, at the date of its charter to the plaintiffs, the State reserved the right to authorize the construction of a railroad from Columbia to Hamburg, was there not involved, in such reservation, the right to authorize such road by at least the straight and direct course between those places? The plaintiffs' road from Hamburg to Graniteville, though pursuing, for some ten or twelve miles, a course almost, if not altogether, in the direct line to Columbia, was built assuredly under the powers conferred by their charter, and certainly not in derogation of any power retained by the General Assembly to authorize other like improvements. If so, then such location of the plaintiffs' road must be held to be in subordination to such reserved power.

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er, although, in *its exercise, the result should be a railway from Columbia, passing by Graniteville, and thence to Hamburg, with a concurrent track along the same route, and involving for that distance an incidental competition between the two roads. As already remarked, the plaintiffs' exclusive privilege is restricted to railway communication between the points indicated in their charter, and the city of Charleston. But the projected road of the defendants constitutes, in no sense, and neither in whole nor in part, a railway communication with Charleston. How can blame be imputed to the defendants for proceeding with their road from Hamburg to Graniteville, when, in so doing, they are pursuing, with slight deviations, the direct course to Columbia, and are confining themselves, so far as the route of their road is concerned, within the strictest limits of their charter?

It may safely be concluded, with regard to each and all of the grounds considered, that it is, to say the least, extremely doubtful whether the construction by the defendants of their proposed road will, to any extent, infringe the exclusive privileges of the plaintiffs under their charter, and, more than that, it is apprehended, needs not to be adjudged in this proceeding. Infringements of corporate franchises or statutory privileges, by Acts which are in the nature of a nuisance, or which occasion a constantly recurring grievance, may undoubtedly be prevented by injunction from this Court. In such case, the ground upon which the Court interposes is the protection of the legal titles. *Cory v. Y. & N. Railway Co.*, 3 Hare, 600; *Wilkins v. Aiken*, 17 Vesey, 424. "When any doubt exists," says Lord Cottenham, "as to the rights of the parties, if the Court were to exercise jurisdiction without giving an opportunity of a trial at law, there would be different law in this Court and in the Court of Law upon the subject." *Bramwell v.*

Holcomb, 3 My. & Cr. 739. "Courts of Equity," it is said, "will grant an injunction to restrain a public nuisance only in cases

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where *the fact is clearly made out upon determinate and satisfactory evidence." "The same doctrine," it is added, "is equally applicable to cases of private nuisance." 2 Story Eq. § 924A; *Gervais v. Council*, 11 Rich. Eq. 440. Great latitude and discretion are allowed to the Court in dealing with an application for injunction, whether made during the progress of the suit or at the hearing. In *Bacon v. Jones*, 4 Myl. & Cr. 438, the Lord Chancellor remarks: "Generally speaking, a plaintiff who brings his cause to a hearing is expected to bring it on in such a state as will enable the Court to adjudicate upon it, and not in a state in which the only course open is to suspend any adjudication until the party has had an opportunity of establishing his title by proceedings before another tribunal. I think," he continues, "that the Court would take a very improper course, if it were to listen to a plaintiff who comes forward at the hearing, and asks to have his title put in a train for investigation, without stating any satisfactory reason why he did not make the application at an earlier stage." What is said, in the case last cited, is deemed entirely applicable to the case in hand. It is true, that the plaintiffs could not have brought suit at law against the defendants for merely apprehended infringement of their charter privileges, but, upon applying to this Court, an issue might have been ordered for trial of the legal right. It is said, that, when the Court plainly perceives what the issues are between the parties, in regard to such rights, it may, upon an interlocutory application, direct their trial at law, and that this may be done even before the coming in of the answer. *Cory v. Y. & N. R. R. Co.*, 3 Hare, 607. Certainly, the cause might be retained until a trial had at law, and the Court, perhaps, might have been not disinclined to such course, but for other and more formidable objections to its interposition, which yet remain to be considered.

It has been already stated that the de-

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fendants were au*thorized to construct their proposed road by Acts of the General Assembly passed in 1858 and 1863. The line along which the defendants are now building their road was surveyed by their Chief Engineer in 1863. The work of excavating and embanking was begun late in 1863, or early in 1864. Subscriptions to the capital stock of the company have been made by the towns of Columbia and Augusta. As late as December last, the General Assembly authorized a subscription, on behalf of the State, for \$42,200 of its stock, and, also, the indorsement of the State's guarantee upon its bonds to an amount approximating a half million of dol-

lars. It is in proof, that the defendants have "already expended at least \$300,000 in constructing their road; have entered into contracts and engagements for as much more;" "and that the work of building their road is now at least four-fifths finished, if not more." Until very recently, the plaintiffs have been passive, silent, and seemingly acquiescent, permitting the defendants to proceed with their work, and to expend moneys and contract engagements, to the very large amounts mentioned, without opposition, remonstrance or dissent of any kind.

The entire absence of opposition or objection, on their part, becomes the more significant when reference is had to certain proposals made to them by the defendants, some twelve months before this suit was instituted. In April, 1866, or perhaps earlier, the defendants proposed to the plaintiffs, upon certain terms, a connection between their respective roads from Graniteville to Augusta, by the defendants being permitted by the plaintiffs to use their right of way, or else their road, as a common track between those points. Although the matter of the construction of their road was thus directly brought by the defendants to the attention of the plaintiffs, yet nothing upon that occasion was even intimated by the plaintiffs, importing

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denial or *doubt of the defendants' right to build their proposed road; on the contrary, the officers of the latter were left under the impression that the proposal submitted was entertained and held under consideration by the plaintiffs. Until March last, the defendants were not apprised that the plaintiffs questioned their right to build their projected road, and designed to resist its completion, and it was not until the 15th April, 1867, that the plaintiffs instituted these proceedings.

Under such circumstances, and at this late hour, the plaintiffs exhibited their bill for the protection of certain exclusive privileges to which they lay claim. Of these, the most important is that derived from the charter of the South Carolina Canal and Railroad Company—a privilege which fast hastens to extinction, which can endure but for a few months after the completion of the defendants' road, and which, from its transitory nature, suggests the doubt whether its infringements should not be ranked among injuries fugitive and temporary in character, and not remediable by the process of injunction. "If there be any thing," says Lord Brougham, "well established in this Court, it is, that a man who lies by while he sees another person expend his capital and bestow his labor upon any work, without giving to that person notice, or attempting to interrupt him—one who thus acquiesces in proceedings inconsistent with his own claims—when he comes to enforce those claims in this Court, shall in vain ask for its inter-

position by an injunction, of which the effect would be to render all the expenses useless which he voluntarily suffered to be incurred." *Parrott v. Palmer*, 3 Myl. & K. 640. "This Court," says Lord Eldon, "will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement."

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Dann v. Spurrin, 7 Ves. *236. One of the cases usually mentioned as coming within the operation of this principle is, when the owner of land stands by, and allows an innocent purchaser to build upon it, without giving notice of his title. It may be said, and with scarcely a figure of speech, that the defendants have, for years, been building upon a franchise which they, in good faith, supposed to be theirs, while the plaintiffs looked on passively, and without objection, until the work approaches completion, when, for the first time, they set up and assert a hostile right, which, if admitted, will render all the labors and capital expended by the defendants, for a season, at least, utterly useless to them.

The principle referred to has been distinctly recognized in regard to buildings or works alleged to be nuisances to the privileges or property of others. In *Williams v. Earl of Jersey*, 1 Cr. & Phil. 97, Lord Cottenham cites with approval the case of *Jones v. The Royal Canal Company*, 2 Molloy, 319, in which it was held, that it was the duty of a party, seeing a nuisance in progress, to give notice to the party creating the nuisance of his intention to object.

Appeals to the preventive jurisdiction of the Court are required to be made promptly and without unnecessary delay. In *Birmingham Canal Company v. Lloyd*, 18 Ves. 516, the motion was for an injunction to restrain the defendants, proprietors of adjacent coal mines, from drawing the waters from certain reservoirs used by the plaintiffs for supplying their canal. The defendants having given the plaintiffs notice of their intention to draw off the water, preparatory to working their mines, a counter notice was given by the plaintiffs that they would sue the defendants at law for damages, if they should proceed. Application for the injunction was not made until nearly two years after the notice to the plaintiffs, and in the meantime the defendants had incurred certain expenses for fire-engines and other preparations for

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working their mines. In pronouncing his *decree, Lord Eldon remarks: "The plaintiffs must establish their right to damages at law before I ought to grant this injunction. I proceed here upon the circumstances of delay." Referring to the notice given to the plaintiffs, he continues: "The company having given a counter notice, that they would

in that case seek damages at law, and having a right to apply promptly to this Court to prevent the act, instead of taking that course, permit the defendants to expend £2,000 in proceeding towards getting coal, by erecting fire-engines, &c., and when they are about to get the coal, the plaintiffs come for an injunction. They ought to have commenced their opposition when they could have done so with justice, and this Court ought not to interfere." The plaintiffs, in the case last cited, held a far stronger position than they do in this. There, the delay of the plaintiffs was far less than it is here, and the sum laid out by the defendants there is but an inconsiderable fraction of the amount expended by them here. In that case, the plaintiffs were neither mute, nor, by implication, assenting to what was proposed by the defendants, but, on the contrary, they proclaimed at once, and in advance of the defendants' operations, their adverse right, and their intention to assert it by suit at law. In this case, in regard to the projected road of the defendants, nothing for years appears, on the part of the plaintiffs, but silence and seeming acquiescence, from which they did not depart, even when the proposition was submitted for a junction of the two roads, or the use in common of their right of way, from Graniteville to Hamburg.

In the *Earl of Ripon v. Hobart*, 3 Myl. & K. 178, Lord Brougham rests his decision, in one aspect of the case, upon the circumstances that the application was not brought before him until after much progress had been made in the works sought to be enjoined, and considerable sums of money expended upon

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them independently of contracts entered into. Although the plaintiffs seem to have given prompt notice of their intention to oppose, by legal proceedings, the works in question, and though there was a delay of but nine months, in applying for the injunction, yet the motion was refused. Referring to the case of the *Birmingham Canal Company v. Lloyd*, Lord Brougham observes: "The danger apprehended in that case was one of a very serious nature, yet Lord Eldon refused the injunction, leaving the company, as he said, to take their chances at law, because they had delayed coming to Court till two years after notice from the defendants. Here, indeed, the delay was only nine months, but there was a counter notice in that case, as well as in this, and it made no difference in the consideration of the Court as to the party's laches."

Though a party seeking an injunction has promptly instituted for that purpose a proceeding in this Court, yet if he be dilatory in pursuing it, the Court will not interfere. In the case of *Bacon v. Jones*, already cited, the object of the bill was to restrain an alleged infringement of the plaintiffs' patent. "The plaintiffs," said the Lord Chancellor,

"might have brought their action before filing the bill, or they might, after the bill was on file, have had their right put in a train for trial. Instead of that, they have allowed the suit to remain perfectly useless to them for the last four years." The decree of the Master of the Rolls, dismissing the bill, was affirmed. In accordance with the authorities referred to, will be found numerous decisions cited in 2 Redfield's Law of Railways, § 220 and note 1.

Having due regard to the doubtful character of the legal rights asserted by the plaintiffs, to their great delay in resorting to this jurisdiction, to their long-continued acquiescence in the building of the defendants' road, to the large sums which have been either actually expended or for which engagements have been contracted in its con-

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struction, and to the disastrous consequences to the defendants which must result should they be enjoined from its completion, the Court conceives that there remains but one course to be pursued. The preventive relief which is sought by the plaintiffs must be denied, and their bill be dismissed, and it is accordingly so ordered and decreed.

The complainants appealed from the decree, on the grounds:

1. That, under the Acts constituting the charter of the South Carolina Railroad Company, there is granted to said company, by the State, the exclusive right to make, keep up and employ railway communication, and intercourse by railway, for thirty-six years, between the towns of Columbia and Hamburg.

2. That the Acts of the General Assembly of the State, authorizing the Columbia and Augusta Railroad Company to construct a railway between Hamburg and Columbia, destroy the exclusive privileges previously granted to the South Carolina Railroad Company, establish a competing road, and impair the obligation of the contract made and existing between the State and the South Carolina Railroad Company, and that his Honor, the Chancellor, should have so decreed.

3. That the said Acts of the General Assembly are in violation of the Constitution of the State (article ix.,) and of the United States, (article 1, section x.,) and are void, and all the acts and deeds of the defendants thereunder are illegal and void, and his Honor, the Chancellor, should have so decreed.

4. That no authority is given by the General Assembly of the State, to the Columbia and Augusta Railroad Company, to construct their track across the track of the South

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*Carolina Railroad Company, near Columbia, and that the action of the defendants in entering upon the land and property of the complainants, and in constructing their track

across the track of the complainants, was illegal, and his Honor should have so decreed.

5. That even if defendants have the right to construct their track across the track of the complainants, such right should be so limited in its exercise as not to prejudice the rights of the complainants, and that to secure to complainants the uninterrupted use of their own property and corporate privileges the defendants should have been enjoined from crossing on the same level, and compelled to cross above or beneath the track of the complainants.

6. That there is vested in the South Carolina Railroad Company, by Acts of the General Assembly of the State, the exclusive right to make, keep up and employ a railway between Charleston and Hamburg, and that the construction by the defendants of a railway parallel to, and competing with the railway of the complainants, from Graniteville to Hamburg, is unauthorized by the charter of the Columbia and Augusta Railroad Company—is in derogation of the exclusive privileges vested in the South Carolina Railroad Company by their charter, and illegal, and his Honor, the Chancellor, should have so decreed, and enjoined the defendants.

7. That any Act of the Legislature, directly or indirectly, authorizing the defendants to construct a railway from Graniteville to Hamburg, or to connect Graniteville and Hamburg by a railway, impairs the obligation of the contract made and existing between the State and complainants, and is in violation of the Constitution of the State and of the United States, and is void.

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*8. That the failure of the complainants to assert their rights of property cannot divest them of those rights, unless such time has elapsed as will constitute a legal bar to the prosecution of their action, and that no such lapse of time has occurred in this case as will constitute either a legal or equitable bar to the assertion of their rights by the complainants.

9. That if the defendants have not the right under their charter to construct the road projected by them, they cannot derive such rights from the implied acquiescence of the complainants; that the assent of the complainants to the action of the defendants never was given, and cannot be implied.

10. That, upon the law and the facts of the case, the complainants are entitled to the relief prayed for in their bill, and that his Honor, the Chancellor, should have so decreed.

Conner, for appellants.

Arthur, Melton, contra.

PER CURIAM, DUNKIN, Ch. J., WARDLAW, A. J., and GLOVER, J., concurring.

It has come to the knowledge of this Court that, after the cause was heard and the motion for injunction pendente lite refused, the Columbia and Augusta Railroad Company, the defendants in this case, with previous notice of their intention given to the plaintiffs, the South Carolina Railroad Company, but without the consent of the plaintiffs and against their active resistance, effected a crossing of the South Carolina railroad about a mile from the depot of the plaintiffs in Columbia, and that that crossing has since

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been used by the defendants for *transportation required in the construction of their road, and is essential to the successful progress of that construction. The Court is aware of the dangers which attend the crossing of one railroad by another, and feels bound, as far as it properly can, to guard against them. Whilst therefore it recognizes the abstract right of the defendants to cross, and affirms the decree of the Chancellor upon the questions considered by him, it will retain the bill and endeavor under it to fix the relative rights and duties of the parties in respect to the crossing, and also to settle all points of dispute between the parties connected with the main subjects, which have been brought under adjudication.

It is therefore ordered that, until a contrary order be made, the defendants shall be permitted to keep in good repair the crossing effected by them as aforesaid, and to use it with extraordinary care in subordination to the rights of the plaintiffs, in the proper enjoyment of their road and right of way, with due regard to the schedules of the plaintiffs and with responsibility for all damages that may come, directly or indirectly, from any misconduct or negligence of the defendants, their agents or employees, in regard to the said crossing.

It is further ordered, that it be referred to the Commissioner for Richland District, to inquire and report a permanent scheme for the crossing by the defendants, and at their cost, of the railroad of plaintiffs, at the place where the crossing has been effected, as aforesaid; which report shall show how, under what plan, with what contrivances and according to whose judgment, it shall be arranged, under whose superintendence it shall continue, what regulations concerning it and its use shall be prescribed for the conduct of the parties respectively, with a view as well to the public interests as to the rights of the two parties; and what in respect to these particulars is the agreement of

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the *parties, or, if there be no agreement between them, their several propositions.

It is further ordered, that the said Commissioner do inquire and report what compensation, if any, shall be assessed in favor of the plaintiffs against the defendants, be-

cause of the crossing, temporary and permanent, above mentioned.

MOSES and DAWKINS, J. J. We concur in the opinion of the Court and orders, except as to so much thereof as refers to the rights of defendants to construct their road from Graniteville to Hamburg. On that question we express no opinion, for reasons affecting us, not necessary to be here stated.

LESESNE, Ch. I concur in the opinion of the Court and orders, except as to the right of defendants to connect Hamburg and Graniteville by their railroad. I do not think they have that right.

INGLIS, A. J., dissenting. Being of opinion that the Columbia and Augusta Railroad Company has the right, under its charter, in the construction of the road thereby authorized, to cross the track of the South Carolina Railroad Company; that the exercise of this right has been by the General Assembly subjected to no other than the single condition, necessarily implied, that the South Carolina Railroad Company shall not therein be disturbed, in the free and unobstructed use and enjoyment of its own road for the legitimate purposes of the business contemplated by its charter; that this Court has no authority to impose upon the exercise of the right, terms and conditions, from which the General Assembly has left it exempt; that the case made by the pleadings and evidence in the Court below not only does not show any attempt or purpose of the defendant company to exercise this right in any other than a lawful manner, but does show the contrary,

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and that, *if, for such use of the plaintiff company's track and roadbed, as is necessary in effecting the crossing, and thereafter enjoying it for the defendant company's legitimate purposes, or for any other cause, any compensation is due, it can be obtained only in the mode prescribed in the defendant's charter, I am compelled to dissent from so much of the judgment of the Court as directs inquiry by the Master, with a view to such additional terms and conditions, and to a determination of the right and measure of compensation. I agree entirely with the Chancellor who heard the cause below, in his judgment touching those rights of the parties, plaintiff and defendant, which are necessarily involved in this controversy, under their respective charters, and concur in the judgment of this Court in so far as it affirms his decree in this behalf.

MUNRO, J., and CARROLL and JOHNSON, C. C., concurred with INGLIS, A. J.
Decree affirmed.

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*WILLIAM L. PICKETT and Others v. JOHN H. WILKINS and Wife and Others.
(Columbia. Dec. Term, 1867.)

[Slaves ⇐24.]

Partition of an intestate's estate, consisting of lands and slaves, made and confirmed, without objection then taken by decree of the Court of Equity in 1864, is valid, though to some of the parties, now complaining, no part of the lands, but only slaves, were allotted.

[Ed. Note.—For other cases, see Slaves, Cent. Dig. § 113; Dec. Dig. ⇐24.]

[Slaves ⇐23.]

Slaves, in this State, did not become, either de jure or de facto, free until 1865, when they were emancipated by the action of the United States authorities.

[Ed. Note.—Cited in Calhoun v. Calhoun, 2 S. C. 305; Blease & Baxter v. Pratt, 3 S. C. 515.

For other cases, see Slaves, Cent. Dig. § 112; Dec. Dig. ⇐23.]

Before Lesesne, Ch., at Chester, July, 1866.
The decree of his Honor, the Chancellor, is as follows:

Lesesne, Ch. Philip H. Pickett died in the month of July, 1862, intestate, leaving a large estate, consisting of lands, negroes, and some other personalty, and leaving as his heirs and distributees, his widow, Mary Jane Pickett, now the wife of the defendant, John H. Wilkins, and five brothers and sisters, to wit, John H. Pickett, William L. Pickett, (the plaintiff,) Susannah A. Simmons, wife of William K. Simmons, Patience P. Lumpkin, wife of Abram F. Lumpkin, and Robert K. Pickett. Proceedings for partition of the estate among them were instituted in this Court, in October, 1863, and at July Term, 1864, the return of the Commissioners appointed to make the partition was confirmed, without any exception being taken to it by any of the parties, all of whom accordingly received the shares assigned to them.

In that partition all the lands fell to the widow, John H. Pickett, Robert K. Pickett, and Mrs. Lumpkin, each of whom, excepting the last named, also received negroes and

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*other personalty. The plaintiffs (William L. Pickett and Mrs. Simmons) received negroes only.

The bill charges that negroes were not property at the time of the partition, and claims contribution from the defendants, in proportion to the value of the land and personalty (other than negroes) which they severally received, so as to make good to the plaintiffs the shares of the estate to which they were entitled; or else that a new partition be had of the estate, exclusive of the negroes.

The plaintiffs insist that the President of the United States emancipated all slaves in the State by his proclamation, which went into effect on the first day of January, 1863, and was fully executed during the year 1865, as to the negroes in question; and that therefore the said negroes were not proper-

ty when the partition took place in 1864, or, if property at all, the title was at that time affected by the President's act, which was then in the process of being executed, and was afterwards fully executed—the title to the negroes destroyed—and the same recognized and confirmed by the Constitution of the State.

Two questions are thus presented: 1st, Was the title to these negroes defective at the date of the partition? 2d, If it was so, are the plaintiffs entitled to the relief they ask for?

These negroes were not made free by the President's proclamation, in law, any more than they were in fact, because the President had not the right to make them free. The institution of slavery was recognized by the Constitution of the United States, and while that instrument remained unaltered, a slave could be lawfully emancipated only in accordance with the laws of the State to which he belonged. But it is said the State of South Carolina, in her new Constitution, established on the twenty-seventh day of September, 1865, acknowledged emancipation

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as having been effected *by the President's proclamation, and confirmed the act, and thereby made it legal, retrospectively.

The words used in the Constitution (Art. IX., Sect. 11) are as follows: "The slaves in South Carolina, having been emancipated by the action of the United States authorities, neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall ever be re-established in this State." Now the thing, which it was the purpose of this clause to ordain, was, that slavery should not thenceforward exist in the State. This is done in the latter part of it. The preceding part is merely a recital, by way of preamble, of the great historical fact that the institution of slavery in South Carolina had been destroyed. This recital was of course intended to state the truth. And as emancipation was not accomplished by the proclamation, either in law or in fact, we must not say that the words of the Constitution ascribe emancipation to the proclamation as its cause, unless those words admit of no other construction.

But such a construction, in my judgment, is not demanded. Emancipation, it is true, was brought about "by the action of the United States authorities;" but that action does not necessarily mean the issuing of the President's proclamation. It was, in fact, accomplished by the conquest of the country. Until that took place, slavery continued after the proclamation, just as it had existed before, and it ceased to exist in the different parts of the State as they fell into the hands of the conqueror. The proclamation was, in effect, simply an advertisement of what would be a certain consequence of

conquest. It would have been a mere *brutum fulmen*, if it had not been followed by conquest. Assuming, then, that the Convention meant to be true to history, and giving no forced significance to their language, it is only proper to interpret the action spoken of as referring to the conquest of the coun-

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try, and the United States *authorities as meaning the conquering generals. It was the proclamation of freedom made by them which possessed real efficacy. If the view thus expressed be correct, it is an answer to the ground taken, that the destruction of title which was consummated in 1865, should relate back to some effect produced upon it by the proclamation in 1863.

The conclusion to which I have come, then, is, that the title to the negroes was not defective at the time of the partition. There was danger of their being made free by force; but that no more constituted a defect of title, than would danger of their being stolen and carried out of the jurisdiction.

This disposes of the case, and makes it unnecessary to consider the question, whether, if the efficacy claimed for the President's proclamation were conceded to it, the plaintiffs would be entitled to the relief they ask for. I will say, however, that, admitting the existence, to some extent, of an implied mutual warranty among parties in partition, it does not apply to cases where there is no unknown fact. The condition of slavery at the time of this partition—the certainty of its destruction in the event of the conquest of the country—was well known to the plaintiffs, and I must suppose they would have excepted to the return, and claimed shares of the lands, if they had not been very confident of the success of the Southern cause.

It is ordered and decreed that the bill be dismissed.

The plaintiffs appealed, on the grounds:

1. That there is a warranty annexed to every partition. Co. Litt. 173 b, 174 a; 2 Cruise, 149; Hilliard, Real Estate, 360; St. 31, Hen. 8, ch. 1, 2 Stat. 571; Allnatt on Partition, 156, 160, Law Lib., 1st series, 63; 4 Kent, 407; Feather v. Strohecker, 3 Penn. 505; Weeks v. Heas, 3 Watts & Sergt.; Burton, Real Prop. 108, 13 Law Lib. 49, 3d series.

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*2. That the title to the slaves assigned to complainants was fatally defective at the time of partition.

First. To establish this, complainants rely upon President Lincoln's proclamation of emancipation, which was operative January 1, 1863.

Second. Andrew Johnson's proclamation appointing a Provisional Governor, and authorizing the call of a convention of the people to organize a State government, prescribing the taking and subscribing of the

"amnesty oath" as a qualification of voters and members.

Third. The proclamation of the Provisional Governor, calling a convention, and prescribing the same oath as a qualification of voters and members.

Fourth. The acceptance by the people of the conditions imposed, by taking the oath and organizing the present Government.

Fifth. By the adoption of a constitution recognizing the abolition of slavery.

Pres. Lincoln's Proc. 1862; Pres. Johnson's Proc. 1865; Repts. Res 1865, 4; Gov. Perry's Proc. idem, 5; Const'n, art. ix. 11; Amnesty Oath, Pres.'s Proc. 29th May, 1865; Vattel, 364.

Kershaw, Melton, for appellant.
Williams, Thomson, contra.

The opinion of the Court was delivered by

LESESNE, Ch. This Court concurs unan-
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imously in the *circuit decree. An argument has been urged here which is based on the terms of the amnesty oath. That oath was required as a qualification for election to the Convention of 1865. Its terms are: "To abide by and faithfully support all laws and proclamations which have been made during the existing rebellion with reference to the emancipation of slaves." And the proclamation of January 1, 1863, on that subject, had declared that "all persons held as slaves within said designated States, and parts of States, are, and henceforth shall be, free." It is contended, that the oath embodies one of the "terms of peace" which were proposed to the State, and accepted, and therefore the State must maintain that

slavery ceased to exist on the 1st of January, 1863. But we have seen that negroes in South Carolina were slaves, to all intents and purposes, long after the 1st of January, 1863. That is a fact which could not be affected by any thing the State could do. It would have remained so, even if the clause on this subject, in the new Constitution, had affirmed, in the words of the Proclamation, that, on the contrary, they were free on and after the 1st of January, 1863. They were treated as slaves after that time by the citizens of the State, and by the law—that law which alone was operative within her limits while she was a belligerent power. Most of those, too, who took the oath were owners of slaves at and after the time mentioned. How could they maintain the proposition, that negroes were free on a certain day, having themselves, after that time, bought and sold them as slaves? They did not mean to do so; no one understood them as doing so. The true obligation imposed by the oath was, to acknowledge and uphold the new status which the negro had in fact acquired. It could not change the past, but only look to the future. And the Convention of 1865, in the eleventh section of the ninth article of the Constitution, carried out the idea I have endeavored to express.

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*It is adjudged and decreed, that the appeal be dismissed, and the circuit decree affirmed.

DUNKIN, Ch. J., WARDLAW, A. J., GLOVER and MUNRO, J. J., CARROLL, C., INGLIS, A. J., MOSES and DAWKINS, J. J., and JOHNSON, C., concurred.

Decree affirmed.

